

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY SELDON BRADY,

APPELLANT

APPELLATE CASE NO 2016-000895

ANDERS BRIEF OF APPELLANT

RECEIVED

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

In light of the trial judge's decision to deny Appellant's motion for new trial based on after-discovered evidence being controlled by an erroneous view of the trial evidence, did the trial judge abuse his discretion in denying the motion where the state's evidence at trial relied upon the jury believing Appellant's co-defendant that Appellant shot the decedent, but the after-discovered evidence revealed the co-defendant confessed to being the triggerman on the day of the shooting?

STATEMENT OF THE CASE

On September 10, 2012, a Lexington County grand jury indicted Appellant for murder (2012-GS-32-2249), burglary in the first degree (2012-GS-32-2250), and armed robbery (2012-GS-2251). R. 1188-1189; R. 1191-1192; R. 1194-1195; R. 1197-1198. On June 1, 2015, a Lexington County grand jury indicted Appellant for conspiracy (2015-GS-32-1421). R. 1197-1198. The state, represented by Shawn Graham and Casey Rankin, called the case to trial before the Honorable Thomas A. Russo and a jury on June 15-19, 2015. R. 101. Eleanor Duffy Cleary and Brie Rust Russell represented Appellant. R. 101. The jury found Appellant guilty as charged. R. 860, ll. 9-23. Judge Russo sentenced Appellant to life imprisonment without the possibility of parole for murder and burglary, thirty years' imprisonment for armed robbery, and five years' imprisonment for conspiracy. R. 868, ll. 7-18; R. 1190; R. 1193; R. 1196; R. 1199.

On June 29, 2015, Appellant, through counsel, filed a motion for new trial pursuant to Rule 29(a), SCRCrimP. R. 1058-1060. The state responded by a motion in opposition on July 1, 2015. R. 1061-1062. Subsequently, on July 15, 2015, Appellant filed a motion for new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP. R. 1063-1075. The state filed its reply on August 12, 2015. R. 1076-1182. Judge Russo presided over a hearing on the motion on February 4, 2016. R. 870. By an order filed April 21, 2016, Judge Russo denied both post-trial motions. R. 1183-1187.

On April 29, 2016, Appellant served his notice of appeal. This brief follows.

ARGUMENT

In light of the trial judge's decision to deny Appellant's motion for new trial based on after-discovered evidence being controlled by an erroneous view of the trial evidence, the trial judge abused his discretion in denying the motion where the state's evidence at trial relied upon the jury believing Appellant's co-defendant that Appellant shot the decedent, but the after-discovered evidence revealed the co-defendant confessed to being the triggerman on the day of the shooting.

Relevant facts

Evidence adduced at trial

On July 28, 2012, David Pritchard with the Lexington County Sheriff's Department, saw Robert Mitchell at a truck stop around 3 a.m. R. 305, ll. 16-24. Around 8:45 a.m., Margaret McKay and her boyfriend, Shawn Kline, went to Mitchell's house in anticipation of a day out on the lake and grilling. R. 306, l. 23 – R. 307, l. 1; R. 308, ll. 13-23. Kline entered the house alone. R. 309, ll. 3-7. He exited a moment later stating Mitchell was dead. R. 309, ll. 5-12. Thereafter, McKay also entered the home and found Mitchell dead. R. 309, ll. 13-22. McKay and Kline contacted the police and Mitchell's son. R. 310, ll. 14-23.

Mitchell had a prescription for oxycodone in 2012. R. 300, ll. 11-13. His prescription was filled on the 15th or 16th of each month. R. 300, ll. 23-25. In July of 2012, he got his prescription filled as usual. R. 301, ll. 1-6. He got thirty new pills, and probably had about 90 pills in total. R. 301, ll. 7-10. Mitchell sold his oxycodone pills "to help pay for bills." R, ll. 20-21.

The police investigation that ensued zeroed in on Nicholas “Nick” Williams as the chief suspect in Mitchell’s murder. However, at the time of Appellant’s trial, the state’s case relied upon the testimony of one central witness – Nick Williams.

