THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court of General Sessions

R. Keith Kelly, Circuit Court Judge

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SC Court of Appeals

Appellate Case No.: 2015-000517

The State of South Carolina, Respondent,

v.

Courtney Ray Mitchell, Appellant.

APPELLANT'S FINAL BRIEF

March 16, 2017

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STATEMENT OF THE CASE

The following is Appellant's Amended Initial Brief in support of the reversal of his criminal conviction for Intimidation of a Witness.

Appellant was initially arrested for Breach of Peace on June 21, 2013, hours after an incident that occurred when he was at lunch with four co-workers from United Parcel Service (UPS). The Breach of Peace that was alleged, occurred despite the fact that the reporters who took issue with Courtney's comments, *never* cautioned him that his conduct was breaching their peace. Furthermore, there were no witnesses, independent of those offered by UPS, that witnessed a breach of peace. He was put on trespass notice in conjunction with the Breach of Peace charge.

He had a couple of items delivered to UPS on July 25, 2013, one of which was a leaf blower he had gotten from a co-worker in an effort to have it repaired by one of his friends; and, the other was a slightly torn envelope containing a number of nondescript items. Appellant was arrested for Intimidating a Witness on July 29, 2013. This appeal stems from Appellant's

conviction for Intimidation of a Witness, and his receipt of the maximum sentence therefore, as a result of jury trial on February 12, 2015. Appellant's Motion for Reconsideration and Motion for New Trial were denied on February 24, 2015. Appellant timely served his Notice of Appeal on March 5, 2015.

STATEMENT OF FACTS

On June 21, 2013, at around 12:30 p.m., Appellant, who was on short term disability at the time, met four of his co-workers from UPS for lunch. At the lunch, Appellant made a number of odd statements that were not the norm for him and were arguably the result of an episode caused by his mental illness. His co-workers recognized that Appellant was "not himself" during the incident. One comment that Appellant made during the lunch was that he wanted to see Ken Baca, a manager at UPS, "leave in a box." He immediately corrected and rephrased his statement, and said that he wanted to see Baca "carrying his box of stuff walking out beside me."

Hiss breach of peace charge states that Appellant threatened co-worker Ken Baca by saying that he wanted to see him being carried out in a box. It is understood that the coworkers at the lunch did not move, nor did they ask Appellant to change his behavior or otherwise suggested that he was being disruptive. No other witnesses stepped forward (nor were any sought) to offer any supporting statements to the contentions of Appellant's coworkers at UPS. The investigation began and ended at the UPS location on Halston Road. UPS called the police. The police came to UPS and took down the facts. At the direction of UPS, the police constructed a warrant for Breach of Peace. Appellant was arrested based solely on the word of UPS (his co-workers).

On July 25, 2013, Appellant, who had been put on a no trespass notice, had to return a co-worker's leaf blower that he had in his possession. He had recognized that the instrument

was not running smoothly; and, he had taken the leaf blower to a friend to have it repaired. He also dropped off a partially torn envelope containing three cell phones, and a number of other nondescript items. The envelope was to be given to Velma Jones, though there was nothing in the envelope that was her property. Moreover, there wasn't anything *within* the envelope directed to her, or with her name on it. The envelope, and its contents, formed the basis of the charge of Intimidation of Witness. The officer who brought the intimidation of a witness charge also worked for, and was paid by, UPS.

Jones, the purported victim of Intimidation of a Witness, had an obtuse explanation for every item in the package. Whereas, Darryl Bailey took the leaf blower that was returned to him and simply placed it in his car (R. 39), Jones believed the leaf blower was a bomb capable of being detonated with a cell phone. (R. 46). Despite the fact that Appellant did not know where her mother lived (R. 49), Jones believed that Appellant was sending her the message because he went to a convenience store that was located in the same county as her mother's house. At trial, she told the jury that the receipt was a threat because it showed a purchase of her favorite beer. (R. 41). She said that a business card from a nursery in Anderson, South Carolina, was a threat against her well-being, because the nursery is near a house in which she had lived-over ten years ago. (R.43). The fanciful explanations of the subject events concocted by Jones and the other purported "victims" has exposed Appellant to a number of disastrous chain of events, as outlined below.

