STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BYRON CHRISTOPHER KINSEY,

APPELLANT

APPELLATE CASE NO 2017-001250

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in permitting the state to introduce cell phone records that had been manipulated by law enforcement because the danger of unfair prejudice, confusion of the issues, and misleading of the jury substantially outweighed any probative value presented by the manipulated evidence, particularly where the state presented only weak circumstantial evidence against Appellant?

STATEMENT OF THE CASE

On January 28, 2016, a Dorchester County grand jury indicted Appellant for murder (2015-GS-18-0971). R. 477. On May 4, 2017, the grand jury indicted Petitioner for armed robbery (2017-GS-18-932) and possession of a firearm by a person convicted of a violent crime (2017-GS-18-933). R. 479. The state, represented by Donald Sorenson and Ryan Templeton, called the case to trial before the Honorable Maite Murphy. R. 1. John Loy and John Kornegay represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 462, ll. 6-15. Judge Murphy sentenced Appellant to five years imprisonment for possession of a firearm, to thirty years imprisonment for armed robbery, and to life imprisonment without the possibility of parole for murder. R. 475, ll. 9-18; R. 483.

On May 23, 2017, Appellant served his notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in permitting the state to introduce cell phone records that had been manipulated by law enforcement because the danger of unfair prejudice, confusion of the issues, and misleading of the jury substantially outweighed any probative value presented by the manipulated evidence, particularly where the state presented only weak circumstantial evidence against Appellant.

Relevant facts

The shooting

Sara Taylor and Robert Crumm had been dating for about a year in March 2015. R. 104, ll. 7-14. During this time, Taylor was trying to get custody of her children. R. 120, ll. 15-22. However, having custody of her children was conditioned upon Crumm moving out of the home the two shared. R. 120, ll. 23-25. When Taylor discussed this with Crumm, he remarked that if he were to move out, then he would return to old habits, primarily drug abuse. R. 121, ll. 2-24. Also during this time, Crumm was experiencing medical problems and financial problems at the time. R. 105, ll. 15-19. In light of these problems, Crumm borrowed money from his godfather multiple times. R. 105, l. 20 – R. 106, l. 1. On March 10, 2015, Crumm borrowed $2000 from his godfather, but he told Taylor he borrowed only $1000. R. 106, ll. 19-21; R. 107, ll. 5-7; R. 157, ll. 1-25.[1]

According to Taylor, Crumm received a call from a friend nicknamed "Creep" asking for a ride. R. 107, l. 21 – R. 108, l. 9.[2] Taylor and Crumm, in their GMC Acadia, picked up Creep.

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[1] Taylor suspected Crumm was being dishonest with her regarding the money he received. R. 118, l. 18 – R. 119, l. 12.

[2] Taylor claimed Crumm's phone number was 504-388-5686. R. 105, ll. 13-14.

R. 109, ll. 3-13.[3] During the car ride, Creep was using his phone to line up another ride. R. 110, ll. 18-24. Also, during the car ride, Creep and Crumm discussed drugs and fake bank accounts. R. 111, ll. 14-17; R. 123, ll. 2-10.

Eventually, the trio ended up at Cedar Key Apartments. R. 111, ll. 18-24; R. 123, ll. 11-13. Creep got out of the car, and Crumm, unexpectedly got out as well. R. 112, ll. 21-25. Taylor watched the men walk toward the apartments until she lost sight of them. R. 113, ll. 1-3. A few minutes later, Taylor heard a gunshot, followed quickly by a second gunshot. R. 113, ll. 13-16. Crumm walked toward her car, but he fell down before he arrived. R. 113, ll. 18-20.[4] A man ran out, crouched over Crumm, rummaged through his pockets, and ran away. R. 113, ll. 20-23.

When the man left, Taylor ran to Crumm and rendered aid. R. 114, ll. 11-16. Taylor also called for help. R. 114, ll. 21-24.

Taylor was uncertain if the person she saw over Crumm's body was Creep. R. 124, ll. 7-23. Taylor provided the police with a description of Creep and provided them with his nickname. R. 125, ll. 2-8; R. 132, ll. 2-3. Within hours of the shooting, the police showed Taylor a photo line-up, which included a photo of an individual known to go by the nickname of Creep. R. 125, ll. 12-15. Taylor selected an individual from the lineup. R. 127, ll. 7-8. According to police, Taylor identified Lesner Gilliard from the line-up, and Gilliard was nicknamed "Creep." R. 154, ll. 4-9. Taylor also told the police about the phone call between Crumm and Creep earlier that day. R. 138, ll. 8-13.