Nicholas Williams

Initially, in 2008, Nick moved in with Appellant and Appellant’s girlfriend, Kim White, because Nick had nowhere to live. R. 189, ll. 7-24. Shortly thereafter, Nick began sleeping with Kim. R. 190, ll. 7-10. When Appellant discovered the infidelity, the trio went separate ways. R. 190, ll. 11-16. Eventually, Nick and Kim moved into “a dope hole,” where drugs were being made and sold from the house. R. 191, l. 24 – R. 192, l. 7.¹

During the early morning hours of July 28, 2012, Kim was arrested by her bondsman because she failed to appear for a court date. R. 193, ll. 1-10. From the jail, Kim warned Nick that the bondsman had seen drugs and drug paraphernalia, that the police were planning a raid, and that Nick needed to get out as soon as possible. R. 193, ll. 11-21. Eventually, due to Kim’s persistent intervention, Appellant agreed to pick up Nick and assist him in getting away from the “dope hole.” R. 194, l. 22 – R. 195, l. 1.

According to Nick, he and Appellant got high and then needed “something to come down off of” the high because the combination of methamphetamine and heroin left the user feeling “all paranoid and sketchy.” R. 198, ll. 19-24. Nick suggested they rob Mitchell, whom Nick had met the week prior because Nick knew Mitchell would have oxycodone. R. 198, l. 25 – R. 199, l. 3. Nick claimed that Appellant got a shotgun from the home of a friend and the two drove to Mitchell’s home in Gilbert. R. 205, ll. 14-23. When the two men arrived, the door was unlocked, allowing them to enter. R. 207, ll. 9-11. Nick began grabbing any valuable items he

¹ Nick got Kim hooked on drugs, including heroin. R. 222, l. 20 – R. 223, l. 2. When the two could not afford drugs, Nick would pimp out Kim in order to feed their habit. R. 223, ll. 8-18.

could find. R. 207, ll. 17-21. Nick claimed he heard two gunshots. R. 208, ll. 1-3. He saw Appellant holding the shotgun and shooting for a third time. R. 208, ll. 18-20. According to Nick, he and Appellant got the deceased's cell phone, wallet, prescription pills, a safe, round tin containers, and various other items from the home. R. 210, ll. 2-10; R. 211, ll. 11-19. Nick further claimed that he and Appellant used some of the drugs they had stolen and divided up the remaining pills and money. R. 213, ll. 2-17.

Nick was charged with murder, armed robbery, burglary in the first degree, and criminal conspiracy in connection with the death of Mitchell. R. 187, l. 18 – R. 188, l. 4. When he first talked to the police, he did not provide the same story to which he testified. R. 218, ll. 17-21. However, he eventually decided to tell the solicitor the story which he told the jury because “it would be better off if the truth [came] out.” R. 219, l. 3 – R. 220, l. 9. At the conclusion of Nick's testimony, the solicitor made clear that Nick did not shoot the deceased; rather, Appellant was the shooter. R. 220, ll. 10-13.

Jeremy Brady

Appellant testified in his defense. Appellant concurred with much of Nick's testimony, including how Nick lived with him and Kim when Nick was homeless. R. 665, l. 2 – R. 666, l. 8. Appellant also told the jurors, as Nick had, that Nick began sleeping with Kim and got her hooked on drugs. R. 666, l. 19 – R. 667, l. 11. On the morning of July 28, 2012, Kim called Appellant, begging him to assist Nick and asking him to help her save her car, which was parked at the drug house. R. 672, l. 1 – R. 673, l. 17. Appellant agreed to help Nick and went to pick him up from the drug house where Nick and Kim had been staying. R. 679, ll. 7-19; R. 680, ll. 13-23.

Nick told Appellant that he had a place to stay in Gilbert. R. 682, ll. 2-11. However, when they arrived at the home in Gilbert, no one answered the door when Nick knocked. R. 685, ll. 4-15. Nick returned to the car with Appellant, and the two left, looking for a place where Nick could stay. R. 685, ll. 14-19. After trying several places with no success, Nick asked to return to Gilbert. R. 685, l. 20 – R. 689, l. 9. Nick entered the house this time, and Appellant waited outside in the car to be sure that Nick would be permitted to stay. R. 690, ll. 2-21.