ARGUMENTS

I. THE STATE FAILED TO PROVE THE ELEMENTS OF INTIMIDATION OF A WITNESS BEYOND A REASONABLE DOUBT.

The trial court erred when it held that the State proved the elements of intimidation of a witness beyond a reasonable doubt. In South Carolina, intimidation of a witness is a statutory

offense that consists of (1) an unlawful threat of force to (a) intimidate or impede a witness in the discharge of his duty, or to (b) destroy, impede, or attempt to obstruct or impede the administration of justice in any court. S.C. Code Ann. § 16-9-340(A); State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (2005). The term "threat" is defined as "a communicated intent to inflict harm or loss on another." Black's Law Dictionary 1519 (8th ed. 2004). Further, "intimidation" has been defined as "caused by an act knowingly and intentionally done or statement knowing and intentionally made by the defendant, which was done or made in such a manner or under such circumstances that would produce such a reaction or such fear of bodily harm in a reasonable person." U.S. v. Crosby, 416 Fed. Appx. 776 (10th Cir. 2011).

Intimidation in the constitutional sense is a type of true threat, where a speaker directs a threat to a person with the intent of placing the victim in fear of bodily harm or death; true threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See Virginia v. Black, 538 U.S. 343, 360 (2003). To support a conviction under § 16-9-340, there must be evidence that a defendant's actions were an attempt to prevent the purported victim from continuing her activity. See Tucker v. Cherokee Cty. Veterans Affairs Office, No. 7:09-cv-193-HMH, 2009 U.S. Dist. LEXIS 66749, at *6 (D.S.C. 2009).

In the case at bar, Appellant did not use any threat of force, nor did he intimidate Jones or attempt to impede her in the discharge of her duties as a witness. At the time the package was sent, Appellant was unaware that Jones would be called as a witness to the breach of peace charge. Further, the State failed to establish that Appellant made any threat to Jones. There was no note or letter directed to Jones containing any threatening statement. The envelope which Jones received contained trash.

There was a 2003 handgun license that had been expired for some time. Appellant had never told *anyone* the purpose of the envelope. The individual who delivered the leaf blower and envelope was not called as a witness and, therefore, did not offer anything regarding what he understood was to be delivered. The owner of the leaf blower put the leaf blower in his car without a second thought. He testified that he is a reasonable person. (R. 50). On the same token, Ms. Jones' belief that a receipt for beer from a convenience store in the county where her mother resided (even though it was undisputed that Appellant did not know where she lived) and a nursery card from a nursery that she lived near over ten years ago, were not reasonable.

The State offered no evidence that Appellant threatened to physically injure the person or property of anyone, let alone Jones. No reasonable person could interpret receipts and a leaf blower as threatening or intimidating. Jones, the alleged victim, believed that the leaf blower was a bomb, and that three cell phones found in the envelope were detonators. Darryl Bailey, Jones and Appellant's coworker and the owner of the leaf blower, did not believe the leaf blower was a bomb; he nonchalantly placed it in his vehicle. Jones had a theatrical explanation for each item in the package, and even stated that she felt the leaf blower was a bomb because of something she had seen in the news.

In short, Appellant did not threaten to harm the person or property of any person, including Jones, nor did he attempt to impede the discharge of any witness's duties. Appellant did not communicate an intent to "inflict harm or loss" upon Jones. Jones and Darryl Bailey had very different reactions to the leaf blower. Bailey placed the leaf blower in his vehicle (R. 40); Jones believed that the leaf blower was a bomb capable of being detonated remotely using a cell phone. She based this belief on things she had seen in the news, not due to anything Appellant had said or done. Basing one's purported fear of bodily harm on what is seen on television, as

opposed to observations of the alleged intimidator, does not pass muster to get a conviction under § 16-9-340. There was never any evidence of the activity that Appellant was attempting to prevent her from *continuing,* presented. For these reasons, the elements of the crime are not met; and, the conviction should be reversed.

