STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Appellant/Respondent,

vs.

EDWARD LEE DEAN,

Respondent/Appellant.

THE STATE'S FINAL BRIEF OF RESPONDENT

Appellate Case No. 2016-001004

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STATEMENT OF THE CASE

A jury convicted Respondent Dean on March 5, 2014, of First-Degree Burglary, Grand Larceny, and Malicious Injury to Property before the Honorable Frank R. Addy, Jr. Judge Addy deferred sentencing. On June 9, 2014, Judge Addy held a sentencing hearing and imposed a twenty-five year sentence based on Dean's criminal record and his bad behavior in court and at the county jail. Dean also filed a motion for new trial. Judge Addy held a hearing on Dean's motion on April 13, 2016. By order dated May 4, 2016, Judge Addy granted Dean a new trial. (R. p. 678). The State appealed the grant of a new trial on May 10, 2016.

On May 16, 2016, Dean filed a motion to dismiss, claiming the order was not appealable. The State then filed its return to Dean's motion to dismiss on November 22, 2016. This Court denied his motion to dismiss and ordered the parties to proceed with briefing on January 23, 2017.

The State filed its initial brief of appellant. Dean filed a cross-appeal and his initial brief of appellant. The State's final brief of respondent follows.

STATEMENT OF FACTS

Dean was convicted of first-degree burglary for his participation in the burglary of a gun collector's home. Several guns were stolen, along with other valuables. Law enforcement was unable to recover anyone's latent prints, and the physical evidence recovered at the burglarized home could not be linked to anyone.

Law enforcement received a tip that stolen guns were stored underneath the duplex where Dean and his mother lived. The search under the duplex yielded two rifles including a .308 rifle. R. pp. 267-69; p. 283, lines 5-7. The serial numbers for the guns came back stolen from Greenwood County. R. p. 283. After receiving consent to search from Dean's mother, law enforcement recovered .308 ammunition and .44 ammunition from Dean's residence. R. pp. 282-83.

Subsequently, Adrian Gaston was arrested for a separate burglary. Gaston provided a statement to law enforcement admitting to several burglaries. Although Gaston was not a suspect in the burglary of the gun collector's home, he implicated himself, Edward Dean, and co-defendant Antwan Anderson. R. pp. 240-41.

Gaston testified for the State against Dean. He testified Anderson picked Gaston up, and Dean was with them when they burglarized the residence. Gaston acted as a look-out as they stole guns and other items. He assisted breaking into a shed to steal more firearms. Gaston kept one of the weapons, while Dean and Anderson split up the remaining firearms. R. pp. 212-18.

Dean was convicted by the jury of First Degree Burglary, Grand Larceny, and Malicious Injury to Property. R. pp. 350-51.

Dean's accusations

In his statement of the case, Dean several times references his inquiries on whether there

were any offers or deals made with co-defendant Gaston. As discussed in the State's initial brief of appellant, there is no evidence of any deals between the State and Gaston, and both the prosecutors involved in the case and Gaston's plea counsel refuted the evidence-free assertion that any deals were made with Gaston. In addition to making an evidence-free claim that the State committed a discovery violation, Dean's counsel accused Judge Addy of imposing a trial tax. On top of these accusations, Dean's counsel submitted a pleading on December 11, 2013, entitled, "Motion for Continuance, Judicial Supervision, and a Scheduling Order" in which Dean's counsel wrote, "Thus, in continued institutional deference to the Solicitor's Office, the Eighth Circuit resident judges see their role as coercing guilty pleas. In essence, the 'price of justice,' i.e. the sentence imposed, increases the longer a case remains on the docket. . . ." R. at 28.

ARGUMENT

I.

The trial court did not err by declining to quash the indictments. The grand jury presentment process in Greenwood County does not violate state law, the state constitution, or equal protection.

Dean complains about the practice of a single law enforcement officer appearing before the grand jury. However, there is nothing improper about this procedure. Further, he speculates that whichever officer testified before the grand jury might not have been sworn. Nothing in the record indicates that an unsworn witness testified before the grand jury. Note that no members of the grand jury were called to testify to determine if any unsworn witnesses were allowed to testify before it.

Dean was indicted on four charges and convicted of three. According to the prosecutor, the witness before the grand jury for the grand larceny charge was Bryan Lewis. There was uncertainty as to who the witness was for the earlier indictments for burglary and malicious injury property. The witness listed on those indictments was Dale Boyer, but he did not recall whether or not he was the witness. The prosecutor indicated, for that agency, the witness typically was Kenny Downing. R. pp. 160-61.

Presumption of regularity

"Proceedings of the grand jury are presumed to be regular unless there is clear evidence to the contrary." State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." Id. at 502, 409 S.E.2d at 424; see State v Griffin, 277 S.C. 193, 196, 285 S.E.2d 631, 633 (1981) (citing 42 C.J.S. Indictments and Information §§ 38, 39 (1944) and noting it has been held grand jurors are presumed to have been

sworn even when the indictment's caption does not indicate they were sworn) *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Hearsay allowed before grand jury/grand jury secrecy/grand jury role as an accusing and investigative body.

