ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRITTANY EMOESHA EPPS,

APPELLANT

APPELLATE CASE NO 2016-001806

RECEIVED
NOV 29 2017
SC Court of Appeals

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

On July 31, 2014, a Williamsburg County grand jury indicted Appellant for murder and possession of a firearm during the commission of a violent crime in a multi-count indictment (2014-GS-45-0159). R. 891-892. The state, represented by Kimberly V. Barr and Julie Swilley, called the case for trial on March 28 – April 1, 2016, before the Honorable Howard P. King and a jury. R. 1. Deborah J. Butcher represented Appellant. Mistrial 1. At the conclusion of the trial, the jury was unable to reach a verdict. R. 10, l. 14 – R. 12, l. 17. Judge King declared a mistrial. R. 12, ll. 18-20.

On July 26, 2016, the state, represented by Barr, called the case for trial again before Judge King and a jury. R. 13. Butcher represented Appellant. R. 13. During the deliberations process, the jury requested to hear the 911 recording again. R. 871, l. 17 – R. 872, l. 19; R. 888. The jurors also requested to hear the testimony of a particular witness. R. 874, ll. 8-22; R. 889. Despite the jurors unanimously agreeing that listening to a portion of the witness's testimony satisfied their needs, the judge, in response to the state's request, required the jurors to listen to the witness's testimony in its entirety. R. 875, l. 12 – R. 878, l. 4. The jurors also asked if it would be possible to find Appellant "guilty of count two but not count one." R. 875, ll. 15-18; R. 890. The judge told the jury foreman, "the simple answer to that question was no." R. 878, ll. 20-21. At the conclusion of the second trial, the jury found Appellant guilty as charged. R. 880, ll. 14-22.

On the state's motion, Judge King deferred sentencing until August 2014. R. 883, ll. 13-16; R. 884, l. 15 – R. 885, l. 5. On August 24, 2016, the state called for the sentencing of Appellant by Judge King. R. 886. At the conclusion of the brief sentencing proceeding, Judge

King sentenced Appellant to forty-five years' imprisonment for murder and to five years' imprisonment for the firearm. R. 887, ll. 3-14; R. 893-894.

On August 30, 2016, Appellant, through counsel, served her notice of appeal. However, trial counsel placed the name of the wrong county in the caption of the notice. In response to a notice of this deficiency, trial counsel filed an amended notice of appeal on September 9, 2016. This brief follows.

STATEMENT OF FACTS

When they were teenagers, Appellant and Jessica Jackson[1] met in a group home and developed a romantic relationship. R. 129, ll. 5-9; R. 130, ll. 3-9; R. 590, ll. 12-15; R. 592, ll. 10-21; R. 754, ll. 22-24. Sixteen-year old Appellant returned to her hometown of Kingstree when she was permitted to leave the group home. R. 128, ll. 22-23; R. 130, ll. 10-15. Although Jackson was not from Kingstree, Jackson followed Appellant to Kingstree. R. 132, ll. 4-13. Appellant's mother did not approve of the relationship between Appellant and Jackson, who was two years older than Appellant. R. 128, ll. 19-21; R. 132, ll. 1-3; R. 134, ll. 3-5; R. 150, ll. 10-18; R. 151, ll. 5-7; R. 754, ll. 18-21. Jackson moved in with Theodore McKnight, who was a friend of Appellant's family. R. 132, ll. 14-20; R. 134, ll. 15-20; R. 591, ll. 19-23; R. 592, ll. 3-4. In light of Appellant's mother's disapproval, Appellant stayed with Jackson at McKnight's home as well. R. 134, ll. 3-5; R. 592, ll. 4-9; R. 754, ll. 3-4; R. 754, ll. 18-21. Appellant suspected that McKnight and Jackson were having sex when she was not around. R. 592, l. 22 – R. 593, l. 18.

In early March 2014, Appellant, Jackson, and Appellant's aunt, Vanity Epps, were at a gas station in Kingstree. R. 140, l. 15 – R. 142, l. 7. They ran into Joseph Brown, the deceased, while there. R. 140, l. 15 – R. 142, l. 7. Brown offered to pay Jackson for sex, but his offer was refused at the time. R. 143, ll. 13-18; R. 595, l. 24 – R. 596, l. 10.