II. THE TRIAL COURT ERRED BY FAILING TO DECLARE THAT APPELLANT'S ARREST FOR BREACH OF PEACE WAS UNCONSTITUTIONAL.

Breach of peace is a violation of public order, a disturbance of tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order. State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967). Before one may be punished for spoken words, there must be evidence that the words tended to incite a person to respond in a violent manner. Downs v.State of Maryland, 366 A.2d 41, 46 (Md. Ct. Spec. App. 1976). The government is not permitted to assume that every expression of a provocative idea will incite a riot, but must determine whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Tex v. Johnson, 491 U.S. 397, 409 (1989). Words may convey anger and frustration without rising to a level such as to provoke violence. Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring). It is not enough that the words merely arouse anger or resentment. Skelton v. City of Birmingham, 342 So.2d 933, 937 (Ala. Crim. App. 1976).

The basis of the charge against Appellant for intimidation of a witness stemmed from a prior breach of peace charge against him. On June 26, 2013, Appellant was charged with breach of peace for making allegedly threatening statements against a member of management at UPS. Appellant was at a lunch with four co-workers outside of UPS property. During the lunch, he expressed his displeasure with a member of management named Ken Baca. Appellant said that

he "would like to see him go out in a box." He immediately corrected himself and said that he would like to see his things go out in a box, with Baca walking next to it. Appellant and the co-workers finished their lunch without any evidence of concern about Appellant's behavior. Upon returning to work, the co-workers went to human resources at UPS and told them about what Appellant had said. It was reported to police that Appellant threatened an individual who was not present. It was reported that Appellant threatened to kill someone for an offhand remark that was a mistake, with a subsequent contemporaneous correction.

To summarize, there is no basis in fact to establish that Appellant's conversation with his co-workers was a breach of peace. No statement by Appellant was intended to incite violence by any co-worker or any person at the restaurant. He simply made a statement that he wanted to see a manager take his belongings out in a box. Not one of the four co-workers ever expressed any discomfort regarding Appellant's conduct to him They did not move from the table. No independent third party was a witness to anything breaching anyone's peace, or at least the State never provided such an individual. Most importantly, Appellant was not arrested at the scene of the alleged breach of peace, but at a later time and at a different location.

Therefore, this Court should declare that Appellant's arrest for breach of peace was unlawful and in violation of his constitutional rights.

III. THE TRIAL COURT FAILED TO HOLD THAT THE CHARGE FOR INTIMIDATION OF A WITNESS WAS "FRUIT OF THE POISONOUS TREE."

The "fruit of the poisonous tree" doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality. State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (S.C. 1996). The doctrine applies to both primary evidence obtained as a direct result

of an illegality, and to evidence discovered and found to be derivative of an illegality. See Segura v. United States, 468 U.S. 796, 804 (1984). It extends as well to the indirect as the direct products of unconstitutional conduct. Id. Appellant contends that the intimidation of a witness charge is but the "fruit of the poisonous tree" that is the breach of peace charge. As detailed above, Appellant's arrest for breach of peace was unconstitutional. Appellant contends that this case is distinguishable from cases such as State v. Nelson.

In Nelson, the Supreme Court of South Carolina held that the defendant's charges were not "fruits of the poisonous tree," but resulted from new and distinct criminal acts. State v. Nelson, 336 S.C. 186, 195, 519 S.E.2d 786, 790 (S.C. 1999). In that case, the court assumed, arguendo, that the police's initial attempt to stop the defendant driver was unlawful. Id. At 194. After the police initially attempted to stop him, the defendant proceeded to run a stop sign and speed through a residential neighborhood. Id. At 189. The court reasoned, essentially, that running a stop sign and speeding were crimes committed independently of the attempted initial stop, and thus "purged the taint" of the attempted illegal stop. Id. At 195. Therefore, because running a stop sign and speeding "purged the taint" of the attempted illegal stop, the court held that those charges were not "fruit of the poisonous tree," but were new and distinct crimes. Id.

This Court should distinguish the holding in Nelson and hold that Appellant's charge of intimidation of a witness was "fruit of the poisonous tree." Like in Nelson, where the police's initial attempt to stop the defendant was illegal, Appellant's initial charge of breach of peace was illegal, as detailed above. However, unlike Nelson, where running a stop sign and speeding were crimes independent of the attempted initial stop, Appellant's charge for intimidation of a witness is not independent of the breach of peace charge. Whereas running a stop sign and speeding are crimes regardless of the circumstances, there can be no charge for intimidation of a witness

charge without a prior charge. Without the illegal breach of peace charge, there would be no "witness" to "intimidate." Thus, without the illegal breach of peace charge, forwarding an envelope containing things traditionally found on a vehicle floorboard, and a borrowed leaf blower, would not constitute "intimidating a witness," as the individual receiving the package would not have been a "witness" to a crime.