Dean complains about the possibility of hearsay being presented to the grand jury. The predominate view is that an indictment is proper even if entirely based on hearsay evidence. See State v. Tressler, 503 S.W.2d 13 (Mo. 1973) (finding indictment based only on hearsay is acceptable, in keeping with the predominate view of the states); Casey v. State, 491 S.W.2d 90, 92 (Tenn. Cr. App. 1972) (indictment may be based solely on hearsay); King v. State, 139 N.E.2d 547, 551 (Ind. 1957); State v. Matthews, 218 So.2d 743 (Miss. 1969) (error to quash indictment merely because it is based on hearsay testimony); State v. Blake, 305 A.2d 300, 303 (N.H. 1973) (rejecting claims that indictment should be quashed because it was based solely on hearsay testimony consisting of four written statements by complainants and their mothers, along with police reports and the testimony of only one police officer); State v. Wall, 159 S.E.2d 317 (N.C. 1968) (indictment sufficient although testimony was from officer who had no independent knowledge of the facts); Commonwealth v. Dessus, 224 A.2d 188 (Penn. 1966) (finding it was well-settled law in Pennsylvania that an indictment may be based on hearsay; "a contrary rule would revolutionize the practice of criminal law and would introduce into the administration of the criminal law a novel and vicious practice"); Douglass v. State, 163 So.2d 477, 489 (Ala. Ct. App. 1963) (indictment may be based on hearsay alone) *rev'd on other grounds*, 380 U.S. 415 (1965); State v. Parks, 437 P.2d 642 (Alaska 1968) (same); Commonwealth v. Walsh, 151 N.E. 300 (Mass. 1926) (finding no merit to contention that indictment should be quashed because sole witness had no independent knowledge of crime, the

court will not inquire into whether competent evidence was heard); People v. Gable, 647 P.2d 246 (Colo. App. 1982) (finding the bulk of information presented to the grand jury or at the preliminary hearing may well be based on hearsay); United States v. Zielezinski, 740 F.2d 727, 729 (9th Cir.1984) ("Grand juries can properly indict suspects on the basis of hearsay"); see also State v. Carruthers, 35 S.W.3d 516, 532-33 (Tenn. 2000) ("It has long been the rule in this State that the sufficiency and legality of the evidence considered by the grand jury is not subject to judicial review. Where an indictment is valid on its face, it is sufficient to require a trial of the charge on the merits to determine the guilt or innocence of the accused, regardless of the sufficiency or legality of the evidence considered by the grand jury.").

Of course, South Carolina follows this view also. State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974); State v. Boyd, 20 S.C.L. 288 (1834) (refusing to inquire into the character of evidence presented where the complaint appeared to be that written statements were submitted by witnesses instead of evidence being presented viva voce); see also Rule 1101(d)(2), SCRE (rules of evidence inapplicable to grand jury proceedings).

"A grand jury is an inquisitorial, informing, and accusing body, and it is not a trial body." 38A C.J.S. Grand Juries § 2 (including citation to State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932) at n. 17). The grand jury system originated in England and proved popular, despite its secrecy, as a fair method of instituting criminal proceedings, as noted in Costello v. United States, 350 U.S. 359, 362 (1956). Costello observed the historical workings of the grand jury as follows:

> Grand jurors were selected from the body of people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make

> their presentments or indictments on such information as they deemed satisfactory.

Id. Our Supreme Court observed that in England "at the time of settlement of this country, [the grand jury was] an informing and accusing body only. . ." Bramlett, 164 S.E. at 875 (citation and internal quotation marks omitted).

Former Attorney General Daniel R. McLeod sought permission from the Supreme Court to appear on behalf of the State and have a stenographer present to take testimony. The Supreme Court denied both requests, proclaiming, "No principle has been followed more closely than that which protects the secrecy of the proceedings of the grand jury . . ." Ex Parte McLeod, 272 S.C. 373, 377, 252 S.E.2d 126, 128 (1979).

In Douglass, the Alabama court observed the inability of an opposing party to confront witnesses is the bedrock rationale for excluding hearsay during a trial: "Before a grand jury, the suspect is given no opportunity to be represented. Hence, the hearsay exclusion would be without the adversary means to implement it." Douglass, at 489-90.

Refusing to inquire into the nature of the evidence presented to the grand jury, a Connecticut Superior Court observed:

> Proceedings before a grand jury are preliminary and ex parte and are only to establish probable cause. To establish such a rule would entail an unnecessary invasion of the secrecy which is essential to the nature of the grand jury proceedings and which is required by oath. Finally, an accused is not entitled to a rule which would result in delay and adds nothing to the assurance of a fair trial.

