STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HOLLY JO THOMPSON,

APPELLANT

APPELLATE CASE NO 2016-000340

FINAL BRIEF OF APPELLANT

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2. Did the trial judge err in not requiring the State to provide defense counsel with rap sheets of jurors with convictions, that were provided to the clerk of court and the judge, so that defense counsel could intelligently determine any issues in regard to the making of a Batson motion?

3. Did the trial judge abuse his discretion in refusing to allow defense counsel to re-cross the forensic pathologist but allowing the prosecution to re-cross the Appellant?

STATEMENT OF THE CASE

In April of 2014, the Richland County Grand Jury indicted Appellant Thompson for murder, indictment #2014-GS-40-02072. On February 16, 2015, Appellant proceeded to jury trial before the Honorable Robert E. Hood. Robert Bank, Alicia Goode and Rhodes Bailey represented Appellant at trial. Kathryn Luck Campbell, Meghan Walker and Laura Gregg prosecuted the case. The jury returned a verdict of guilty. Judge Hood sentenced Appellant to forty-five (45) years in prison. A timely notice of intent to appeal was filed on February 24, 2016. This appeal follows.

STATEMENT OF FACTS

On Monday, January 27, 2014, James Soloman was found dead in his trailer home. (R. p. 63, lines 13-25). A forensic pathologist testified that the cause of death was exsanguination due to multiple blunt and or sharp force injuries to the head. (R. p. 273, lines 17-25). When asked how long it would have taken for the deceased to have bled to death after receiving the injuries to the head, the forensic pathologist testified that it could have taken roughly anywhere from a few minutes to an hour. (R. p. 274, lines 2-20). Investigator Kerri McClary, a crime scene investigator with the Richland County Sherriff's Department, testified that she found what appeared to be a bloody print on a piece of glass found inside the home. (R. p. 124, lines 1-25). The latent print analyst, Tricia Odom, testified that the print found by Investigator McClary on the neck part of a glass vase was a palm print that matched Appellant. (R. p. 309, line 10 – p. 310, 311, lines 1-16). As a result of the palm print, Appellant was arrested and charged with murder. (R. p. 433, line 8 – p. 434, lines 1-4).

Appellant provided a written statement to police which was introduced in evidence at trial without objection. (R. p. 582, lines 10-25, R. pp. 729 – 733). Appellant stated that she knew the deceased by his nickname, the Grill Man. He was called the Grill Man because he was a welder and made large barrels into grills which he sold. (R. p. 586, lines 4-25). The Grill Man would give Appellant either money or drugs in exchange for sex. (R. p. 586, lines 14-17). On either Friday night, January 24th or Saturday night January 25th Appellant went to the Grill Man's trailer where they smoked crack and tried to have sex. (R. p. 587, line 12 – p. 588, lines 1-12). Appellant stated that the Grill Man because frustrated because he could not perform sexually and then began to accuse Appellant of stealing his crack. (R. p. 588, lines 4 – 21). Appellant stated that the Grill Man swung a knife at her, cutting her arm. (R. p. 588, lines 16-19). Appellant

picked up a glass vase that was full of the Grill Man's urine. (R. p. 588, line 22 – p. 589, line 1). As he swung the knife at her, she swung the vase at him hitting him in the face. (R. p. 589, lines 2-10). She told the police, "He kept coming at me and pushing me into the wall in the hallway, so I kept swinging. The next thing I know, he was in the floor and the vase was broken. I was so scared that I grabbed my stuff and left. I put my bra and shirt on and went out the front door and closed the door behind me." (App. p. 589, lines 11-16).

When asked if he was bleeding when she left Appellant told the police, "I think he was. I know his face was bleeding where I hit him in the face with that thing. The hall was dark and I didn't have my glasses on." (R. p. 590, lines 2-5). When asked where he was when she left she answered, "He was on the floor in the hall cussing me out. He was steady saying, Bitch, bring my crack back. Bitch, I'm going to kill you when I get up." (App. p. 639, lines 6-9). Appellant admitted that she did not call the police because she did not like to get people in trouble. (R. p. 590, lines 10-12). She also stated that she did not know she had hurt him that bad. (R. p. 590, lines 12-13).