However, on March 29, 2014, Appellant and Jackson walked to Brown's home. R. 158, ll. 20-21; R. 596, ll. 12-13. While Brown left to run an errand, he allowed Appellant and Jackson

[1] At the time of Appellant's trial, Jessica Jackson had entered a guilty plea to attempted murder for involvement in the death of Joseph Brown. R. 127, ll. 3-4. She had not been sentenced, however. R. 127, ll. 5-10. Jackson was charged originally with murder, which carried a mandatory minimum sentence of thirty years' imprisonment and a maximum sentence of life. R. 229, ll. 14-19.

to remain at his home. R. 160, ll. 5-7; R. 596, ll. 15-22. Jackson used this opportunity to steal a few things. R. 160, ll. 21-22; R. 161, ll. 1-9; R. 164, ll. 6-12. When Brown returned, he invited them to a cookout. R. 165, l. 1; R. 596, ll. 23-24. All three went to the cookout in nearby Greeleyville. R. 167, l. 25 – R. 168, l. 6; R. 596, l. 25 – R. 596, l. 2. During the cookout, Jackson led Brown and others to believe she was a prostitute. R. 249, ll. 16-22.

After the cookout, Brown took Jackson and Appellant to McKnight's home. R. 597, l. 5 – R. 598, l. 6. Appellant wanted to buy some marijuana, and McKnight wanted to buy some alcohol. R. 598, ll. 7-9. Jackson had agreed to have sex with Brown in exchange for money. R. 598, ll. 9-17. All four got into Brown's car. R. 250, ll. 6-8; R. 600, ll. 3-4. Brown dropped off Appellant at a store from where she could walk to buy marijuana. R. 600, ll. 8-19. Brown, Jackson, and McKnight drove away as Appellant walked away. R. 600, ll. 20-25.

When Appellant was walking to the spot where they had agreed to meet, she saw Jackson, who was wearing only a bra and a pair of shorts, sitting at a driveway. R. 40, l. 22 – R. 41, l. 1; R. 601, ll. 1-2; R. 602, ll. 5-11. Appellant noticed Jackson's fingers were bleeding. R. 601, ll. 4-5; R. 602, ll. 14-15. Appellant and Jackson began panicking. R. 601, ll. 5-6. Appellant suggested they walk to Pearline Pressley's home, which was nearby, to call an ambulance. R. 602, ll. 15-17. While Appellant and Jackson walked to Pearline's home, McKnight met up with them. R. 602, ll. 19-20. They explained they were going to call an ambulance, and McKnight accompanied them to Pearline's. R. 602, ll. 20-24.

Pearline did not have a telephone; therefore, Appellant walked across the street to get a phone from a neighbor. R. 39, ll. 7-10; R. 42, ll. 15-20; R. 203, ll. 17-21; R. 603, ll. 3-6. Appellant carried the neighbor's cordless phone back to Pearline's, where Jackson remained, and called 911. R. 25, ll. 12-23; R. 44, ll. 6-9; R. 207, ll. 5-14; R. 603, l. 3 – R. 604, l. 3; State's

Exhibit #1. Soon, an ambulance and a police officer arrived. R. 44, ll. 21-24; R. 49, ll. 14-20; R. 208, ll. 12-23; R. 604, ll. 4-9. Jackson left with the ambulance while Appellant spoke to the officer. R. 57, ll. 4-20; R. 604, ll. 8-14. Appellant told the officer that Jackson shot her hand during a hunting accident – this was a story she was told to tell. R. 52, ll. 12-20; R. 604, ll. 15-21. Wanting to check on Jackson, Appellant told the officer she was going to her aunt's house and then to the hospital. R. 58, ll. 2-8; R. 61, ll. 17-23; R. 604, ll. 12-14. At some point during this commotion, McKnight left. R. 609, ll. 9-15.

Appellant then walked to her aunt's house. R. 605, ll. 7-17. Appellant and her aunt went to the hospital in Kingstree to check on Jackson, but they discovered she had been taken to the hospital in Florence instead. R. 605, ll. 18-22. Appellant's aunt refused to take her to Florence so they returned to her home where they went to sleep. R. 605, ll. 20-22.

The next day, Appellant learned the police were looking for her when they arrived at her aunt's home. R. 606, ll. 14-22. Young and afraid, Appellant reached out to her mother, who turned to her mother, Appellant's grandmother, in order to determine what to do. R. 606, l. 16 – R. 607, ll. 8. Appellant, along with her mother and grandmother, went to the police station so that Appellant could turn herself in. R. 606, ll. 12-13; R. 607, ll. 9-14.