When Nick first exited the home, he got into a truck on the property. R. 691, ll. 1-6. Eventually, Nick got out of the truck and returned to the car with Appellant. R. 691, ll. 14-15. When Appellant requested gas money from Nick, Nick offered him two oxycodone pills. R. 692, ll. 4-14. Appellant returned to his apartment, leaving Nick outside to fend for himself. R. 692, ll. 15-22. Nick then asked Appellant to take him to a pawn shop, which Appellant did. R. 694, ll. 11-17. Appellant took Nick to two pawn shops, where he was able to sell a small air compressor. R. 694, l. 18 – R. 695, l. 8. Nick then gave Appellant money for gas. R. 695, ll. 7-8. Nick and Appellant returned to Appellant's apartment. R. 697, ll. 15-18. Appellant then left to assist his dad with getting Kim's car from the drug house. R. 697, l. 19 – R. 699, l. 2. Nick left with William White. R. 698, l. 1 – R. 699, l. 2.

Appellant testified that he never heard any gunshots the morning he was trying to help Nick. R. 717, ll. 23-24. He readily admitted that he told the police, shortly after his arrest, that he heard gunshots as he was driving away from Mitchell's home. R. 717, ll. 4-18. Appellant explained he had lied to police because he was trying to make "Nick to be the guilty party." R. 717, ll. 6-18. During his trial, Appellant was clear that he had knowledge of who shot Mr. Mitchell. R. 719, ll. 15-16.

Motion for new trial

On June 3, 2015, Archie Goodwin wrote letters to law enforcement stating he had information that Nick had confessed to murder. R. 1063-1075. Law enforcement shared this information with the solicitor, who shared it with defense counsel. R. 1063-1075. Specifically, Goodwin stated Nick relayed that he and someone else were at a guy's house, that they tried to rob the guy of prescription pills, and that Nick had killed the guy. R. 1063-1075. Subsequent to his letter to law enforcement, Goodwin also wrote to the assistant solicitor who prosecuted Appellant. R. 1063-1075.

In its responsive pleading, the state conceded that Appellant satisfied "prongs 2, 3, and 4" of the test for granting a motion for new trial based on after-discovered evidence. R. 1076-1182. The state argued the evidence "would probably not change the result" of Appellant's trial and that Goodwin's testimony was "merely impeaching evidence." R. 1076-1182.

Archie Goodwin

Archie Goodwin and Nick Williams were good friends from 2010 through 2012. R. 920, ll. 13-18. Goodwin sold drugs locally. R. 920, ll. 13-18. Williams was a customer and a business associate. R. 920, l. 17 – R. 9212, l. 14; R. 925, l. 19 – R. 926, l. 11. Goodwin recalled that Nick called him one day wanting to know where Goodwin was. R. 928, ll. 6-14. "Nick was in a hurry." R. 928, l. 14. Nick said, "I'm on the run for murder," and "I killed somebody." R. 928, ll. 16-17. Nick explained that "he went to a house in Gilbert to buy prescription pills from a guy." R. 929, ll. 9-10. Nick went to the guy's house "with someone else." R. 929, ll. 10-11. "[I]nstead of buying the pills" Nick took the pills." R. 929, l. 12. "[T]hings got out of hand" and Nick "ended up killing the guy." R. 929, ll. 13-14. During this conversation, Nick sounded "real hurried" and [r]eal aggravated." R. 929, ll. 17-22.

Appellant's argument in favor of new trial

Defense counsel argued the Goodwin's testimony was "credible enough to put before a jury" "because it [was] consistent with some known facts about the murder," including that the purpose of going to the deceased's home was to get some prescription drugs, that Nick did not have a "steady place to live," and that Nick "was a drug addict." R. 1009, ll. 1-11. Specifically, Goodwin knew that Nick's girlfriend was Kim White and that Nick was addicted to heroin. R. 1009, ll. 11-14. Additionally, defense counsel submitted phone records to show communication between Goodwin and Nick. R. 1009, ll. 17-22; R. 1010, ll. 2-4. Corroborating testimony was presented to show that Nick purchased boxes of Sudafed for Goodwin to use to make methamphetamine. R. 1009, ll. 15-17.