This Court should distinguish the reasoning in Nelson, which essentially held that the crimes committed by the defendant subsequent to the attempted illegal stop were independent of said stop, and thus "purged the taint" of the stop, and hold that Appellant's intimidation of a witness charge was by definition dependent upon the illegal breach of peace charge, and thus could not have "purged the taint" of the charge. Therefore, because Appellant's intimidation of a witness charge did not "purge the taint" of the illegal breach of peace charge, this Court should hold that the intimidation of a witness charge was "fruit of the poisonous tree," and reverse Appellant's conviction thereof accordingly.

In conclusion, this Court should hold that Appellant's charge of intimidation of a witness was the "fruit of the poisonous tree." The initial charge for breach of peace of was illegal. The charge of intimidation of witness, by definition, is dependent upon the illegal breach of peace charge; without the illegal breach of peace charge, there would be no "witness" to "intimidate." The intimidation of witness charge was not independent of the illegal breach of peace charge, and thus did not "purge the taint" of the illegal charge. Therefore, the intimidation of a witness charge was the "fruit of the poisonous tree," and Appellant's conviction thereof should be reversed.

IV. THE TRIAL COURT ERRED BY DENYING APPELLANT HIS RIGHT TO DUE PROCESS.

Appellant contends that the trial court erred by denying him his right to due process, by failing to compel the discovery of Velma Jones' personnel file, which had previously been subpoenaed, on February 9, 2015. (R. 3-16). In addition, the Court refused to dismiss the case against Appellant due to the failure to adhere to Brady and its progeny. The motion was argued immediately prior to trial on Thursday, February 12, 2015. (R. 17-28).

It should be noted that if the State should object to either of these issues as having been waived by not addressing them in trial, Appellant puts forth the Futility Doctrine as justification. In particular, the Court was of the belief that discovery issues were not relevant if the issues were not going in front of the jury. The Futility Doctrine was applied in Higginbottom wherein, "the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile." State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001). In the case at hand, the Court's dismissive remarks concerning Appellant's objections to the manner in which the State provided discovery in light of Brady, were such that any further objection would have been futile.

Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either through examination of the witness or by evidence otherwise adduced. Rule 608(c), SCRE. Anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded to his or her testimony. State v. Baker, 390 S.C. 56, 66, 700 S.E.2d 440, 444 (S.C. Ct. App. 2010).

The trial court granted UPS's Motion to Quash discovery of the personnel file of Velma Jones, sought by Appellant. He had originally sought the personnel files of the co-workers that were present at the lunch, based on the fact that the Breach of Peace was not devised until the co-

workers had returned to UPS and counseled with their superiors. Based on the fact that the State only intended to call Ms. Jones, the alleged victim in this intimidation charge, Appellant moved only to acquire her personnel file. Appellant believes that there is evidence that would show that Jones was being passed over for promotion at UPS, and initiated the Intimidation of a Witness to cause people to feel sorry for her and, perhaps give further thought to promoting her. Jones became a victim in order for UPS to overlook whatever it was that was preventing her advancement.

As discussed above, Jones likened the return of the leaf blower to a terroristic act, with an allegation that the leaf blower contained a bomb (despite the fact that she never saw it). She fed her co-workers' fear of potential terroristic acts, with baseless claims. Her vivid imagination provided an explanation for every useless piece of paper found in the envelope, ultimately relating them to herself. She created a furor by announcing that a leaf blower, that had been safely placed in a vehicle by its owner, was a bomb. She then stated that Appellant purposefully put three cell phones in the envelope because they were detonators. None of the outrageous claims that she made proved to be true. It can logically be deduced that the claims were not made by a reasonable person because prior to her announcement of terrorist activities, everyone was moving forward without hesitation.