State v. Stallings, 206 A.2d 277, 278 (Conn. Super. Ct. 1964).

The United States Supreme Court found in Costello that an indictment could properly be found solely on hearsay. Costello. In the Second Circuit's opinion, Judge Hand observed, "Indeed,

we conduct our most serious affairs upon the strength of [hearsay]; it would be impossible to carry on a day's business without it." United States v. Costello, 221 F.2d 668, 678 (2d Cir. 1955).

The hearsay rule is not based on the precept that hearsay statements are without probative value or supply a logical basis for conclusions of fact. State v. Parks, 437 P.2d 642, 644 (Alaska 1968). It is only inadmissible if objected to at trial, otherwise once admitted, the jury may properly consider the hearsay in their determinations. Id.; accord State v. Frank, 262 S.C. 526, 205 S.E.2d 827 (1974) (failure to object to testimony renders evidence competent and may be considered to the extent it is relevant). "Since hearsay evidence has probative force and may furnish a logical basis for conclusions of fact, it cannot be said that because evidence presented to the grand jury was hearsay it did not rationally establish the facts sought to be established." Parks at 644.

In the instant case, the secrecy of the proceedings prevents this Court or the parties to know what substantive evidence was presented to the grand jury, but obviously, from the trial court record, competent evidence supports the conviction beyond a reasonable doubt. Therefore, evidence existed to meet the lower probable cause threshold. Merely because an officer, perhaps unconnected to the investigation, relayed statements of the victims and eyewitnesses, as opposed to an investigating officer or the officer that secured various warrants, does not render the charging decision of the grand jury unfair.

On point is State v. Matthews, 218 So.2d 743 (Miss. 1969). In that case, the sole witness was a police officer with no direct knowledge of the testimony given by him, but instead he testified from police department and FBI files. The court reversed the dismissal of the indictment, noting the sufficiency of evidence before a grand jury cannot be challenged, only an allegation of undue influence was tenable.

Dean relies heavily on Chief Justice Lewis' dissent in State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981). However, in that case, which dealt with the propriety of a prosecutor being a witness before the grand jury, Justice Lewis' chief concern appears to be with the solicitor's role as an attorney rather than his role in law enforcement. Consider the following from his dissent:

> It is the duty of a solicitor not to convict, but rather to see that justice is done; however, it is also the duty of the solicitor to prosecute vigorously. . . . It is partly because of this role as advocate that he cannot also be a witness in a grand jury proceeding.

Id. at 874-75 (internal citation omitted).[1] Justice Lewis noted the rules of professional responsibility provide "the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Id. (citation omitted).

While Justice Lewis obviously was seeking changes to the grand jury system well beyond the question of whether a prosecutor should testify, it is obvious the gravamen of his concerns was the simple proposition that a prosecutor should not serve as both advocate and witness on the same case. An investigator or other law enforcement agency representative does not implicate the same concern.

An investigative officer may be the sole witness before the grand jury. State v. Whitted, 279 S.C. 260, 305 S.E.2d 245 (1983) *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). Rather than admit Whitted controls the result, Dean argues Whitted stated a requirement a law enforcement officer must have participated in the investigation of the case to be a witness before the grand jury. However, Dean does not explain what nexus is required or how such a

[1] The Court did not agree with Chief Lewis' proposition that a prosecutor could never be a witness before the grand jury, but instead "strongly" suggested the practice should "be abandoned unless no alternative is available." Capps, 276 S.C. at 62, 275 S.E.2d at 873. For several years, the Supreme Court "also stated that this does not necessarily mean that it is error for a solicitor to be a sole witness before the grand jury." State v. Dawkins, 297 S.C. 386, 390, 377 S.E.2d 298, 300 (1989).

rule would be workable without making grand jury proceedings a full blown, first-round trial rather than simply a determination of probable cause.

Fifth Amendment

Dean claims the Fifth Amendment as authority for his arguments. This is only a conclusory assertion and so this Court should not consider the matter. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal) *aff'd as modified*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). Further, his argument runs counter to State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980), which held the following:

> This court has previously noted that the fifth amendment requires only that the indictment be returned by a legally constituted and unbiased grand jury and that the indictment must be valid on its face. State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). The fifth amendment requirements implicitly recognized the traditional view that the deliberations of a grand jury must remain secret and inviolate. We adhere to that view. From the record before us, we cannot agree that the indictment should have been quashed. The length of time spent deliberating a matter, even if it could be established, does not control the effectiveness of the deliberation. The requirements of the fifth amendment were met.

Id. at 381, 264 S.E.2d at 422.