Defense counsel argued the evidence put "the case in a whole different light such as to undermine the confidence in the verdict." R. 1018, ll. 7-11. Importantly, "the only person who" claimed Appellant used the gun in the deceased's home, and further claimed Appellant killed the deceased was Nick. R. 1018, ll. 17-19. In light of Goodwin's testimony that Nick did not identify the person who accompanied him when the murder occurred, defense counsel explained "the jury could believe that [Appellant] wasn't the other man or that [Goodwin was] mistaken about that part of his story or that Nick said that another man was involved to share the blame." Motion 150, ll. 18-22. "[W]ithout Nick Williams there couldn't have been a conviction under hand of one is the hand of all." R. 1020, ll. 4-6. Further, defense counsel explained the defense "was not focused on Nick being the shooter." R. 1020, ll. 8-9. The defense had "no evidence that Nick was the shooter." R. 1020, ll. 9-10. Therefore, the defense focused on attacking the integrity of the investigation, which was difficult when the prosecution did not call the lead investigator as a witness during its case-in-chief. R. 1020, ll. 12-15.

Acknowledging that the testimony by Goodwin would have been impeaching of Nick's testimony, defense counsel argued the impeachment evidence was "so crucial that there [was] really distinction between [it] and exculpatory evidence." R. 1020, ll. 16-23. "Evidence that is merely impeaching may be so directly applicable to the main point involved that it would be a denial of justice to refuse the motion" for new trial. R. 1022, ll. 18-21. For purposes of the "new trial" test, "merely impeaching" refers to a collateral matter. R. 1020, l. 23 – R. 1021, l. 2. Counsel explained that "[m]erely impeaching" would be when the evidence serves only "to show bias or motive or that sort of thing or contradiction." R. 1021, ll. 20-25. Had defense counsel had this evidence, "the whole defense would [have been] different." R. 1022, ll. 2-3. Defense counsel explained that Nick's confession "was so material as to guilt or innocence that it can't be deemed just merely impeachment." R. 1026, ll. 5-7.

State's argument opposing new trial

The state conceded that Goodwin's testimony was discovered after the trial and could not have been discovered prior to the trial. R. 1032, ll. 16-20. Also, the state conceded Goodwin's testimony was "material," meaning it was relevant and would have been admissible at trial. R. 1032, ll. 21-23. However, the solicitor argued the evidence was not material to Appellant's guilt or innocence. R. 1032, ll. 23-25. Further, the solicitor argued Goodwin's testimony was "merely impeaching or cumulative." R. 1032, l. 25 – R. 1033, l. 1.

The state argued Goodwin, who had been used as a confidential information for multiple police agencies over a period of years, was not credible. R. 1028, l. 10; R. 1032, ll. 13-15. The solicitor argued Goodwin's timeline was "totally off." R. 1029, l. 18. Although multiple police agencies failed to disclose that Goodwin had contacted them alleging he had information about the murder case, the solicitor was especially critical of Goodwin because Goodwin claimed Nick

confessed in July of 2012, but Goodwin did not disclose this information until May of 2014. R. 1030, ll. 24-25. According to the solicitor, Goodwin “sat on this important information for multiple years.” R. 1030, l. 25 – R. 1031, l. 2; see also R. 1031, ll. 15-16.

In the solicitor’s estimation, Goodwin’s testimony “actually bolster[ed]” Nick’s testimony because Goodwin confirmed that Nick was with someone else at the time of the robbery and murder. R. 1033, ll. 2-15. The solicitor conceded the testimony “may change who the jury might believe was the shooter.” R. 1033, ll. 15-16. However, the state emphasized that its case against Appellant relied upon the legal theory of the hand of one is the hand of all; therefore, knowledge of which person who actually pulled the trigger was not necessary to resolution of the criminal charges against Appellant. R. 1034, ll. 1-7. In the solicitor’s estimation, Goodwin’s testimony that someone other than Appellant was the shooter “doesn’t say that [Appellant] is not guilty of murder. It doesn’t say that he’s not guilty of burglary first and it doesn’t say he’s not guilty of armed robbery or conspiracy. That’s why it’s only merely impeaching so it comes in.” R. 1036, ll. 21-25. According to the solicitor, “there [was] no proof that the outcome would be different.” R. 1037, ll. 11-12. Notwithstanding what the solicitor believed were credibility problems with former confidential informant Goodwin, the solicitor argued Goodwin’s testimony was not material to Appellant’s guilt or innocence. R. 1037, ll. 12-18.