The reason the police were looking for Appellant quickly became apparent. Jackson told police that she and Appellant were involved in Brown's death.[2] According to Jackson, while she and Appellant were with Brown, he showed them a gun he had in his jacket pocket. R. 165, l. 24

[2] Jackson told multiple stories to the police. First, she said she was shot during a hunting accident. R. 214, ll. 3-8. Next, she said she was shot when Brown was trying to rape her. R. 215, l. 1; R. 345, l. 11 – R. 346, l. 8. In relaying this story, Jackson said she agreed to have sex with Brown for money, but that she shot him instead. R. 232, l. 4 – R. 237, l. 11. Third, she told the police that she, Jackson, shot Brown and that Appellant was merely present. R. 215, l. 21 – R. 217, l. 11; R. 238, ll. 1-11; R. 346, ll. 9-18. However, it was not long before Jackson settled on the story she gave at trial regarding the botched robbery. R. 218, ll. 10-16; R. 346, ll. 19-25; R. 347, ll. 6-10.

– R. 166, l. 12. Jackson also claimed that Brown placed the gun in the glove compartment of his Cadillac when the trio went to the cookout. R. 170, ll. 2-8. While at the cookout, Jackson asserted, Appellant said she wanted to shoot Brown with the gun so that she could steal his car and his gun. R. 175, ll. 1-5. Jackson claimed the plan was for her to cut the straps off her pocketbook and wrap those straps around Brown's neck in order to be a distraction to allow Appellant to get the gun from the glove compartment. R. 175, ll. 16-22. Jackson admitted she was going to choke Brown with the pocketbook straps. R. 175, l. 23 – R. 176, l. 1. Jackson elaborated on the plan – (1) Appellant was going to lead Brown into a deserted area, (2) Jackson was going to announce the code word, "take off," (3) Jackson would put the pocketbook straps around his neck, and (4) Appellant would pull the gun out. R. 177, ll. 5-12.

Jackson claimed she used the code word and placed the pocketbook straps around him. R. 183, ll. 10-15. She said her hands were sweaty so she let go, however. R. 183, ll. 16-17. Also, she claimed that Appellant and Brown (and perhaps even Jackson) were going for the gun and a struggle ensued. R. 183, l. 20 – R. 184, l. 1; R. 245, ll. 8-10. According to Jackson, Appellant got the gun and fired. R. 184, ll. 1-2. During the ensuing chaos, a bullet hit Jackson's thumb. R. 184, ll. 3-4. Jackson later returned the gun to the glove compartment. R. 210, ll. 6-10.

Jackson claimed that despite her injury, she helped Appellant place Brown's body in the trunk of the car. R. 192, l. 10 – R. 193, l. 19. Jackson could not explain why Brown's pants were down and his shirt was up when he was found by the police, but she disputed his clothes were arranged this way because he was preparing for sex with her. R. 193, ll. 20-22. According to Jackson, she and Appellant then tried to get the car out of the mud, but it was too bogged down. R. 199, ll. 7-24. Unable to get the car to move, Jackson and Appellant looked for help,

and saw a man walking down the street. R. 202, ll. 7-13. This man referred them to Pearline. R. 202, ll. 15-16.

ARGUMENT

The trial judge erred in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice.

A. The trial judge erred in not permitting Appellant to impeach Theodore McKnight with his pending charge of murder.

Trial counsel planned to call Theodore McKnight as a witness during Appellant's case-in-chief. R. 584, ll. 9-11. Trial counsel advised that she wanted to impeach McKnight "with a criminal record of a later charge pending against him for a murder that occurred some two years after this event." R. 584, ll. 11-14. The judge ruled that "any testimony with regard to Mr. McKnight's criminal record of a pending charge of murder after this [was] not admissible and [could not] be gone into." R. 584, ll. 22-25. The judge offered no other explanation or elaboration of his ruling.

McKnight's testimony was important in light of Appellant's insistence that he was present and likely involved in Brown's death, and Jackson's claim that he was not there. Additionally, an independent witness tended to support Appellant's version of events.

Samuel Barr lived near Pearline. R. 67, ll. 10-20. On March 29, 2010, Barr was listening to his police scanner when he heard about a shooting nearby. R. 67, l. 21 – R. 68, l. 17. "Being nosey," Barr decided to investigate. R. 68, l. 21 – R. 69, l. 6. Barr saw an ambulance in Pearline's yard. R. 69, ll. 17-20. He then saw a reflection of a tail light of a car sitting in the woods farther down the street. R. 70, ll. 9-14. He pulled closer to have a better look. R. 71, ll. 10-13. Shortly, a man approached Barr. R. 71, ll. 15-16; R. 73, l. 25 – R. 74, l. 8. The man said

his girlfriend made him drive his car into the woods. R. 71, ll. 18-22. Barr got back into his truck and left. R. 71, ll. 23-25.