Equal protection

Dean further claims the legislative scheme for county grand juries violates the equal protection clause because of how it differs from the state grand jury statutes. However, a rational basis exists for the differing grand jury systems due to the special enhanced powers of the prosecution in the State Grand Jury system that are countered by the legislature with more checks on prosecutorial power. These enhanced prosecutorial powers differ from the prosecutor's role in the

county grand jury system, where the prosecution has hands off involvement with the grand jury.

Dean must overcome a strong presumption of constitutionality to successfully attack the constitutionality of a statute. The Supreme Court has declared:

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt.

State v. Harrison, 402 S.C. 288, 292-293, 741 S.E.2d 727, 729 (2013) (internal citations omitted).

The Equal Protection Clause of the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides no "person shall be denied the equal protection of the laws." S.C. Const. art. I, § 3. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

Not all classifications are unconstitutional, however, for "[t]he equal protection clause only forbids irrational and unjustified classifications." Bodman v. State, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013). If the statute "does not implicate a suspect class or abridge a fundamental right, the rational basis test is used" to determine whether the classification falls into the prohibited group. Id. (citing Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)). "A classification does not violate the Equal Protection Clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." Curtis v. State, 345 S.C. 557, 574, 549 S.E.2d 591, 599-600 (2001) (citing Whaley v.

Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999)). "A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." Bodman, 403 S.C. at 69, 742 S.E.2d at 367.

The Supreme Court explained in Bodman:

> We give great deference to the General Assembly's decision to create a classification. Consequently, those who challenge the validity of one under rational basis review must "negate every conceivable basis which might support it." Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. Moreover, "[t]he fact that the classification may result in some inequity does not render it unconstitutional."

Id. at 69-70, 742 S.E.2d at 367-368 (internal citations omitted). "Accordingly, [this Court's] entire equal protection inquiry revolves around interplay between the specific classification created and the purported basis for it, with a challenger coming under rational basis review facing a steep hill to climb." Id. at 70, 742 S.E.2d at 368.

The State Grand Jury System is a fairly recent development, enacted in 1987 and becoming effective in February 1989. 1987 Act No. 150 § 1. The legislature announced its intent in passing the act was "to enhance the grand jury system and to improve the ability of the State to detect and eliminate criminal activity." S.C. Code § 14-7-1610 (A).

An important purpose of the State Grand Jury is its ability to detect and investigate drug trafficking with multi-county significance. The State's ability to detect and investigate this illicit commerce is enhanced by a grand jury with authority to cross county lines. Section 14-7-1610(A).

Likewise, the statutory scheme is designed to improve the investigation and prosecution of criminal gang activities (§ 14-7-1610 (B)), public corruption (§ 14-7-1610(C)), child obscenity (§ 14-7-1610 (D)); election fraud (§ 14-7-1610(E)), and environmental crimes (§ 14-7-1610(F)), on the basis that enhanced grand jury powers were necessary for investigation and prosecution of those particular crimes.

The limited role of the prosecutor in county grand jury proceedings was greatly expanded in the State Grand Jury framework. In enacting Article 15, the legislature required the Attorney General or his designees to attend sessions of the State Grand Jury, to act as legal advisor to the State Grand Jury, to examine witnesses, present evidence, and draft indictments and reports under the direction of the State Grand Jury. S.C. Code § 14-7-1650 (A). The Attorney General is empowered with the ability to notify the presiding judge that the State Grand Jury is expanding its scope of inquiry. S.C. Code § 14-7-1690. Additionally, the Attorney General is able to require the Clerk of the State Grand Jury to issue subpoenas to appear before the State Grand Jury. S.C. Code § 14-7-1680.

Enactment and evolution of the State Grand Jury followed and overlapped with the "journey" to Anderson[2] described by Dean. When Attorney General McLeod proposed providing a representative from this office to examine and cross-examine witnesses before the county grand jury and for a stenographer to record the proceedings of the county grand jury, the Supreme Court sternly refused. The Supreme Court explained, "Adherence to the foregoing long established public policy has prohibited the prosecuting attorney from entering the grand jury room for the purpose of

[2] State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993) (announcing a prosecutor is prohibited from being a witness before the grand jury).

presenting evidence through the examination and cross-examination of witnesses." Ex parte McLeod, 272 S.C. 373, 377, 262 S.E.2d 126, 128 (1979).

In rejecting the request for the stenographer, the Supreme Court also soundly rejected the call by the Attorney General to revise the county grand jury despite that it might "in certain limited respects have some appeal." Id. at 378, 262 S.E.2d at 128. The Supreme Court explained: "If, however, the fundamental principle of secrecy in grand jury proceedings as long followed in our prior decisions is to be changed, it should come as the result of a comprehensive study and evaluation of all facets of the question and not through a process of judicial erosion." Id.

Two years later, Chief Justice Lewis, in his dissent in State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981), advocated "retreating" from the Supreme Court's holding in McLeod by allowing the prosecutor to participate as an advocate (but not as a witness) and allow a stenographer to record the proceedings. Addressing the concern of a prosecutor being an attorney-witness, Chief Justice Lewis warned "the environment of one-sided proceedings before the grand jury increases the potential for abuse of the relationship and further heightens my concern." Id. at 67, 275 S.E.2d at 875.