Order denying motion for new trial

On April 21, 2016, Judge Russo issued his order denying Appellant’s motion for new trial based on after-discovered evidence. R. 1183-1187. At the outset, Judge Russo quoted language from appellate cases concerning the standard of review governing how appellate courts review a lower court’s ruling on a motion for new trial based on after discovered evidence. R.

1183-1187. Only after citing the appellate review standard did Judge Russo quote the five-part test for granting a motion for new trial based on after-discovered evidence. R. 1183-1187. Specifically, Judge Russo provided that in order for Appellant to prevail, he just show the after-discovered evidence “(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching.” R. 1183-1187 (citing State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)). Judge Russo determined Appellant established “prongs two (2), three (3), and four (4).” R. 1183-1187. However, the judge held Appellant failed to establish “prongs one (1) and five (5)” to the court’s “satisfaction.” R. 1183-1187.

The judge erroneously summarized the trial evidence in the case:

All of the uncontroverted evidence in the case, showed, that the two co-defendants, Nick Williams and Jeremy Brady, planned to go to the victim’s house to take drugs, went and secured a sawed-off shotgun before going to the victim’s home, drove to the victim’s home together at the time of the shooting, and that the Victim was shot and killed with a sawed-off shotgun during the time both co-defendant’s [sic] were at the house securing the drugs.

R. 1183-1187. The judge also erroneously stated that “[t]hroughout the trial, both co-defendants pointed the finger at the other as the one who actually pulled the trigger killing the victim.” R. 1183-1187. Based on this erroneous view of the evidence, the judge concluded “[t]he only thing the after discovered evidence purported to expose was that co-defendant Williams admitted to an inmate snitch that he, Williams, was the one who killed the victim.” R. 1183-1187.

According to Judge Russo, the state relied upon the law of “Felony Murder.” R. 1183-1187. Judge Russo claimed that based upon this theory, he charged the jury ““When two or more people combine together to commit a criminal act and during the criminal act, a homicide is committed as a natural and probable consequence, all present and participating in the criminal act are as guilty of

the killing as the one committing the homicide.” R. 1183-1187. With this backdrop, the judge concluded “[a]ll the after discovered evidence consisted of was that co-defendant, Williams, allegedly admitted to another inmate that he was the one who killed the victim.” R. 1183-1187. “There was no other evidence tending to show that either he did it alone or that Brady was not there. The only thing the after discovered evidence purported to reveal was that Williams admitted he was the shooter.” R. 1183-1187.

Turning to the first prong of the after-discovered evidence test, the judge determined “[t]his evidence” “would not likely change the result of the jury’s verdict.” R. 1183-1187. In arriving at this conclusion, the judge erroneously relied upon his assertion that “[d]uring the trial, the co-defendants pointed the finger at one another as to who fired the shots that killed the victim.” R. 1183-1187. “Other than the ‘swearing contest’ between the co-defendants, there was little to no evidence presented which would assist the jury in determining who fired the shots.” R. 1183-1187. According to the judge, “[a]ll the evidence pointed to the fact that both co-defendants were there to get illegal drugs and that during the encounter the victim was shot and killed.” R. 1183-1187. In the judge’s view, the jury arrived at its verdict of guilty “after being charged the law on accomplice liability.” R. 1183-1187. The judge concluded that the after-discovered evidence addressed only the question of who fired the shotgun killing the victim, and that “[a]nswering the question of who the trigger man was does not relieve the other co-defendant of liability.” R. 1183-1187. Judge Russo determined that even if the jury considered the after-discovered evidence, it “would still most likely have found [Appellant] guilty under the Felony Murder and Hand of One theories.” R. 1183-1187. “The identity of the trigger man would most likely not have mattered under the law charged, as both men would have been liable regardless of who fired the gun.” R. 1183-1187. In light of the

evidence “not exonerate[ing]” Appellant, the judge concluded it “likely would have had no effect on the jury’s verdict.” R. 1183-1187.