Trial counsel called McKnight as a witness during Appellant's case-in-chief. McKnight denied having anything to do with Brown's death. R. 755, ll. 16-18. He denied being picked up by Appellant, Jackson, and Brown. R. 756, ll. 16-19. He denied receiving a ride in order to pick up some liquor. R. 756, ll. 20-22. He denied having a plan with Jackson to rob Brown. R. 757, ll. 5-15.

McKnight admitted to being incarcerated in the Williamsburg County Detention Center from March 2015 up through day of Appellant's trial. R. 760, l. 24 – R. 761, l. 3. He also admitted to knowing Schain McCrea and that the two were in the jail at the same time in 2015. However, McKnight denied ever speaking to McCrea at the jail. R. 761, ll. 18-20.

After McKnight's denials, trial counsel called McCrea to impeach McKnight. McCrea told the jury he was in the county jail between March 2015 and June 2015. R. 776, ll. 17-18. He also explained that he had known McKnight since he was twelve-years old. R. 776, ll. 19-25. In sharp contrast to McKnight, McCrea stated that he and McKnight talked to each other "just about every morning" while in jail. R. 777, ll. 7-16. McCrea and McKnight discussed the shooting death of Brown while the two men were in jail. R. 778, l. 25 – R. 779, l. 8.

McKnight knew "exactly what happened." R. 779, ll. 10-11. He "was there." R. 779, ll. 14-15. McKnight, Brown, and Jackson dropped Appellant off. R.779, ll. 16-17; R. 779, l. 21 – R. 780, l. 1. Jackson and Brown were supposed to have sex in exchange for money. R. 779, ll. 17-18; R. 780, ll. 2-9. McKnight and Jackson planned to rob Brown, "but somehow they end[ed] up killing him." R. 779, ll. 17-20; R. 780, ll. 15-19. McKnight admitted that Brown was shot, but he would not say who shot Brown. R. 780, l. 20 – R. 781, l. 4.

During McCrea's testimony, the judge instructed the jurors that "the testimony of" McCrea could not be considered "on whether the alleged statements made by the previous witness to this witness [were] true, but only to the credibility of the previous witness." R. 778, ll. 6-13. He informed the jurors they "must not consider the testimony" of McCrea "for any purpose other than the credibility of the previous witness and not the truth of the matters to which the witness will testify." R. 778, ll. 13-17. He could not "emphasize enough" that the jury "must not consider the testimony of this witness as true of the matters to which he is testifying, but only," and he emphasized only, "as to the credibility of the previous witness." R. 778, ll. 17-21.

B. The trial judge erred in not permitting Appellant to impeach Mark Hatten with his pending charges of malicious injury to property and assault and battery.

The state wanted to call Mark Hatten as a witness to establish that he "was the previous owner of ... [the] '94 Cadillac vehicle that's involved in this case." R. 264, ll. 16-18. According to the solicitor, Hatten sold the car to the deceased in 2012, and his testimony would "be with regard to ownership of that vehicle." R. 264, ll. 19-20. When pressed, the solicitor admitted she wanted Hatten to testimony about "[o]wnership of the vehicle and ... [to] identify the key, remote, and the chain." R. 264, ll. 22-23. Trial counsel explained she wanted to impeach Hatten with charges pending against him in Williamsburg County to show Hatten's "motive to be biased towards the state's side, ... under [Rule] 608." R. 264, ll. 4-8. Trial counsel explained Hatten may be "biased towards the state looking for some leniency towards the adjudication of those pending charges." R. 265, ll. 12-15. She explained this was particularly important as he would identify the remote and key chain in the state's possession as belonging to the specific car. R. 265, ll. 18-24.

During the proffer, Hatten indicated that he sold the Cadillac to the deceased, and identified relevant paperwork to that effect. R. 266, l. 21 – R. 267, l. 6. He also indicated that the police asked him about the key chain and remote to the Cadillac, but that the police had not shown the items to him. R. 267, ll. 7-15. He indicated that by making his "accurate description" he was making a "positive identification." R. 267, ll. 7-17. He further indicated he gave "the keys, key chain, and key fob" to the deceased when he sold him the car. R. 267, ll. 18-21.