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[3] The police found no evidence that Appellant was ever inside or outside the Acadia. R. 285, ll. 8-19; R. 310, ll. 13-21.

[4] According to the pathologist, Crumm died as a result of exsanguination due to a gunshot wound to the back. R. 331, ll. 1-3.

One of the apartment's residents, Savion Willis, heard two gunshots on March 10, 2015, when he was walking to the dumpster. R. 164, ll. 21-24. Looking in the direction of the shots, Willis saw two men, one with a gun. R. 166, ll. 3-6. The shooter, an African American, wore a black hoodie and beige pants. R. 166, ll. 12-14.

Happenings nearby

During the afternoon of March 10, 2015, Alphonso Middleton and his brothers were working on small engines at the home of one of the brothers on Pidgeon Bay Road and Gospel Lane. R. 172, l. 8 – R. 173, l. 13. Cedar Key Apartments were very close to where the brothers were working. R. 174, ll. 12-16. Wearing all black, Appellant walked up to the men, asking for a ride and to use the bathroom. R. 173, ll. 14-19; R. 393, ll. 16-23. He was permitted to use the bathroom behind the house. R. 173, ll. 19-20. Alphonso agreed to give him a ride so the two got into Alphonso's Suburban. R. 176, ll. 1-13. On the way to Charleston, the two men stopped at a gas station where they purchased beers. R. 178, l. 13 – R. 179, l. 6.

Eventually, the police found Crumm's wallet behind the Middleton home. R. 206, l. 14 – R. 207, l. 20; R. 214, ll. 8-10. Inside the wallet, the police found a hundred dollar bill with a white powdery substance inside it. R. 241, ll. 18-23.

Despite Taylor's identification of Lesner Gilliard as Creep and the discrepancy between Middleton's description of Appellant's clothing and Willis' description of the shooter's clothing, the police charged Appellant with Crumm's murder due in large part to his presence near the crime scene seeking a ride to Charleston from Middleton. Additionally, the police and the solicitor relied heavily upon the phone records, showing calls between the deceased and a phone associated with Appellant and cell site location information placing Appellant in the vicinity. There was simply no other evidence against Appellant.

The disputed evidence – manipulated phone records

Prior to trial, defense counsel explained he had received in discovery a presentation created by a member of the Sheriff's Department. R. 36, ll. 21-23. The officer took "some of th[e] data from the phone records, input it into some program that they have which manipulates this data and basically shows a push-point map or a presentation where the detective believes the phone was at various points in time along with times that would relate to it." R. 36, l. 21 – R. 37, l. 3. Defense counsel objected to the introduction of the manipulation of the data and the visual representation. R. 37, ll. 5-8.

After an *in camera* hearing concerning the evidence, defense counsel maintained his objection to the admissibility of the evidence. Defense counsel explained the state sought to introduce the presentation to show the jury that Appellant's phone, and therefore, Appellant, was present at certain locations at certain times. R. 61, l. 26 – R. 62, l. 1. Defense counsel emphasized the lack of reliability of the evidence due to the telephone company's indication of "low-level of confidence" concerning specific locations. R. 62, ll. 1-7. Due to that lack of reliability, the evidence was "not probative," and introduction of the manipulated evidence would be "fundamentally unfair." R. 62, ll. 6-7. Counsel explained the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion, and misleading of the jury. R. 62, ll. 7-10.

Counsel elaborated that the presentation showed "only one" location that was in close proximity to where the shooting occurred and for this location, the phone company indicated it had "low level of confidence that [the phone] was in this area or at this place." R. 62, ll. 11-14. The state could not explain whether "low level of confidence" meant "5 percent, 3 percent, 6 percent." R. 62, ll. 15-16. This cell cite location was "the only one that tends to put the cell

phone in question at the scene of the shooting itself." R. 62, ll. 20-22. According to defense counsel, "[u]nexplained as it is, it is merely suspicious ... it's unfair and it's prejudicial to the defense without further quantification or qualification." R. 62, ll. 22-25. "[W]ithout any further information or input for the Court as to what that pushpin means and why it has a low level of confidence in this presentation," defense counsel asked the judge to suppress the evidence. R. 63, ll. 4-7.

The state argued defense counsel's argument went "to weight of the evidence not to admissibility." R. 63, ll. 12-14. The state claimed the "records are going to show a whole lot more than just that phone being located at that one pushpin." R. 63, ll. 14-16. He asserted the "testimony [would] show that this defendant was picked up by the victim and his girlfriend in North Charleston," put the phone in the College Park Road area "driving around," and then "up into Summerville in the vicinity of where our homicide occurs." R. 63, ll. 22-24. The records would then show the phone going "back down to Charleston." R. 64, ll. 1-2. Concerning the confidence levels, the state argued those "basically are how sure they are within that area." R. 64, ll. 5-7.