Next, Judge Russo tackled the fifth prong of the after-discovered evidence test. R. 1183-1187. He concluded the “newly discovered evidence only” called into question Nick’s testimony that Appellant shot the deceased, and as such, the evidence was “merely impeaching.” R. 1183-1187. Per the judge, there was “no other use of the after discovered evidence other [sic] than to impeach” Nick’s testimony where he testified Appellant shot the deceased. R. 1183-1187. “Since the only use the defense would have for the after discovered evidence would be to impeach the co-defendant’s trial testimony, it fails in the eyes of this Court, to meet the fifth prong of the Spann Court’s test.” R. 1183-1187.

Discussion

Pursuant to Rule 29(b) of the Rules of Criminal Procedure, a motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence. A motion for a new trial based on after-discovered evidence must be granted if the evidence “(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching.” State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)(citing State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)).

In Spann, 334 S.C. at 619, 513 S.E.2d at 99, the South Carolina Supreme Court held a trial judge erred in failing to grant a new trial based on after-discovered evidence. Spann “was convicted of the 1981 sexual assault, robbery, and murder of Melva Neill, as well as the burglary of her home, and received a death sentence.” Id. At his motion for new trial based on after-discovered evidence,

Spann claimed he was entitled to a new trial because expert testimony would have shown that the killing was the work of a serial killer in the area, not Spann. Id. at 620, 513 S.E.2d at 99. Although Spann presented other matters during his motion for new trial, which the trial judge concluded were merely impeaching or not credible, the South Carolina Supreme Court granted Spann a new trial based on the expert testimony and did not reach the remaining issues. Id.

The Court explained the context of the crime for which Spann was convicted to place the proposed after-discovered evidence in the correct context. Id. at 620, 513 S.E.2d at 99. These three events “occurred within a twelve mile radius in York County between July and November 1981.” Id. First, “[o]n July 18, 1981, the body of Mary Ring was discovered in the bathtub of her home.” Id. She was “a heavy-set white woman, fifty-seven years old, who had been beaten about the head, sexually assaulted, and strangled to death. Her nude body was found in her partially filled tub.” Id. Second, “two months later, the nude body of eighty-one year old Mevla Neill was found in the bathtub of her home.” Id. She “had been beaten around the face and chest, had been brutally sexually assaulted, and strangled, her body then placed in the partially filled tub.” Id. She too “was a heavy-set white woman.” Id. Finally, “[o]n November 16, 1981, the mostly nude body of Bessie Alexander was found on her dining room floor.” Id. Her face and neck were injured, and bruises were on other parts of her body. Id. She had been sexually assaulted and then strangled. Id. Like Ms. Ring and Ms. Neill, Ms. Alexander “was a heavy-set white woman” who lived alone. Id. Unlike Ms. Ring and Ms. Neill, however, Ms. Alexander was not found in her bathtub. Id. However, her bathtub was “inaccessible from her home’s interior,” and her body was found “drenched in liquids, including fruit juice.” Id.

The police never arrested anyone for the death of Ms. Ring. Id. Spann was arrested for the murder of Ms. Neill, and Johnny Hullett was arrested and convicted for the murder of Ms.

Alexander. Id. Importantly, Ms. Alexander was killed “approximately two months after” Spann was arrested for Neill’s death. Id. In 1981, the police said publicly there was no connection between the three murders, and the local pathologist “did not recognize any pattern” among the three deaths. Id. at 620-621, 513 S.E.2d at 99-100.