Hatten stated he was not aware of any pending charges in Williamsburg County. R. 273, ll. 2-4. He indicated "everything was dismissed." R. 273, l. 8. When asked about a pending charge for assault and battery, he stated, the charge was "never filed." R. 273, ll. 11-12. Regarding a pending charge of malicious injury to property from 2012, Hatten said it was "dismissed or handled." R. 273, ll. 13-16. He then said "the case was a mistake" and he received "a 25-dollar fine." R. 273, ll. 16-18. He was "let out of jail on flag day, the day before flag day." R. 273, ll. 18-19.

The judge queried defense counsel:

> Tell me how that, the fact that those two matters is biased, prejudiced, or motive to misrepresent the testimony 'cause what the issue here is whether he is misrepresenting his testimony and how is that evidence he's misrepresenting the testimony that (a) he owned the car, (b) that this key fob came from the Arizona dealership with that car. Now how is that evidence of motive to misrepresent those things?

R. 274, l. 22 – R. 275, l. 6. Defense counsel explained the pending charges would provide a motive "to gain some favor from the state on those charges." R. 275, ll. 7-10. The judge continued to challenge defense counsel by asking how the pending charges were "evidence of bias to misrepresent or prejudice to misrepresent or motive to misrepresent?" R. 275, ll. 14-17. He explained that was "the test," "if he's got any reason to say anything that's not true; that's why you would impeach him." R. 275, ll. 17-20. He wanted to know why the pending charges

would show Hatten "would have any reason to show anything is not true based upon the testimony that he gave about the ownership of the car and the key fob?" R. 275, ll. 20-23.

Defense counsel responded that Hatten may claim to recognize the key chain when he actually does not in order to curry favor with the state – "the motive to show the bias of why he would be untruthful." R. 275, l. 24 – R. 276, l. 3.

The solicitor informed the judge that she had never spoken to Hatten. R. 277, ll. 5-7. She argued that

> if the question before the jury is we're trying to get them to the truth, and trial really is a search for the truth, to put it and throughout this trial and imply throughout this trial this witness who has no interest or bias or motive in this case at all, to just try to effect the well and have this jury believe that, well, the charges may or may not be pending, but if they are pending we're really trying to get help from the state for a charge that's apparently by all accounts four years old at this point.

R. 277, ll. 8-18. Then, the state went to her fallback position that the prejudicial effect of mentioning the pending charges from 2012 was clearly outweighed by the probative effect of the evidence. R. 277, l. 19 – R. 278, l. 2.

Judge King refused to permit trial counsel to impeach Hatten with the evidence of his pending charges in Williamsburg County. Judge King "fail[ed] to see how the attempted impeachment evidence of bias, prejudice, or motive to misrepresent the facts," as required by Rule 608(c), SCRE, "an attempt to misrepresent the facts, which the witness ... testified to." R. 278, l. 23 – R. 279, l. 3. According to the judge, the facts were "clear regarding the ownership of the vehicle as evidenced by the documentation that the key fob came with the car, that he had the key fob when he got the car and gave it to the new owner, it looks like the same one." R. 279, ll. 4-8. The judge continued that there was a key fob, remote, and key chain that identified the car to an Arizona dealership. R. 279, ll. 9-11. The judge simply did not "see in any way how the

proposed impeachment of questionable pending charges in any way is motive, bias, or prejudice to misrepresent the facts. That's what the rule requires, that it would show misrepresentation of the facts." R. 279, ll. 15-16.

The judge ruled in the alternative that "even if the evidence were to show bias or misrepresentation," he ruled it inadmissible "because the prejudicial effect substantially outweighs the probative value." R. 279, ll. 17-24.

Thereafter, Mr. Hatten testified before the jury, explaining how he came to own the 1994 green Cadillac and sell it to the deceased. R. 282, l. 8 – R. 291, l. 12. In additional to giving the deceased the car as part of the transaction, Hatten believed he gave the deceased "two sets of keys" for that car. R. 291, ll. 15-21. He also gave him a key chain and a key remote. R. 292, ll. 1-16. He identified a set of keys in the state's possession as "definitely the keys" he had for the car and that he gave to the deceased. R. 292, ll. 17-23. He had no doubt in his mind that the keys he gave to the deceased were the ones in the state's possession. R. 300, l. 22 – R. 301, l. 8.

Hatten also told the jurors that he met with police to discuss the key remote or key chain. R. 293, l. 14 – R. 294, l. 2. Hatten explained the officer "never showed" the key remote or chain to him, but he asked Hatten about the items. R. 294, ll. 1-2. Hatten tried his hardest to remember what the keys looked like, but he could not. R. 294, ll. 8-16. However, after the police left, he recalled an image of the keys in detail: "it was a gold rectangular shape key chain, and it had like a marron [sic] and black plastic Cadillac thing in the middle, an emblem, and the back had like a texture, like a little texture plating type of stuff and it was gold color." R. 294, l. 19 – R. 295, l. 2. Then, he seemed to ask if it had a key fob on it. R. 295, l. 2. Upon hearing his description, the officer said he "described it perfectly." R. 295, ll. 9-10.