As Dean notes, prosecutors were discouraged and ultimately barred from appearing before a county grand jury as a witness. State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993). In reaching this result, the Supreme Court cited favorably Chief Justice Lewis' reasoning in his dissent in Capps that "considering the authoritative nature of the relationship between a solicitor and the grand jury, the lone testimony of the solicitor as a representative of the State would be too potent to allow as the general rule." Anderson, at 187, 439 S.E.2d at 837.

Viewing the expansion of the prosecutors' role in State Grand Jury proceedings, in which they were allowed to examine witnesses, it is understandable the legislature wanted to counter this

expansion of prosecutorial power in the setting of a unilateral proceeding by requiring a record of the proceeding be preserved as a check against potential (hypothetical) abuse by the State.

On the other hand, the legislature sought to preserve the long-held principals of grand jury secrecy in county grand jury proceedings as the prohibition against the solicitor examining or cross-examining witnesses was maintained.

Thus, a rational basis exists between maintaining grand jury secrecy in county grand jury proceedings, but requiring a recording of the more expansive State Grand Jury proceedings. Therefore, the fact Dean chose to commit crimes without multi-county significance and otherwise outside the statutorily enumerated class of crimes leading to empanelment of a State Grand Jury investigation does not amount to a violation of his rights under the equal protection clauses.

II.

The trial court did not err in declining to quash the indictment as it charged the language substantially in the language of the statute proscribing first degree burglary and the nature of the offense could easily be understood.

Dean argues that the burglary indictment was not sufficient. However the indictment provided the time and place of the crime and alleged the language of burglary in the first degree. Dean does not allege he was surprised by the evidence presented at trial and it is clear from the record he was aware of the nature of the allegations.

"[T]he [trial] court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged." State v. Tumbleston, 376 S.C. 90, 96-97, 654 S.E.2d 849, 852 (Ct. App. 2007).

In determining whether an indictment is sufficient, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991); Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853 (citing State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006)). An indictment generally passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Tumbleston, at 98, 654 S.E.2d at 853 (citing State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002)).

"[T]he true test of an indictment's validity is not whether it could be made more definite and

certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

In making such a determination, the trial judge must look to the indictment with a practical eye and examine the surrounding circumstances that existed prior to trial in order to determine whether the defendant was prejudiced in the sense that defendant was taken by surprise and unable to combat the charges against him as a result of the indictment. Wade, 306 S.C. at 86, 409 S.E.2d at 784 (1991). If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury). "The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." Tumbleston, 376 S.C. at 94, 654 S.E.2d at 851.

The indictment alleged the following:

> That Edward Lee Dean, did in Greenwood County, state aforesaid, on

> or about the 13th day of August, 2012 willfully and unlawfully enter a dwelling without consent and with intent to commit a crime therein, when in effecting entry or while in the dwelling or in immediate flight there from, he or another participant in the crime: was armed with a deadly weapon or explosive; or caused physical injury to a person who was not a participant in the crime; or used or threatened the use of a dangerous instrument; or displayed what was or appeared to be a knife, pistol, revolver, rifle, shotgun, machine gun or other firearm, the said dwelling being owned and/or occupied by John Lester Hart, Jr., in violation of Section 16-11-311 of the South Carolina Code of Laws, 1976, as amended.

R. p. 4. Note Dean does not allege in his brief that he was surprised by any evidence presented or any allegations made by the State. Dean is simply shopping for a windfall despite being on sufficient notice that he was being accused of a burglary in which he and his confederates stole firearms from the residence.

Prior to State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), on appeal from a guilty plea for felony DUI, the appellant complained that while the indictment provided statutory language alleging the appellant, while under the influence, "did an act forbidden by law and/or neglected a duty imposed by law;" the indictment failed to allege a specific act and/or neglected duty the State relied on to support the felony DUI charge. State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004) *overruled on other grounds by* Gentry. This Court found the following:

> Even a cursory reading of the indictment in the current case shows it contains virtually identical language to that contained in the statute defining the offense. In addition, because Campbell pled guilty, it is clear she was aware of the nature of the charge against her. A thorough review of the record discloses no indications of uncertainty in regard to the crime with which she was charged.

Id. at 579, 605 S.E.2d at 533.

In the instant case, the evidence establishing the aggravating circumstance for first degree

burglary was the theft of the firearms, including the two firearms found underneath Dean's residence. Dean's counsel acknowledged receiving the police report of the incident (R. p. 153) and did not claim to have been surprised by any evidence presented. Nothing in the record indicates that Dean was not aware of the nature of the charge against him. Accordingly, the trial court did not err in denying the motion to quash the indictment.