ARGUMENTS

1. **The trial judge erred in refusing to instruct the jury on the law of involuntary manslaughter when there was evidence in the record that Appellant acted legally in self-defense by hitting the deceased in the head with a glass vase numerous times but then recklessly fled the scene without calling for help leaving the deceased to bleed to death.**

Prior to the judge instructing the jury on the law, Appellant requested that the judge charge the jury with the law of involuntary manslaughter. (R. p. 543, lines 4-10). Appellant asked the judge, "Absolutely self-defense. I believe Mr. Bailey is maybe going down to see if – I think he's more prepared to argue it right now that I am, but an involuntary manslaughter charge on the basis of her leaving while he is still alive and not informing police, not calling police and that contributing recklessly to his death." (R. p. 543, lines 4-10). Later the trial judge noted that neither the prosecution nor the defense requested a charge that a person is entitled to continue acting in self-defense until the threat of harm has ended. (R. p. 607, line 25 – p. 657, lines 1-5). Appellant requested that the judge instruct the jury about continuing to act in self-defense until the threat of harm has ended. (R. p. 608, lines 6-7). The trial judge then stated, "Okay. Well that's directly contradictory to your argument that she didn't mean to kill him." (R. p. 608, lines 8-10). Counsel for Appellant explained, "I mean, our argument is that she didn't know whether she killed him. Now, she used the force that she felt was necessary, had no idea whether she killed him or not." (R. p. 608, lines 11-14). The trial judge then stated, "Okay. So then you're not requesting involuntary manslaughter? I mean, you understand at this point, those two are exclusive of each other. She either – it was either an intentional act or it was an unintentional act." (R. p. 608, lines 15-19).

Appellant cited State v. Light, 378 S.C. 641, 651, 664 S.E.2d 465, 470 (2008), in support of the proposition that involuntary manslaughter and self-defense are not mutually exclusive. (R.

p. 608, lines 20-24). Appellant explained, "And Your Honor, we would submit that she was acting lawfully in self-defense and with reckless disregard in leaving Mr. Soloman injured. And that would be our position in trying to get the involuntary manslaughter charge, that she was acting without malice, engaging in self-defense when she struck Mr. Soloman and that leaving him --" (R. p. 613, lines 2-8).

After hearing arguments from both sides the trial judge denied the request to charge the jury with the law of involuntary manslaughter. The judge ruled:

> Okay. Involuntary is out, continuing until the threat of harm is in. The Defense can point to no evidence in the record that she did not intend to hit him in the head with a vase, which is obviously attempting to cause serious bodily injury. She didn't say I didn't intend to hit him. She said, I didn't intend to kill him. She didn't say I didn't intent to kill him. She said, I was there, but I didn't kill him. I didn't mean for this to happen. I didn't want him dead. I just wanted it to stop. Okay.

(R. p. 619, line 18 – p. 620, lines 1-2).

The judge instructed the jury on self-defense but not involuntary manslaughter. (R. pp. 700-703). Appellant objected to the exclusion of the involuntary manslaughter charge and asked to be heard again on the issue. (R. p. 707, lines 8-23). The judge replied, "You've already argued that issue. Let's not argue it anymore." Counsel for Appellant told the judge, "Your Honor, in that case, I feel like I've done my client a disservice by not properly arguing at the time, if I can on the record now?" (R. p. 708, lines 1-3). The judge again responded, "All right. That issue has been argued and ruled upon." (R. p. 708, lines 4-5). The trial judge erred in failing to charge involuntary manslaughter. There is evidence in the record from which the jury could have found either self-defense or involuntary manslaughter. The jury was not given the opportunity to decide if Appellant committed involuntary manslaughter. The jury was erroneously only given a choice between murder and self-defense.

Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). In determining whether the evidence requires a charge on a lesser included offense, the facts are viewed in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). A jury charge must be given if there is any evidence in the record to support the charge. State v. Tucker, supra.

In State v. Light, 378 S.C. 641, 650–51, 664 S.E.2d 465, 469–70 (2008)(footnote 7 omitted), the South Carolina Supreme Court wrote:

> A past holding of this Court seems to indicate that, where a defendant is claiming self-defense, as petitioner is here, involuntary manslaughter may not be charged. In State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), we held that where a defendant admits he intentionally shot his gun, but that he did so while acting lawfully but recklessly in defending himself, he is not entitled to a charge of involuntary manslaughter. However, a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges. See State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (improper to hold that any evidence of an intentional shooting negates evidence from which any other inference may be drawn); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (error by trial court in not charging involuntary manslaughter, even though the trial court charged murder, voluntary manslaughter, accident, and self-defense); State v. Turbeville, 275 S.C. 534, 273 S.E.2d 764 (1981) (defendant charged with involuntary manslaughter was not entitled to self-defense charge because there was no testimony concerning self-defense in the trial record; indicating the charge would be appropriate if there was testimony concerning self-defense). When there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges as there is "any evidence" to support each charge. When there is evidence of both, as in this case, we find the jury is entitled to resolve the question of how the shooting actually occurred.

In Light the Court found that there was evidence in the record that the defendant was lawfully armed in self-defense because he took the loaded gun from the decedent who was

threatening him with it, warranting the instruction on self-defense. The Court also found that there was evidence in the record that defendant recklessly handled the gun and/or that the two were struggling over the gun, either one of which warrant the instruction on involuntary manslaughter. See State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) (evidence petitioner recklessly handled the gun because, according to his testimony, it fired almost immediately after he took possession of it supported an involuntary manslaughter charge); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (evidence of a struggle between a defendant and a victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury).

Appellant's actions in the present case fall under the second definition of involuntary manslaughter. There is evidence in the record that the killing was unintentional because Appellant acted lawfully in self-defense in striking decedent with the vase after he threatened her with a knife but acted recklessly in fleeing the scene without calling for help, leaving the decedent to bleed to death. When asked why she did not call 911 appellant testified, "Being a prostitute and a known crack addict, the police don't look too kindly on either one. I have had instances where I have called the police before, and they get out to take my statement or whatever and they'll say, well, just let it go. They don't believe the story. They don't want to hear it. It's just unfathomable that a female could be a prostitute and a drug addict." (R. p. 490, line 23 – p. 491, lines 1-5). Appellant acted recklessly in failing to call for help after she struck the deceased in self-defense and knew that he was bleeding.

The present case is distinguished from State v. Sams, 410 S.C. 303, 317, 764 S.E.2d 511, 518 (2014), reh'g denied (Nov. 7, 2014), where the South Carolina Supreme Court held there was no evidence to support a charge on involuntary manslaughter. In Sams the Court wrote:

> Even if Sams *initially* intended only to "restrain" Frazier, at some point, when he maintained a chokehold on him for well over ten minutes, past the point when the victim had stated he could not breathe and then became limp, Sams's prolonged and continued hold on the victim's neck, until a responding officer repeatedly ordered Sams to release his hold, was intentional and the type of conduct that is highly likely to result in serious injury or death. We believe there is undoubtedly a distinction to be made between restraining someone, which Sams arguably did when he pinned Frazier down by lying on top of him, versus maintaining a prolonged chokehold around someone's neck, which undeniably carries with it the risk of serious harm within moments. The medical evidence also indicates the severe nature of the altercation, as there were objective signs of strangulation present, including bruising to the victim's neck and hemorrhages in his eyes. *Cf.* People v. Leach, 405 Ill.App.3d 297, 345 Ill.Dec. 694, 939 N.E.2d 537, 549–51 (2010) (rejecting the defendant's assertion "that the evidence at best proved only the lesser offense of involuntary manslaughter in that he only acted recklessly in choking [his wife]"; the appellate court noted (1) it was "undisputed that [the] defendant knowingly placed his hands on [his wife's] neck and exerted sufficient force to first render her unconscious and eventually dead"; (2) that the time frame for the choking incident, some three minutes, "created a strong probability of death or great bodily harm" of which the defendant had to be aware; and (3) the probability of harm was further supported by the medical evidence, which indicated continued pressure can cause a loss of consciousness within ten to thirty seconds and death within three to six minutes, and there were objective signs of strangulation, including trauma to the neck and hemorrhages in both eyes).

410 S.C. at 311–12, 764 S.E.2d at 515–16.

In the present case, Appellant did not continue to strike until death as the defendants in Sams and Leach continued to knowingly choke until death. To the contrary, Appellant struck, albeit numerous times, until she could escape. The testimony at trial supports the fact that when Appellant left, while she knew he was bleeding, he was not dead yet and she did not intend to kill the deceased. Appellant told the police, "I didn't mean for this to happen. I didn't want him dead. I just wanted him to stop trying to hurt me." (R. p. 592, lines 18-20). The jury could easily have rejected Appellant's self-defense claim based on her reckless failure to call for help.

The present case is also distinguished from State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015), reh'g denied (Dec. 16, 2015), where the South Carolina Supreme Court found

there was no evidence to support an involuntary manslaughter charge because there was no evidence the defendant acted recklessly. In Scott the Court wrote:

> Here, Scott asserts that his conduct falls under the second definition of involuntary manslaughter, claiming the evidence demonstrates that he unintentionally killed Cynthia while executing a martial arts move, and therefore that he must have recklessly disregarded the safety of others. However, the only evidence presented at trial that supports Scott's version of the facts is Investigator Litchfield's testimony that Scott told him Cynthia charged at him with a "shiny [ ] silver" object, at which point he executed a "martial arts move, pushing her elbow up, [and] causing her to stab herself in the throat." Scott did not testify, nor did he offer any evidence that he was criminally negligent in executing the martial arts move. To the contrary, Investigator Litchfield testified that Scott's father had a black belt in martial arts, and that he trained Scott. Thus, the only testimony regarding Scott's martial arts background suggests that his actions were anything but reckless, and that he intentionally caused Cynthia's death.

414 S.C. at 487–88, 779 S.E.2d at 531–32.

Appellant does not argue that she recklessly struck the deceased with a vase as the defendant in Scott argued that he acted recklessly in executing a martial arts move. Instead, Appellant argues that she acted in self-defense in striking the deceased with the vase but acted recklessly in fleeing without calling for help, leaving the deceased to bleed to death. Unlike in Sams and Scott, there was evidence in the record that Appellant acted recklessly. The present case is more analogous to State v. Light, State v. Burris, Casey v. State, Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008), where a struggle between the defendant and the victim led to the unintended death of the victim. While Appellant and the deceased did not struggle over the vase as the parties struggled over a gun in the above cases, they did struggle and Appellant's reckless flight then resulted in the unintended death of the victim. The jury should have been given the opportunity to decide between self-defense or involuntary manslaughter. The trial judge erred in refusing to charge involuntary manslaughter.

The Court discussed the standard of review in Sams, writing:

> In criminal cases, appellate courts sit to review only errors of law. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). Thus, an appellate court is bound by a trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.
>
> "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); see also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996).
>
> "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 570, 647 S.E.2d at 166–67. "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *Id.* at 570, 647 S.E.2d at 167.
>
> In determining whether the evidence requires a charge on a lesser-included offense, the Supreme Court must view the facts in the light most favorable to the defendant. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994).