Based on the baseless claims, of Ms. Jones, it became necessary to look into what might be driving her to make such claims. Her failure to advance at UPS, demonstrated a possible motive for pursuing the charge. She maintained an employment relationship with UPS. She had helped to get the original Breach of Peace charge against Appellant, even though she did absolutely nothing to indicate to him that he was doing *anything* wrong during the course of the lunch. Without her personnel file, he was unable to review her employment history to derive

whether there was something that illustrated bias. Based on the fact that her claims were not credible in any way, it was necessary to have her file.

It is Appellant's belief that Jones's personnel file would shed some light on her motivation for concocting such wild allegations. Much like the plaintiff in Yoho v. Thompson, 336 S.C. 23, 518 S.E.2d 286 (2000), Appellant deserved the opportunity to thoroughly cross-examine Ms. Jones to uncover any bias that she may have. Without her personnel file, the jury was only able to see an individual insulated from any true inquiry into a potential motive.

Appellant was also denied the opportunity to get *his* personnel file. He is able to get his personnel file in a Workers' Compensation case involving money damages. However, the Court refused to allow him to show that the claims regarding his ineptitude by Ms. Jones-no less, were less than credible. It is not logical that an individual may collect his or her personnel file to perfect a Workers' Compensation claim, but is unable to collect the personnel file that may be the difference between freedom and a ten-year sentence.

Appellant moved for a dismissal of the charge due to the State's failure to provide discovery in a manner that reflects the idealistic intention of Brady, to safeguard the ability to defend oneself, as extolled by the Constitution.

In addition, the State has a duty to disclose evidence favorable to a defendant. See generally Brady v. Maryland, 373 U.S. 83 (1963). Suppression of evidence favorable to an accused violates due process where the evidence is material. Id. At 87. There are three categories of Brady violations: (1) cases involving nondisclosed evidence or perjured testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for Brady material. State v. Moses, 390 S.C. 502, 516-17, 702

S.E.2d 395, 403 (S.C. 2010). Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence, and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. Id. To show prejudice resulting from the exclusion of evidence, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof. State v. Lyles, 379 S.C. 328, 334, 665 S.E.2d 201, 204 (S. C. Ct. App. 2008).

A defendant has a right to all evidence that could prove his innocence. Respondent withheld Brady evidence. Respondent offered Appellant the supplemental incident report on February 10, 2015 (two days before trial), or nearly a year and a half after the incident. Respondent offered a video of the July 25, 2013 incident on January 16, 2015. The video was roughly three minutes and fifty seconds long. There were two blank areas of film that were forty-eight and forty-nine seconds, respectively-nearly half the video was missing. Respondent hid evidence behind UPS by saying it "didn't have control" of UPS, despite the fact that the video was played for law enforcement and was used to arrest Appellant.

UPS gave Respondent what it wanted. In essence, UPS was given a deputy's badge, similar to the sheriff's auxiliary in some jurisdictions. It is suspect that so much evidentiary material was withheld from Appellant. There is no reason for two blank areas in the video. Similar to the eighteen and one-half minute gap in the Nixon White House Tapes, Respondent appears to have been hiding something. Where there is smoke, there is fire.

In sum, Appellant was deprived of evidence critical to his defense. Employee records of UPS personnel would have shed light on a possible conspiracy to oust Appellant from the company. Particularly, Jones's records would have shed light on a possible conspiracy to oust

Appellant from the company, or to simply bolster her efforts to secure elevation within the company. Particularly, Jones's records would have shed light on the outlandish story that she told regarding the leaf blower.

Respondent entirely withheld some evidence, including portions of the video of the subject incident. Police statement(s) that were given to the State psychiatrist who was assessing Appellant's competency, but not given to the defense. Part of the supplement to the Incident Report was withheld until February 10, 2015 (2 days prior to trial), when it had been signed off by the necessary supervisor in August of 2013. Other evidence was withheld for so long as to prevent Appellant from incorporating it in his defense, such as the parts of the video that were actually provided and the supplement to the incident report. Appellant was prejudiced by these illegal withholdings. Therefore, this Court should reverse his conviction for intimidation of a witness, based on the State's, in conjunction with UPS, willful and wanton failure to provide complete discovery at the time that it became available to the State, and/or its agent, UPS.