III.

The trial court did not err in finding testimony that ammunition was found in Dean's residence was relevant and not prejudicial because the ammunition was the kind of ammunition stolen from the victim and the question was one of weight, not admissibility.

Law enforcement seized ammunition from Dean's residence after receiving a tip that stolen guns were underneath his duplex. The officers first found two rifles underneath the duplex, then Dean's mother gave the officers consent to search the house, and the officers found .44 and .308 ammunition, two kinds of ammunition stolen from victim's house. The officers did not seize the ammunition because they did not know at the time that Dean was connected to the burglary. They seized the guns from underneath the house because they determined the weapons were stolen after running the serial numbers. Even if there was a question as to whether the observed ammunition was the ammunition stolen, the testimony was relevant and admissible.

"'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. "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, 126-27, 606 S.E.2d 508, 518 (Ct. App. 2004).

Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, SCRE. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577

S.E.2d 438, 442 (2003). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

Dean complains the ammunition was not relevant because Victim never had the opportunity to identify the ammunition and confirm it was ammunition stolen from him. Officer Davenport testified that he took the rifles recovered from under the house because he entered serial numbers from the rifles into NCIC and they came back stolen. He did not seize the ammunition though. R. pp. 271-72. The search occurred on August 27 and Gaston did not implicate himself and Dean until September 5. R. p. 242, lines 15-17; p. 245, lines 8-15. Given that Dean had not been implicated in the burglary yet and that ammunition typically does not have serial numbers, it is not surprising that Officer Davenport did not seize the ammunition since unlike the guns with serial numbers, Officer Davenport did not have a basis to believe the ammunition was stolen.

In cases for larceny, "it is not essential that the identification of allegedly stolen property be totally free from doubt in order to be admissible, but rather the uncertainty of the identification of the alleged stolen property goes to the weight of the evidence." People v. Bailey, 552 P.2d 1014, 1018

(Colo. 1976); *see also* Hall v. State, 353 S.E.2d 614 (Ga. Ct. App. 1987) ("On the trial of a defendant charged with larceny, where there is some evidence descriptive of the stolen property which is substantially conformable to the description alleged in the indictment, and nowhere contradictory thereof, the identity of the stolen property is a matter addressed peculiarly and solely to the jury." (citation and internal quotation marks omitted)); Gibbs v. State, 300 A.2d 4 (Del. 1972) *abrogated on other ground by* Lecates v. State, 987 A.2d 413 (Del. 2009); State v. De Tonancour, 112 P.2d 1065 (Mont. 1941) (finding in prosecution for larceny of hogs testimony about kegs of pickled pork found in a defendant's residence was admissible). Evidence describing the amount, kind, make, brand, and/or character of property found and property stolen, or the testimony of an eyewitness to the taking of property, though never recovered, can be sufficient proof of identity. 52B C.J.S. *Larceny* § 173 (2016).

In the instant case, two guns were recovered from underneath the house, including a .308 rifle. The ammunition recovered from inside the house was .44 ammunition and .308 ammunition. Accordingly, the .308 ammunition was highly probative because a stolen .308 rifle stolen from Victim was found underneath the house. Additionally, .44 magnum ammunition was stolen from Victim and .44 ammunition was found in Dean's residence. R. p. 197, line 21 – p. 198, line 4. Accordingly, the evidence was relevant and probative.

In contrast, the danger of unfair prejudice was slight. "'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" Stephens, 398 S.C. at 320, 728 S.E.2d at 71 (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 206 (Ct.App.2008)). "**All** evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct.App.1998) (emphasis added) (*quoting* United States

v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989)). In determining whether the danger of unfair prejudice outweighs the probative value of evidence, the court must consider the entire record, and the determination will turn on the facts of each case. Lyles, 665 S.E.2d at 206 (*citing* State v. Gillian, 373 S.C. 601, 646 S.E.2d 872, 876 (2007)). In the instant case, the evidence found in Dean's residence carried probative value, but there was little danger that the evidence would be considered for some improper basis as opposed as being considered as some evidence that Dean was in possession of some of the stolen items. Accordingly, the trial court did not abuse its discretion nor was Dean prejudiced by the admission of the evidence.

IV.

The trial court did not err in declining a jury instruction concerning informants that was an unconstitutional charge on the facts.

Dean argues the trial court erred in declining an instruction that sought to differentiate an informant's testimony from "an ordinary witness." Because the instruction is an impermissible comment on the facts that violates our state constitution, the trial court did not err. Further, Gaston was not an informant, he was an accomplice and co-defendant.[3]

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583.

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004); but see State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (overruling Rayfield and finding corroboration instruction in criminal sexual misconduct case was unconstitutional even though it was a correct statement of the law). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006).