State v. Sams, 410 S.C. 303, 307–08, 764 S.E.2d 511, 513 (2014), reh'g denied (Nov. 7, 2014)

Viewing the evidence in the light most favorable to the Appellant, there was evidence in the record from which it could be inferred that the Appellant committed involuntary manslaughter. There is evidence in the record that Appellant acted lawfully in self-defense but recklessly in fleeing the scene without calling for help, leaving the victim to bleed to death. The refusal to grant the requested charge on involuntary manslaughter is an error of law requiring reversal.

2. **The trial judge erred in not requiring the State to provide defense counsel with rap sheets of jurors with convictions, which were provided to the clerk of court and the judge, so that defense counsel could intelligently determine any issues in regard to the making of a Batson motion.**

Prior to jury selection, Appellant asked the judge to order the prosecution to provide defense counsel with rap sheets of jurors with convictions. Counsel for Appellant stated:

> The only thing that needs to be heard before jury selection is I think the typical situation that the Court is aware of or that a lot of judge here are aware of that the solicitor's office runs rap sheets of the entire jury potential panel. Those rap sheets are provided to the qualifying judge, to the clerk of court. They obviously retain a copy. We never received a copy.
>
> We're asking for the Court to order them to have one or to give us one. We don't necessarily need the rap sheets of every single person, but if we could, at least, have the information of who has been convicted of crimes that don't exclude the jurors. It begins to be an issue in Batson issues when we don't know why they're excluding someone until later.
>
> Again, in all fairness, it doesn't seem fair that everybody in the courtroom has a copy of this information except the defendant. So we just ask for that information to be provided for people who do, in fact, have some type of conviction.

(R. p. 19, lines 2-21). The prosecution responded, "State vs. Childs, Your Honor, State vs. Casey, I believe addresses this issue." (R. p. 19, lines 22-23). The judge asked, "I assume it says you don't have to give that over to them?" (R. p. 19, lines 24-25). The prosecution answered, "That would be correct, Your Honor." (R. p. 20, line 1). The judge then said, "Don't ever say fundamental fairness. It's not right in the bar examine, it's not right in here. You can look it up if you want to. Denied. Let's go to the Defendant's voir dire." (R. p. 20, lines 2-4). The trial judge erred.

In State v. Childs, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), one of the cases referenced by the prosecution as standing for the proposition that the State did not have to provide the defense with juror rap sheets, the defendant asked for all records of arrest, convictions, and prior jury service including information as to backgrounds, attitudes, or

characteristics of any member of the petit jury venire. The Court held in Childs that, pursuant to State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988) cert. denied 489 U.S. 1091, 109 S.Ct. 1559, 103 L.Ed.2d 861 (1989), the defendant was not entitled to information collected by the prosecution as to the prior jury service, backgrounds, attitudes, or characteristics of any member of the petit jury venire. In Matthews the Court noted that Rule 8 of the Criminal Practice Rules provides that, "reports, memoranda, or other internal prosecution documents made by the [solicitor] or other prosecution agents in connection with the investigation or prosecution of the case" are not subject to disclosure in finding that background information on the *venire,* if any, held by the solicitor qualified as "internal prosecution" matter connected with the prosecution of the case. Appellant in the present case did not seek this type of juror information. Instead, Appellant asked to receive a copy of rap sheets of jurors with convictions that the State provided to the clerk of court and judge.

As to criminal records checks or records of arrest, the Court in Childs wrote, "No right to discovery exists in a criminal case absent statute or court rule. State v. Matthews, supra; State v. Miller, 289 S.C. 316, 345 S.E.2d 489 (1986). Because there is no statute or court rule requiring a disclosure of this information, we hold that the trial judge did not abuse his discretion in denying appellant's request." State v. Childs, 299 S.C. at 474, 385 S.E.2d at 841 (1989).