Judge Murphy ruled the evidence was admissible. R. 64, l. 25 – R. 65, l. 1. She found the officer "was trained on the data and the software, which is relevant-type of evidence in this case." R. 64, ll. 14-18. The concluded that defense counsel's arguments went "to the weight and not to the admissibility of evidence." R. 64, ll. 21-23. In her view, "the probative value would outweigh and prejudicial effect of this and any deficiencies." R. 64, ll. 18-21.

Jennifer Dalmida was a senior analyst for Verizon Wireless based out of Orlando, Florida. R. 332, l. 3 – R. 333, l. 1. Dalmida identified two sets of phone records that were provided to the Dorchester County Sheriff's Office. R. 333, ll. 2-19; State's Exhibit #36; State's

Exhibit #45. One set of documents concerned phone number 843-518-8276.[5] R. 334, l. 1; State's Exhibit #36. The second set of documents concerned phone number 504-388-5656. R. 334, l. 23 – R. 335, l. 1; State's Exhibit #45. The records covered March 10, 2015. R. 336, ll. 5-7. Dalmida had no subscriber information for either set of records. R. 336, ll. 8-20; R. 338, ll. 14-21.

Adam Smith with the Dorchester County Sheriff's Office obtained the cell phone records for the phone believed to belong to the deceased from Verizon Wireless. R. 339, ll. 22-24; R. 343, ll. 20-32. Upon Smith's review of the phone records, he found a number that had called the phone several times on March 10, 2015 – 843-518-8276. R. 344, ll. 1-10. Thereafter, Smith obtained the records for that phone as well. R. 344, l. 16 – R. 345, l. 5.

According to Smith, there were nine calls between the phone associated with Appellant and the phone believed to belong to the deceased on March 10, 2015, with the last one occurring at 4:02 p.m. R. 354, ll. 1-24.

Smith explained that when he received the records from Verizon Wireless, there was "some formatting" that had to be done, including "separating say date and time from one column into two separate columns to make it compatible with the program." R. 345, l. 14 – R. 346, l. 3. Smith obtained "the GPS coordinates from the actual cell site list and merge those" with the data obtained from the phone company regarding "first-serving cell site and last-serving cell site." R. 346, ll. 4-14. This would allow him to "plot out which cell towers were used during a certain time frame." R. 346, ll. 15-16. He also received "the real-time tool" from the phone company, which provided "an estimate" of the phone's location at any point in time. R. 346, ll. 16-19.

[5] The parties stipulated that 843-518-8276 was a number that Appellant used in 2015 and 843-532-5431 was a number of an acquaintance of Appellant. R. 331, ll. 12-18.

This information was "not exact to a certain location," and could only provide information about "a certain area." R. 346, ll. 19-22.

After going through the phone records, formatting the records, merging the records with other documents, and plotting the inexact information onto a map, Smith created a PowerPoint presentation to display the information the phone with the number 518-8276. R. 347, l. 17 – R. 348, l. 10; State's Exhibit #46. On the map, Smith placed pushpins with corresponding dates. R. 349, ll. 11-13. Those pushpins were related to one row of data in the Excel file provided by the phone company and altered by Smith. R. 349, ll. 13-14. Smith explained the map showed "a date, a time, a geographic location for one actual point where they received data from that cell phone." R. 349, ll. 14-16.

According to Smith, the phone was in the North Charleston area near Isaiah Drive and I-26 between 1 p.m. and 2 p.m. R. 350, ll. 1-6. Between 3 p.m. and 4 p.m., the phone moved from North Charleston toward College Park. R. 350, ll. 14-18. Between 4 p.m. and 5 p.m., the phone started to move toward the Summerville area. R. 351, ll. 1-4. From 5 p.m. to 6 p.m., the phone moved toward North Charleston and Charleston. R. 353, ll. 7-12. Smith noted two towers the phone was using around the time of the shooting and showed those in relation to the incident location. R. 355, l. 8 – R. 356, l. 20.

On cross-examination, Smith admitted he did not know how any of the software programs that he was using worked or how the phone companies determined the location of the phones. R. 358, l. 17 – R. 359, l. 4; R. 360, ll. 14-17. He explained he took the records from the phone company and put them into the program. R. 359, ll. 5-9. He also admitted that Verizon Wireless provided something called "call location confidence" with each of the geographic coordinates. R. 361, ll. 3-11. This confidence level was measured in high, medium, and low. R.