On review of a jury charge, an appellate court considers the charge as a whole in view of the

[3] Dean uses the term "betrayal witness" in his brief, perhaps bemoaning the lack of honor among thieves. This term implies the belief Gaston violated some duty to Dean to keep Dean's role in the

evidence and issues presented at trial. State v. Lee-Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

The Supreme Court has rejected similar requests for instructions. In State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972), the prosecution relied largely on the uncorroborated testimony of a coconspirator. The trial court was asked "to instruct the jury that in determining the credibility of the testimony of the witnesses, 'they have the right if not the duty to take into consideration any bias or prejudice or hope of reward that a witness might have.'" Id. at 524, 186 S.E.2d at 717. The trial court denied the request and instead charged the jury "that it was their duty to pass upon the credibility of the testimony of the witnesses and that they could reject any part of the testimony if they found good reason for so doing." Id. The Supreme Court held: "The instructions clearly left to the jury the determination of the credibility of the testimony of the witnesses and the record shows no prejudice from the failure to give the requested instruction." Id.

In State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976), the appellant asserted the trial judge erred in "refusing to charge that the testimony of a codefendant should be carefully scrutinized and that the jury may consider whether the witness is fearful of retribution or has any hope of leniency from the prosecution." Id. at 573, 225 S.E.2d at 193. The South Carolina Supreme Court found "the trial judge's overall instruction that it was the jury's duty to pass upon the credibility of the testimony of witnesses, and that they could reject any part of the testimony if they found reason for doing so, was adequate." Id. (citing Steadman). The Supreme Court also held, "Any further instruction on this point might have invaded the province of the jury to draw inferences from the evidence." Id.

The Supreme Court rejected an instruction that uncorroborated statements from an alleged

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crime secret. The State finds this position odd.

accomplice "should be received by the jury with caution and should be scrutinized by the jury with great caution." State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244, 249 (1942). The Court noted, "The law with regard to the testimony of an accomplice is the same as to the testimony of any other witness in the case." Id. (quoting State v. McAdams, 167 S.C. 405, 166 S.E. 405, 408 (1932) (internal quotation marks omitted)). In other words, Dean's request, besides being an unconstitutional charge on the facts, is not even a correct statement of the law.

The requested instruction in this case is unnecessary in light of the extensive instructions to the jury by the trial court on determining the credibility of witnesses. During his initial remarks to the jury, the trial court advised the jury as follows:

> Now, ladies and gentlemen, necessarily you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth. In determining the believability of witnesses who have testified, you may believe one witness over several witnesses, or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, biased, prejudiced or other motive in this case, and you may also consider the appearance and manner of the witness while on the witness stand.

R. p. 338, lines 5-20.

In providing initial instructions to the jury after they were sworn and before opening arguments, the trial court advised the jury as follows:

> In determining the true facts, ladies and gentlemen, you must decide whether the testimony of witnesses is believable or not. It's my responsibility to rule as a matter of law on whether certain testimony can be admitted. However once that testimony is admitted, whether

> or not you choose to believe it is solely for you all to determine. Deciding whether to believe a witness, you have the right to consider the interest of any witness, the bias of any witness, the prejudice of any witness, the opportunity for the witness to have seen the matters and things about which the witness testifies and the way the witness acts on the witness stand. You can consider anything that's in the record in this case which will help you evaluate the testimony of the witnesses.

R. p. 175, line 24 – p. 176, line 11.

It is questionable whether Gaston, a codefendant and accomplice, would qualify as "an informer." Gaston was not paid for his testimony or information, and he was not offered any plea bargain in exchange for his testimony. However, the trial court found that assuming Gaston met the definition of an informer, the instruction was improper as a comment on matters of credibility. R. pp. 302-03. Dean references the prosecutor's argument on whether Gaston was an informer, but fails to reference the trial court's ruling, and fails to argue why the instruction would not violate this State's constitutional prohibition on jury instructions that are comments on the facts. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see e.g. State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (finding the victim corroboration instruction in sexual assault cases was an unconstitutional instruction on credibility). Because the requested instruction constitutes an impermissible charge on the facts, the trial court did not err in declining the instruction.

V.

The trial court did not abuse its discretion in sentencing career criminal Dean to twenty-five years imprisonment for a burglary involving the theft of multiple dangerous weapons.

Dean alleges Judge Addy punished Dean for invoking his right to trial. The record shows otherwise. Dean was punished for his egregious crime, his extensive criminal record, and his bad behavior during trial and in the county jail. At no point did Judge Addy suggest his sentence was based on Dean invoking his right to trial. Dean bases his entire argument on his own earlier baseless allegations and not on anything Judge Addy actually said. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel.").

Dean's criminal record extends back to when he was a juvenile, in 1996, and includes sixteen convictions and two juvenile adjudications. These include two criminal domestic violence convictions, a resisting arrest conviction, and a common law robbery and assault and battery of a high and aggravated nature conviction. R. pp. 369-371.