V. THE TRIAL COURT ERRED BY DENYING APPELLANT HIS RIGHT TO A SPEEDY TRIAL

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution, and is further imposed by the Due Process Clause of the Fourteenth Amendment. Barker v. Wingo, 407 U.S. 514, 515 (1972). A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of the right; and, (4) prejudice to the defendant. State v. Evans, 386 S.C. 418, 423, 688 S.E.2d 583, 586 (S.C. Ct. App. 2009). The four factors must be considered along with any other relevant circumstances. Id. If the defendant shows actual prejudice, the court must consider the prosecution's reasons for the delay and balancer the justification for delay with any prejudice to the defendant. State v.

Brazell, 325 S.C. 65, 72, 480 S.E.2d 64, 68-69 (S.C. 1997). Showing actual substantial prejudice only requires a reasonable probability that, absent the delay, the result of the proceeding would have been different. Jones v. Angelone, 94 F.3d 900, 908 (4th Cir. 1996). An indictment should be dismissed if a delay was an intentional device by the State to gain a tactical advantage. State v. Brazell, 325 S.C. at 72. If a court concludes that a defendant's right to a speedy trial has been violated, dismissal of the charges is the only possible remedy. State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (S.C. 2012).

The basis for Appellant's intimidation of a witness charge was the unlawful breach of peace charge. As discussed above, there was no basis for the breach of peace charge. It focused on Appellant's statement that he would like to see UPS manager carrying his belongings in a box. Such a statement certainly would not tend to incite others to commit violence or any other illegal act. There was no reaction by the witnesses to Appellant's conduct that day at lunch. Clearly, if the conduct did not produce a single objection from four people, there is no way that it could be considered as being conduct that tends to incite others to commit violence or other illegal acts.

Despite conceding that breach of peace is not a general sessions charge (R. 5), the State removed the charge from the municipal court's jurisdiction. The State gave no further explanation for the interference. The State knew that the breach of peace charge was baseless, and did not want the charge to be tried before the intimidation of a witness charge. If Appellant were exonerated of the breach of peace charge, the State's case for the intimidation of a witness charge would have fallen apart. The State was manipulating the docket to fit its own end. It refused to prosecute, despite Appellant's requests for a speedy trial. Appellant was prejudiced by

the denial of a speedy trial because he had to defend himself against a charge-intimidation of a witness-which would have been without merit had he been exonerated of breach of peace.

In conclusion, Appellant's right to a speedy trial was violated. The State maintained that Appellant was attempting to intimidate a witness for a simple breach of peace charge, a charge that the defense believed would be dismissed prior to the empaneling of a jury. The State did not show that Appellant was aware that Ms. Jones was a witness to anything given the fact that she did not make any direct or circumstantial statement regarding his conduct at the lunch. Additionally, the State did not show that Appellant somehow knew that Ms. Jones met with the UPS hierarchy, along with her co-workers, to provide the impetus for the Breach of Peace charge. The police, who were being paid by UPS, manufactured a breach of peace charge from the lunch event, despite the fact that the lunch had disbanded hours before without incident.

The breach of peace charge was removed from the jurisdiction of the municipal court, for the sole purpose of preventing it from reaching trial. If Appellant had been exonerated of the breach of peace charge, it would have shown that once and for all that there existed no reason to intimidate anyone. The State disallowed the breach of peace charge from reaching trial in order to gain a tactical advantage over Appellant, a reason for the delay that the Supreme Court of South Carolina has explicitly denounced as prejudicial to a defendant. Therefore, because Appellant was prejudiced in his defense of the intimidation of a witness charge by the State's unreasonable denial of his right to a speedy trial, this court should reverse his conviction of same.

CONCLUSION

Jones assumed that Appellant was intending to deter her from testifying against him in the Breach of Peace case, by sending the envelope with the leaf blower. There is no way that he

would have known that she was part of a quest to have him arrested. First, she (nor did anyone else at the table) did not say anything negative to him about his conduct at the lunch. In fact, she "may" have spoken to him about her 9 mm at the lunch, which invited him to continue to speak of guns. Second, and most importantly, Jones never corresponded with Courtney again, following the lunch.