At his hearing on the motion for new trial, Spann presented three expert witnesses who testified the three murders were related. Id. at 621, 513 S.E.2d at 100. One expert “testified all three women were strangled in a unique way.” Id. Based on this and other similarities, the expert “opined that one perpetrator was responsible for all three murders.” Id. A second expert “testified the three murders were committed by a single individual, a sexual sadistic murderer.” Id. This expert “opined based upon his examination of [Spann] that it was ‘impossible’ that [Spann] had committed these offenses.” Id. This expert also “testified that sexual sadistic killers are almost always psychiatrically disturbed white males.” Id. Spann was a black man with no history of psychiatric problems; Johnny Hullett was a white man with a long psychiatric history. Id. Finally, a third expert “profiled the killer of these three women as a white male in his mid-20’s to mid-30s with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area.” Id. Spann simply did “not fit this profile.” Id.

The trial court rejected Spann’s bid for a new trial, “finding the evidence and science upon which their opinions were based was all in existence at the time of [Spann]’s trial.” Id. Thus, the trial court concluded the evidence “could have been discovered by his attorneys with the exercise of due diligence.” Id. The Supreme Court disagreed. Id. The Court explained the attorneys would have needed to recognize the similarities between the three deaths, which were not recognized even by experts in the field at the time of the trial. Id. at 621-622, 513 S.E.2d at 100. The “due diligence

standard imposed upon [the] trial attorneys” by the trial judge was too high. Id. at 622, 513 S.E.2d at 100. The Court granted Spann a new trial. Id.

In another capital murder case, the South Carolina Supreme Court affirmed a trial judge’s decision to deny a motion for new trial based on after-discovered evidence. State v. Mercer, 381 S.C. 149, 170, 672 S.E.2d 556, 567 (2009). At trial, “[t]he centerpiece of Mercer’s guilt phase defense was third-party guilt.” Id. at 163, 672 S.E.2d at 563. He pointed the finger at his co-defendant, Marcus Thompson, as the triggerman. Id. “This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman.” Id. at 164, 672 S.E.2d at 563. During the trial, Mercer argued the police and the state had a “myopic view to focus on Mercer at the expense of a thorough and proper investigation.” Id. at 164, 672 S.E.2d at 563-564.

Shortly after Mercer’s trial ended in guilty verdicts and a death sentence, Kevin Fuller contacted the state, claiming Thompson had confessed to shooting the deceased. Id. at 165, 672 S.E.2d at 564. Based on this information, Mercer filed a motion for new trial. Id. at 165-166, 672 S.E.2d at 564. The trial judge denied the motion, finding Fuller was not credible. Id. at 167, 672 S.E.2d at 565. The judge based on his credibility finding on his observations of Fuller’s demeanor, the inconsistencies in Fuller’s statements, the inconsistencies of Fuller’s testimony with “known facts.” Id. In the judge’s estimation, Fuller’s testimony, which was inconsistent with evidence presented at trial, was not the result of a “mistake or failure of recollection,” but was “intentional calculated misrepresentation.” Id. In short, the trial judge “believe[d] Fuller fabricated the story” of Thompson’s confession. Id.

On appeal, the Supreme Court engaged in “careful scrutiny of the actual statements Fuller attribute[d] to Thompson.” Id. at 168, 672 S.E.2d at 566. “Given the inconsistencies with

Fuller's story," the Court found "a basis to sustain the trial court's lack of credibility finding." Id. Additionally, a second inmate, whom Fuller claimed would support his testimony, testified at the hearing, but he denied Fuller's account of Thompson's confession. Id. The trial court credited the second inmate's testimony. Id. Finally, the appellate court contrasted "the purported Thompson confession against what [were] fairly solid facts." Id. Of particular interest to the Court was the description of the assailant provided by the only eyewitness to the crime – the deceased's roommate. Id. This description "closely matched the much bigger Mercer and not the slender Thompson." Id.

The Court held the trial judge's decision to deny Mercer's motion for new trial was not an abuse of discretion. Id. at 170, 672 S.E.2d at 567. The Court was careful to note that "a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt." Id. Nevertheless, the Supreme Court affirmed the trial judge's ruling based upon the judge's credibility determination and view of the evidence presented at trial. Id.

The "general rule is that newly discovered evidence which 'merely impeaches or contradicts the testimony of a witness at the trial' affords no sufficient grounds for a new trial." State v. Strickland, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942). However, "there may be exceptional cases warranting a new trial on merely cumulative or impeaching testimony." Id. When the newly discovered evidence is "so directly applicable to the main point involved that it would be a denial of justice to refuse the motion," the general rule must not apply. Id.