Dean also displayed his difficulty in conforming his conduct to Judge Addy. When the trial court was about to recess for the evening, Dean's counsel moved for Judge Addy to reconsider his decision to take Dean into custody and not allow Dean to remain on bond. Judge Addy noted that when the court broke for lunch, the following occurred:

> I was using the private bathroom that's down the hall. Your client was somewhat, shall we say, animated. I'm trying to put this tactfully. Vocally irritated at the officers who were escorting him per my order. Seeing as how I am the person who gave that order I poked my head out. I poked my head out and I saw your client and he was

> yelling and screaming and he was carrying on. I am not going to reconsider my decision and he's free to – your client is free to say something to me if he wants to, but in all honesty I think it's probably best that he talk through you, Mr. Grose. Because what I was going to tell him before we stop for the evening is that I don't know if he's going to be convicted of this or not. I don't know what the jury is going to do, but obviously the Court can take a lot of things into consideration in sentencing and I really would appreciate it if he would accord the authorities the proper respect that they are due for simply carrying out what I asked them to do.

R. p. 294, line 6 – p. 295, line 2. To his credit, Dean apparently apologized to the officers. R. p. 295, lines 3-4.

After the jury found Dean guilty, Judge Addy deferred sentencing and ordered a pre-sentence report. He warned Dean to behave in jail in the meantime and noted that an incident occurred where a witness was contacted. R. p. 361. Dean did not behave in prison. Dean received five days lockdown for failure to follow a direct order. Dean also failed to be at his cell door when it opened and received three days lockdown. On another occasion, Dean failed to stand for roll call. Dean received five days for failure to follow a direct order when he was told multiple times to end a phone call before he ended the phone call. R. pp. 382-83. The prosecution noted the victim suffered a loss of $17,000, of which insurance only paid $7,000. R. p. 387, lines 15-19.

Judge Addy laid out the sentencing factors he took inconsideration as follows:

> Certainly your criminal history is not the best. It looks like you have been in, pretty much, apparently regular trouble except for maybe a six year period of time, '01 to '07. So you have been in trouble with the law for a large part of your life. Admittedly a lot of these crimes are Magistrates level offenses and there are some that are simply driving offenses. But I am also looking at a common law robbery charge, an ABHAN in 2007, some resisting arrest issues. I was also, of course, the Judge that presided over your trial, Mr. Dean. And I am aware of you received an attempt to intimidate a witness that testified during the course of the trial when you were sitting over

> there, I recall a witness passing by you and some words being exchanged by you. I have taken that into account as I promised I would, I have taken into account the manner in which you have behaved in the detention center since your conviction. . . . I, in all candor, would liked to have gone along with what your attorney has suggested by way of a minimum, but for your prior criminal history and the effort to [intimidate] that witness at trial, Mr. Dean, I probably could have done that. . . . I do believe, Mr. Dean, that you are guilty of these offenses.

R. p. 393, line 16 – p. 394, line 19.

Dean bases his argument based on a discussion with Judge Addy during a hearing on December 11, 2013 in which Dean's counsel claimed he heard there is a "trial tax" and warned "there are civil rights groups from outside South Carolina that are probably coming to look at a trial tax." R. p. 90, lines 16-20. Judge Addy flatly said, "There is not a trial tax." Judge Addy noted the difference between a defendant who pleads guilty early in the process and one who waits until the eve of trial to plead guilty, but also explained, "A person who decides that they want a jury trial, if they're entitled to a jury trial, they've got the right to a jury trial, they want a jury trial, they should have a jury trial and the Court will not punish them in anyway shape or form. That is the position of this Judge." R. p. 91, lines 11-15.

Dean, rather than thanking Judge Addy for the clarification, replied, "Well, that was the impression that came out at the meeting." R. p. 91, lines 21-22. Judge Addy replied that Dean's perception was inaccurate and noted it indicated "that perhaps the perception that you've gleamed from some of the past cases with the State is inaccurate too." R. p. 91, line 23 – p. 92, line 2.

Accordingly, the record does not remotely support that Dean was punished for going to trial. Instead, Judge Addy's sentence, below the maximum life sentence and only ten years above the minimum, was based on Dean's extensive record and other indicators of his unwillingness to

conform his conduct to the law, as well as the egregious facts of the case in which numerous weapons were stolen.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 7, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Appellant/Respondent,

vs.

EDWARD LEE DEAN,

Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this The State's Final Brief of Respondent 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."

Respectfully submitted,

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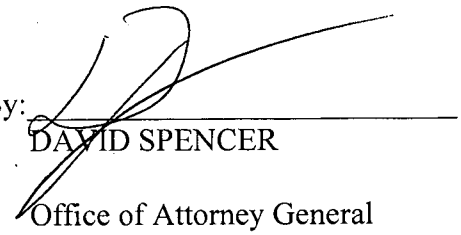
By: 

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