Jones and the rest of team UPS went to Human Resources following the lunch, which is where the Breach of Peace charge was hatched. Courtney was not privy to anything that was said or done at the Halston Road location. When he was charged with the Breach of Peace, it was understood that carrying Ken Baca out in a box, and referring to Dwight Inman as a towel-head taxi driver, formed the basis for the charge. Hence, he sent them both trespass notices in which he said they were no longer his friends, and that they needed to stay away from him and his family.

His failure to send anyone else a like declaration indicates that he had no knowledge of anyone else's involvement. Gina "Velma" Jones was Courtney's friend. He had absolutely no reason to believe that she would attempt to have him prosecuted. Without the knowledge that Velma was instrumental in the creation of the Breach of Peace charge, there is *absolutely nothing* that supports him having a reason to intimidate her for a peace that she herself, with her inaction at the lunch, verified that he did not breach.

In summary, the State did not prove Appellant's the elements of intimidation of a witness, with the use of hot phrases and catch words. Appellant neither threatened nor intimidated Jones. In determining whether a defendant's acts did in fact cause intimidation, courts employ a reasonable person standard, and determine whether the acts would produce a fear of bodily harm in a reasonable person. The alleged victim, Jones, stated that the borrowed

leaf blower was a bomb, and three cellphones, or at least one of them, was a detonator. She subsequently said that she realized this scenario due to her television viewership. Such a belief was not based on Appellant's statements (whether direct or circumstantial) or actions. A reasonable person would not have been overcome with fear of bodily injury with knowledge of the presence of a leaf blower, as evidenced by the owner summarily dismissing the leaf blower to his car upon receipt.

Additionally, Appellant's arrest for breach of peace was unlawful. The statements that Appellant made regarding his desire to see a UPS manager carry his belongings out in a box was not directed to any of the co-workers present when the statement was made. None of the co-workers that heard the statements expressed any discomfort as the statements were being made. Such statements would not tend to incite violence or the commission of other unlawful acts by those who heard them. Essentially, Appellant was arrested for a lawful exercise of his First Amendment rights. Furthermore, Appellant was not arrested for the alleged breach of peace until hours after the statements were made.

The intimidation of a witness charge that followed the unconstitutional breach of peace charge was "fruit of the poisonous tree." By definition, the intimidation of a witness is dependent upon the prior commission of a crime. As opposed to a new and distinct crime, which would be committed independently and "purge the taint" of the illegal police activity, Appellant could only be charged with intimidation of a witness because of the existence of the breach of peace charge. Without the breach of peace charge, there would not have been a "witness" to claim to have been "intimidated."

Finally, the trial court erred in denying Appellant his right to due process. The trial court refused to enforce subpoenas and a Brady request that sought materials critical to Appellant's

defense. The subpoena sought UPS employee records of Jones, which may have shed light on issues such as the motive which drove Jones to concoct such imaginary suspicions of leaf blowers and cellphones. The State failed to produce the entire surveillance video of the drop-off of the leaf blower and envelope. Police statements which were given to Appellant's psychiatric competency evaluator, were withheld by the State. Respondent withheld other crucial evidence, such as the supplemental incident report and snippets of the video, unit it was too late to incorporate the materials in Appellant's defense. Further, Appellant was prejudiced by the denial of his right to a speedy trial. The State manipulated the dockets and removed the breach of peace charge from the municipal court's jurisdiction, knowing that Appellant's exoneration of the charge would eliminate the grounds for the intimidation of a witness.

Therefore, for the reasons stated herein, this Court should hold that the trial court erred by: (1) holding that the State did not prove the elements of the Intimidation of a Witness; (2) failing to declare Appellant's arrest for breach of peace unconstitutional; (3) failing to declare that Appellant's intimidating a witness charge was "fruit of the poisonous tree"' (4) denying Appellant his right to due process; and, (5) denying Appellant his right to a speedy trial. Accordingly, this Court should reverse Appellant's conviction for intimidating a witness.

Respectfully submitted,

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Anderson, South Carolina
March 16, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court of General Sessions

R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000517

The State of South Carolina, Respondent,

v.

Courtney Ray Mitchell, Appellant.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that the Appellant's Final Brief in the above-captioned matter contains all materials proposed to be included by the parties, and not any other material.

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