The present case is distinguished from Childs in two ways. First, the rap sheets were not maintained solely by the prosecution but instead were shared with the clerk of court and the judge. There is no indication that the prosecution in Childs shared the information with third parties. Importantly, Appellant in the present case asked for the juror rap sheets so she could

intelligently determine any issues in regard to a Batson[1] motion. The Childs case did not address the disclosure of juror rap sheets in the context of a Batson motion. To the extent that Childs stands for the proposition that defense counsel is never entitled to the disclosure of juror conviction and arrest records contained in a rap sheet, provided to the clerk of court and judge, this Court should modify that ruling in Childs and reverse here.

The present case is also distinguished from State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct.App. 1997), the other case cited by the prosecution. In Casey the defendant made a Batson motion based on the fact that the State used all of its peremptory strikes against male jurors. The prosecution asserted that three of the males were stricken because of prior convictions for DUI and none of the females seated had DUI convictions. The Court in Casey ruled:

> Neither *Batson* nor its progeny requires that the proponent of a strike present evidentiary support for the strike. See State v. Kandies, 342 N.C. 419, 467 S.E.2d 67, 77 (1996) ("[T]he district attorney is an officer of the court, and, as such, is sworn to represent the State honestly and to the best of his ability. Absent evidence to the contrary, it is not unreasonable for the trial court to assume that the prosecutor is telling the truth with regard to the criminal records of prospective jurors."). Accordingly, we conclude that the trial court did not err in refusing Casey's motion to have the State produce the jurors' criminal records.

State v. Casey, 325 S.C. 447, 456, 481 S.E.2d 169, 174 (Ct. App. 1997).

If Casey had been provided with the rap sheets upon which the State sought to strike potential jurors, Casey may not have challenged the jury selection at all. The rap sheets may have demonstrated a gender neutral reason for the strikes, DUI convictions for the males struck, and may have demonstrated that no similarly situated jurors were seated, no DUI convictions for the female jurors seated. The interests of judicial economy weigh heavily in favor of the State providing the defense with copies of rap sheets of potential jurors. Additionally, as the opponent of the strike carries the burden of proving that an allegedly neutral explanation is pretextual, in

[1] Batson v. Kentucky, 476 U.S. 79 (1986).

the interest of fundamental fairness and due process, the opponent should have access to the rap sheets that have already been provided to the court.

In State v. Kandies, 342 N.C. 419, 438, 467 S.E.2d 67, 77 (1996), a case cited in the Casey opinion, the North Carolina Supreme Court wrote:

> Finally, once the prosecutor has articulated a nonracial explanation for each challenged peremptory strike, the burden shifts to the defendant to introduce evidence that the State's reasons are a pretext. Robinson, 330 N.C. at 16, 409 S.E.2d at 296. Thus, the ultimate burden of rebutting the State's representations and proving purposeful discrimination lies with the defendant. Defendant had sufficient opportunity to produce evidence that the prospective jurors in question did not have criminal records. He could have obtained a record check himself or secured a court order requiring production of these documents. There were resources available to defendant to rebut the State's explanations, and he chose not to utilize them.

In the present case the State ran rap sheets on the entire jury venire and provided those rap sheets to the clerk of court and the judge. Defense counsel, on the other hand, did not have that ability and asked that the State provide defense with a copy. Requesting a South Carolina Law Enforcement Division [SLED] background check for each member of the jury venire would be cost prohibitive for the defense. Again, if defense counsel had the ability to verify, by having a copy of the jurors' rap sheets, the State's reason for a particular strike and that no similarly situated jurors were seated, there is a reasonable likelihood that in many cases counsel would not have to make a Batson motion in the first place. Based on traditional concepts of fairness, reasonableness and judicial economy, the judge should have required the State to provide defense counsel an opportunity to view the rap sheets of the jury venire. To the extent that Casey stands for the proposition that defense counsel is never entitled to the disclosure of juror conviction and arrest records contained in a rap sheet, provided to the clerk of court and judge, this Court should modify that ruling in Casey and reverse here.