The key fob and chain was important evidence in the state's case. On March 31, 2014, the police found a key fob and chain from Appellant's aunt's front yard. R. 435, l. 23 – R. 436, l. 12. The police tested the key fob on Brown's Cadillac, but they were unable to determine if that particular key fob worked on Brown's car. The battery was corroded, but even when the police changed the battery, the key fob did not open the car. R. 365, l. 10 – R. 366, l. 2. The only way the police could connect the key fob to Brown's Cadillac was through Hatten's testimony. R. 366, ll. 3-10.

Discussion

Confrontation Clause

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. U.S. Const. amend VI. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 449, 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). "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." Id. at 449-450, 602 S.E.2d at 71. This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). In fact, "[t]he primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination." Gillian, 360 S.C. at 450, 602 S.E.2d at 71. Additionally, Rule 608(c) of the South Carolina Rules of

Evidence states that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

To establish a violation of the Confrontation Clause, Appellant must show that she was prohibited from asking questions designed to show bias on the part of the witnesses. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002). "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Gillian, 360 S.C. at 450, 602 S.E.2d at 71.

South Carolina has a well-developed body of law providing that a defendant should be allowed to cross-examine witnesses concerning pending charges and the possible punishments following from those charges. Frankly, "[o]n cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." Gillian, 360 S.C. at 450, 602 S.E.2d at 71. In Gillian, the judge restricted Gillian's cross-examination of a key witness for the state. Id. at 449, 602 S.E.2d at 70. The judge permitted the jury to learn that the witness had a pending charge of burglary in the first degree, but refused to allow Gillian to question the witness on the sentencing possibilities. Id. The South Carolina Supreme Court held the trial court erred in excluding evidence concerning the witness's possible sentence in violation of the Confrontation Clause. Id. at 454, 602 S.E.2d at 73.

In Sims, 348 S.C. at 25-26, 558 S.E.2d at 523, the South Carolina Supreme Court held the trial judge erred when he limited the defendant's questioning of a state witness about pending charges. The Court was persuaded that the number of the charges pending "and the severity of the

potential sentences" was probative as to the witness' bias. Id. at 25, 558 S.E.2d at 523 (explaining the witness was charged with burglary in the first degree, among other crimes, which exposed the witness to a possible life sentence). According to the Court, "[t]here was the substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case." Id.

In Mizzell, 349 S.C. at 330, 563 S.E.2d at 317, the South Carolina Supreme Court held the trial court erred in refusing to permit the defendant to question the witness on the potential sentences he faced where the witness was charged with the same crimes as the defendant. The Court was not persuaded by the state's argument that the testimony was not probative because the witness had neither agreed to a plea bargain nor pled guilty and held this fact should not prevent the admission of such evidence. Id. at 332-333, 563 S.E.2d at 318. The Court held "[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 for leniency." Id. at 333, 563 S.E.2d at 318.

In State v. Graceley, 399 S.C. 363, 373-374, 731 S.E.2d 880, 885-886 (2012), the Court held the trial court erred in improperly limiting the scope of defense counsel's cross-examination of state's witnesses concerning the witnesses facing mandatory minimum sentences that were significantly longer than the sentences received in exchange for their cooperation. The prosecution made plea deals with multiple cooperating witnesses against Gracely. Those deals permitted the witnesses to avoid several mandatory minimum terms of imprisonment. Id. at 374, 731 S.E.2d at 885-886. The trial court permitted defense counsel to question the witnesses regarding the maximum sentences permissible for the charged offenses, but limited counsel's questioning regarding mandatory minimums. Id. at 374, 731 S.E.2d at 886. This limitation prevented counsel "from demonstrating the possible bias arising from the plea deals through an examination reaching

the requisite degree of granularity." Id. The Supreme Court made clear "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." Id. at 374-375, 731 S.E.2d at 886 (emphasis in the original); see also State v. Pradubsri, 403 S.C. 270, 279-280, 743 S.E.2d 98, 103-104 (Ct. App. 2013)(finding error in the judge's refusal to permit the defendant from questioning a witness on the exact potential sentence of each charge the witness faced because the potential legal exposure was relevant to the witness's bias and motive in testifying).