Judge Russo's abused his discretion in denying Appellant's motion for new trial based on after-discovered evidence because his decision was based upon an erroneous view of the facts presented at trial. Although Judge Russo had the benefit of selected portions of the transcript

available for his review, his order denying Appellant's motion is replete with erroneous factual recitations, which were foundational for his legal conclusions. According to the judge, "[a]ll of the *uncontroverted* evidence in the case, showed" that Nick and Appellant "planned to go to the victim's house to take drugs, went and secured a sawed-off shotgun before going to the victim's home, drove to the victim's home together at the time of the shooting, and that the Victim was shot and killed with a sawed-off shotgun during the time both co-defendant's [sic] were at the house securing the drugs." R. 1183-1187 (emphasis added). Contrary to the judge's assertion, this evidence was disputed; it was decidedly *not* uncontroverted. Appellant testified that he did not plan to go to the deceased's home to take drugs, that he did not obtain a sawed-off shotgun prior to the shooting, and that he was not aware of the deceased having been shot while he was present at the home or when he was absent.

Additionally, the judge stated that Appellant and Nick "pointed the finger at the other as the one who actually pulled the trigger killing the victim" throughout the entirety of the trial. R. 1183-1187. This was simply not the case. Appellant testified unequivocally that he could not say that Nick pulled the trigger killing the deceased because he was not present during the shooting. Appellant testified that he did not even hear gunshots while sitting in his parked car outside the deceased's home. Appellant further testified that he never saw Nick with a gun that morning. In short, Appellant did not point the finger at Nick as the triggerman.

The judge's ruling on Appellant's motion was based upon this erroneous view of the evidence. As such, the judge abused his discretion because his ruling was not supported by the factual record. Importantly, despite the state's specific request that he do so, Judge Russo did *not* find Goodwin's testimony not credible. Although the judge noted there were "credibility issues" for Goodwin, Judge Russo did not find him unbelievable. Certainly, the judge was very familiar with

the “credibility issues” of all witnesses involved in Appellant’s trial, who had an assortment of pending charges, convictions, and various prior bad acts.

CONCLUSION

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

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of June, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY SELDON BRADY,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

RECEIVED
JUN 14 2017
SC Court of Appeals

Counsel for Jeremy S. Brady states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the records of (a) the Jackson v. Denno hearing, which was held on June 10, 2015, (b) Appellant's trial, which was held on June 15-19, 2015, and (c) the motion for new trial hearing, which was held on February 4, 2016. All matters were heard and decided by Judge Thomas A. Russo. In her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jeremy S. Brady.

Respectfully Submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 14th day of June, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY SELDON BRADY,

APPELLANT

DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL

RECEIVED

JUN 14 2017

SC Court of Appeals

Appellant proposes the following be included in the Record on Appeal:

1. Entire transcript of Jackson v. Denno hearing dated June 10, 2015;
2. Entire trial transcript dated June 15-19, 2015;
3. Entire transcript of hearing on motion for new trial dated Feb. 4, 2016;
4. Exhibits from Feb. 4, 2016 hearing: State's Exhibits #1 (certified conviction), #2-5 (letters), #6 (statement), Defendant's Exhibits #2 (voucher), #3 (phone records), Court's Exhibit #1 (criminal record);
5. Motion for new trial filed June 29, 2015;
6. State's Motion opposing the motion for new trial filed on July 1, 2015;
7. Motion for new trial based on after-discovered evidence filed July 13, 2015;
8. State's reply to the motion filed on Aug. 12, 2015;
9. Order denying post-trial motions filed April 21, 2016;
10. True-billed indictments (2012-GS-32-2249; -2250; -2251; and 2015-GS-32-1421); &
11. Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 14, 2017

Susan B. Hackett

Susan B. Hackett
SCCID - Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

June 14, 2017.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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ATTORNEY FOR APPELLANT

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY SELDON BRADY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jeremy S. Brady, 313705, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of June, 2017.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of June, 2017.

[Signature] (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

RECEIVED

JUN 14 2017

SC Court of Appeals