3. The trial judge abused his discretion in refusing to allow defense counsel to recross the forensic pathologist but allowing the prosecution to recross the Appellant.

After the redirect examination of the forensic pathologist, Dr. Amy Durso, the following exchange took place between the trial judge and defense counsel:

> The Court: Thank you, Dr. Durso. You may step down.
>
> Mr. Bailey: I'm sorry.
>
> The Court: No re-cross. You may step down.
>
> Mr. Bailey: I'm sorry, Your Honor.
>
> The Court: How long is the next witness?
>
> Mr. Bailey: I'm sorry, for the record, I would like to say the Defense would like to re-cross the witness.
>
> The Court: Under Rule 611, no re-cross.

(R. p. 293, line 24 – p. 294, lines 1-7). Trial counsel did not move to proffer the proposed recross examination. In State v. China, 312 S.C. 335, 342, 440 S.E.2d 382, 385–86 (Ct. App. 1993), the South Carolina Court of appeals wrote:

> During both *in camera* hearings and before the jury, the trial judge permitted redirect examination by the prosecution. The trial judge, however, did not permit recross by China. China did not make a proffer to the trial judge. This issue, therefore, is not preserved for appeal. State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991) (in the absence of a proffer of excluded testimony, a reviewing court is unable to determine whether the appellant was prejudiced).

Appellant submits, however, that this Court should find the issue preserved because any attempt to proffer the recross examination of the forensic pathologist would have been futile. See State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001).

While Appellant was prohibited from recross examining the forensic pathologist, the State was allowed to recross examine the Appellant. (R. p. 540, lines 12-15).

Rule 611, SCRE, provides the mode and of interrogation and presentation stating:

> **(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> **(b) Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.
>
> **(c) Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
>
> **(d) Re-examination and Recall.** A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

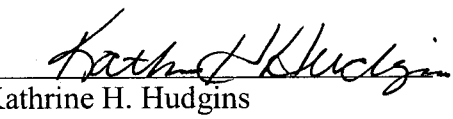
The right to and scope of recross examination is within the sound discretion of the trial court. Liberty Mutual Ins. Co. v. Gould, 266 S.C. 521, 224 S.E.2d 715 (1976). "[A] trial judge may impose reasonable limits on cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant." State v. Johnson, 338 S.C. 114, 124, 525 S.E.2d 519, 524 (2000). "Absent the introduction of any new matter on re-direct examination, the rule is that recross-examination is not required. Without something new, a party has the last word with his own witness." United States v. Fleschner, 98 F.3d 155, 157 (4th Cir.1996).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)). "A failure to exercise discretion amounts to an abuse of that discretion." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) (citations omitted).

Because the judge failed to state any grounds for the refusal to allow recross examination of the forensic pathologist, it is difficult to determine if he failed to exercise his discretion or if his decision was without evidentiary support. The fact that the trial judge allowed the State to recross the Appellant reflects that he was aware that recross examination was in his discretion. The record, however, does not provide valid reasons for prohibiting the defense from recross examining the pathologist but allowing the State to recross the Appellant. The disparate treatment without valid justification should constitute an abuse of discretion. In the context of a challenge to an excessive sentence, the South Carolina Supreme Court wrote, "It has long been settled that this Court has no jurisdiction on appeal to correct an allegedly excessive sentence, which is within the limits prescribed by law for the discretion of the trial judge and which is not proved to be the result of partiality, prejudice, oppression or corrupt motive. We deem it unnecessary to cite or refer to the many authorities for this well settled proposition." Clark v. State, 259 S.C. 378, 382–83, 192 S.E.2d 209, 210–11 (1972). The disparate treatment in the present case gives the appearance of impartiality and should constitute an abuse of discretion.

CONCLUSION

Based on the above arguments, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.



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ATTORNEY FOR APPELLANT

This 23rd day of March, 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."

March 23, 2017

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