During Graham's murder trial, the presiding judge prohibited Graham from asking a witness called by Graham's co-defendant about an eight-year sentence he received for accessory after the fact of the murder for which Graham was on trial. Graham, 314 S.C. at 385-386, 444 S.E.2d at 527. With little elaboration, as surely none was needed, the South Carolina Supreme Court held this limitation violated Graham's Sixth Amendment rights. Id.

In a recent post-conviction relief case, this Court held trial counsel performed deficiently by failing to preserve the issue of whether she could cross-examine a state's witness about the dismissal of his carjacking charge. Smalls v. State, 415 S.C. 490, 501, 783 S.E.2d 817, 822 (Ct. App. 2016), cert. granted Mar. 7, 2017. According to this Court, the witness "provided key evidence for the state's case, yet the state failed to inform trial counsel about the dismissal of his carjacking charge until the morning" of the defendant's trial. Id. However, trial counsel "neither sought a ruling on the record concerning whether she could cross-examine [the witness] about the dismissal nor requested to proffer any questions about the circumstances surrounding the dismissal or Green's potential motivations." Id.

The next inquiry is whether the error was harmless beyond a reasonable doubt. Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Gillian, 360 S.C. at 454, 602 S.E.2d at 73; Mizzell, 349 S.C. at

333, 563 S.E.2d at 318; Graham, 314 S.C. at 385, 444 S.E.2d at 527. Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684; see also Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Mizell, 349 S.C. at 333, 563 S.E.2d at 318-19.

In Gracely, 399 S.C. at 376-377, 731 S.E.2d at 887, the Court found the Confrontation Clause violation was not harmless even where the evidence presented was cumulative regarding Gracely's involving in drug trafficking. The Court explained that the testimony "only corroborated other testimony," and the prosecution presented no physical evidence connecting Gracely to the charged offenses. This "enhanced the importance of that testimony, and the necessity that [Gracely] be permitted to demonstrate any bias on the part of the State's witnesses." Id. at 376, 731 S.E.2d at 887. The Gracely court also expressed that the background of the witnesses "should have cautioned the trial court against limiting [Gracely]'s cross examination." Id. at 377, 731 S.E.2d at 887. The witnesses in Gracely had significant involvement in criminal activity and cooperated only after arrest and the prospect of long prison terms. "In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless." Id.

Likewise, this Court held the violation of Pradubsri's right to cross-examine the witness against him was not harmless beyond a reasonable doubt. Pradubsri, 403 S.C. at 284, 743 S.E.2d at 106. The trial court restricted Pradubsri's cross-examination of the state's main witness against

him. Id. The police officer testified he pulled over Pradubsri's car, in which Pradubsri and the witness were the occupants, but the officer did not see Pradubsri with any drugs. Id. The witness provided the only testimony that the drugs belonged to Pradubsri. Id. According to this Court, "[t]he state failed to present evidence amounting to constructive possession of the drugs without [the witness]'s testimony." Id.

The South Carolina Supreme Court held a violation of the Confrontation Clause was not harmless even where the facts did not fall squarely within the Van Arsdall factors. Graham, 314 S.C. at 385, 444 S.E.2d at 527-528. The witness, Simmons, first invoked his Fifth Amendment right not to incriminate himself where there was still a pending murder indictment against him despite his guilty plea to accessory to murder after the fact. Id. at 386, 444 S.E.2d at 528. The prosecutor claimed the plea agreement was valid only if the state called Simmons and Simmons testified truthfully, which the state defined as consistent with a prior statement that he was drunk and had no knowledge of the surrounding events. Id. at 386-387, 444 S.E.2d at 528. The prosecutor acknowledged he could not prevent Simmons from testifying, but continued to threaten further prosecution unless Simmons testified truthfully, as defined by the prosecutor. Id. Predictably, Simmons testified he was drunk and had no knowledge of the murder. Id. Graham then proffered the testimony of another witness who stated that Simmons informed the witness that he would have no further problems with the victim and that Simmons had killed the victim. Id. The Court stated that the prosecutor's attempted manipulation of Simmons' testimony and the witness' proffered testimony raised the question of the extent of Simmons' involvement in the murder. Id. The Court held the jury was entitled to know Simmons' sentence of only eight years as murder was a serious crime for which Graham, who was sixteen, received a life sentence and Simmons avoided the heavy penalty "for what may have been his silence." Id.

In Mizzell, the Court held the trial court's error in limiting cross-examination of a witness concerning potential sentencing was not harmless because the witness provided the only evidence of the defendants' participation in the crime. 349 S.C. at 334, 563 S.E.2d at 319. Although some of the testimony from the witness was cumulative, the witness provided the only evidence that the defendants were at the crime scene as there was no physical evidence implicating the defendants. Id.

Also, in State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991), the South Carolina Supreme Court held a trial court's limitation on the defendant's cross examination of a state's witness was not harmless error. The witness testified that in return for her testimony she was allowed to plead guilty to one count of conspiracy for which she could receive a maximum of seven and one-half years. Id. However, the defendant was prevented from asking the witness the punishment for trafficking cocaine, the original charge for the witness. Id. The Court noted that the witness faced a mandatory sentence of at least twenty-five years without parole for the trafficking cocaine charge. Id. The Court held the fact that the mandatory minimum was more than three times the duration she would face on her plea to conspiracy was critical evidence of potential bias. Id. Additionally, the witness's testimony was critical to the prosecution's case because she provided the only evidence of the defendant's knowing involvement in the drug deal. Id. at 171-172, 399 S.E.2d at 594.

On the other hand, in Sims, the Court held the error was harmless because the prosecution's case against the defendant was strong where the defendant's fingerprints were found at the scene, the victim's mother testified the defendant was angry with the victim, and the defendant confessed to two officers. 348 S.C. at 26, 558 S.E.2d at 523. Similarly, this Court held the error was harmless where the testimony provided by the two witnesses whose cross-examination was limited

improperly was not the only evidence of the defendant's involvement in the murder. State v. Curry, 370 S.C. 674, 681, 636 S.E.2d 649, 652-653 (Ct. App. 2006). One of the victims unequivocally identified the defendant as the shooter, and a co-conspirator testified regarding the defendant's discussion about the murder weapon; thus, this Court concluded, the testimony of the two witnesses was cumulative to that given by others. Id. at 681-682, 636 S.E.2d at 653.

Rule 403, SCRE, analysis

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Probative value

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence

that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Analysis

The trial judge barred Appellant from questioning two critical witnesses regarding their pending criminal charges. Not only were the charges pending against them at the time of their testimony, but their charges were pending in the same judicial circuit in which Appellant was tried. As this Court and the South Carolina Supreme Court have held in numerous cases, evidence of pending charges is evidence of bias and motive. Appellant had a right to confront the witnesses

with the evidence of their prior criminal charges in order to demonstrate this motive and bias. The only real question as far as the Confrontation Clause is concerned is whether the error was harmless.

An examination of the Van Arsdall factors reveals the error was not harmless beyond a reasonable doubt. Appellant pointed to McKnight as being Jackson's co-conspirator; therefore, McKnight's testimony and his credibility was important for the jury to evaluate. Although McKnight denied involvement, his denial was critical for Appellant to present, especially as she was impeaching him with a confession he made to a friend while in jail. Likewise, Hatten's testimony was critical for the state because it connected the key fob found in the front yard of Appellant's aunt's home to the deceased's car. The police were unable to make that connection without Hatten. The state's case against Appellant relied solely upon the jury believing Jackson, a co-defendant. Jackson had told multiple stories to the police, and had been allowed to plead guilty to a lesser offense, which carried significantly less time in prison. Jackson's involvement in the shooting death of Brown could not be denied in light of her injury; however, Jackson cast blame on Appellant to shield herself from the full force of the law. In light of these factors, the state could not prove the errors were harmless beyond a reasonable doubt.

Turning the analysis pursuant to Rule 403, SCRE, the trial judge erred in determining the probative value of Hatten's pending charges was substantially outweighed by the prejudicial effect. The probative value of the charges was high given the critical nature of Hatten's testimony. As stated, Hatten provided the only link between the key fob recovered in an area connected to Appellant and the deceased's car. Thoroughly examining his credibility was crucial for the jurors due to his pivotal role in the state's case against Appellant. The prejudicial effect was not substantial because Hatten was not a defendant in the case. While the existence of pending charges damaged his credibility – and therefore, were prejudicial – there was no danger that the jury would

decide the case on a basis other than the evidence, such as emotion, with the knowledge of those charges. Also, there was no danger the charges would confuse or mislead the jurors. Hearing about the charges would simply inform the jurors that Hatten had a motive to testify in favor of the state and to be biased in favor of the state – to curry favor with the state due to his pending criminal charges. Balancing the high probative value of the criminal charges against the low danger of unfair prejudice reveals the trial judge abused his discretion in denying Appellant her right under the Constitution to cross-examine Hatten regarding the pending charges as motive and bias.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 29, 2017

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589