361, ll. 8-11. Smith was unaware of what the different levels meant – beyond the obvious. R. 361, ll. 24-25.

Smith's mapping showed a location "off of Pidgeon Bay Road," but Verizon Wireless indicated it had "a low level of confidence" with that location. R. 362, ll. 11-18. Three minutes after the phone was allegedly in that location, it was in another location quite a distance away. R. 362, l. 19 – R. 363, l. 7. Two other locations on Smith's map showed phone calls happening twenty-four seconds apart, but the actual distance between those locations was "a mile or so." R. 363, ll. 8-22. Smith admitted no one could be in those two places twenty-four seconds apart. R. 363, ll. 23-24. He admitted something was "wrong" with the data. R. 364, ll. 5-6.

Closing argument

According to the solicitor, the phone records were the essential evidence that "link[ed] this whole thing together" because the "phone ends up tracking from Summerville, around Gospel Lane, all the way down to Charleston exactly where Alphonso Middleton says he dropped him off between, you know, that five to 6:00 p.m. time frame that night." R. 414, ll. 11-17. The state also claimed the records showed Appellant using his phone immediately after the shooting trying to get a ride. R. 419, l. 23 – R. 420, l. 8. He told the jurors to recall "the little slide, the last slide in the PowerPoint," showing phone calls, which the state claimed supported his theory of Appellant trying to get a ride away from the shooting scene. R. 420, ll. 1-8.

The state told the jury he could not "put the phone in the witness chair," but he had "put that phone in North Charleston, the area where he was picked up between three and four o'clock." R. 422, ll. 1-5. The phone was "track[ed] up to the College Park Road area, down Highway 78, and up into Summerville right where [Taylor] sa[id] they ultimately went." R. 422,

ll. 5-8. And, "more importantly," the phone "track[ed] from that area all the way back down to Charleston just like Alphonso Middleton says." R. 422, ll. 8-10.

In rebuttal, the solicitor maintained his theme that the phone records were the lynchpin in the case:

> The record show, yet again, a number that is stipulated to you that he used in 2015. Called the [deceased] beforehand. But not only that, it's calling during the time that they're driving around in the car. He's calling a number that's an acquaintance of his, and calling that same number right after the homicide. And while, as I said, and nobody's ever said that that phone, those records, pin something down to an exact location. It still puts it, yet again, in North Charleston when he's picked up. Puts it in Summerville. Puts it all the way in Charleston. That's off the phone. I mean, that's not something that anybody is making up. And he kind of stops there. That's what the state is proving.

R. 445, ll. 13-25.

Discussion

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

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or

indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011).

Probative value

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

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v.

Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Danger of confusion of the issues and misleading of the jury

Additionally, the court must next evaluate the danger of confusion of the issues or of misleading the jury by presenting the evidence. Very little case law exists in South Carolina regarding these aspects of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back

problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to marijuana." Id. at 128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Balancing act

Once a court has determined the evidence's probative value as well as the danger of unfair prejudice, confusion of the issues, and misleading of the jury attributed to the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013).

"When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." Lyles, 379 S.C. at 338, 665 S.E.2d at 206. Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Analysis

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state, the extreme danger of unfair prejudice, confusion of the issues, and misleading of the jury posed by the evidence necessitated the exclusion of the PowerPoint presentation created by law enforcement through manipulation of inherently unreliable data by law enforcement.

The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury. The question before the jury was – did the state prove beyond a reasonable doubt that Appellant killed took the life of Crumm with malice aforethought on March 10, 2015? The location of Appellant's phone during the hours before, during, and after the shooting failed to prove or disprove anything related to the shooting of Crumm. Most of the phone records merely placed Appellant in the vicinity of the shooting location, which Appellant admitted. Concerning the phone's placement of Appellant in the Suburban with Middleton going to Charleston, this was undisputed as well. The only record that placed Appellant very close to the scene of the shooting was associated with a "low level of confidence" by the phone company. Thus, the probative value of that singular piece of evidence was extremely low simply by the phone company's determination that it had a low level of confidence that the phone was in the location at that particular time. The other phone records, as manipulated by the state, also proved

very little in the case. The records could not, and did not, show who shot Crum. The records showed no motive for a shooting or any other evidence to indicate Appellant was the shooter. The probative value of the phone records was extremely low.

The danger of unfair prejudice, confusion of the issues, and misleading of the jury from manipulated phone records was exponentially high. The phone records merely showed a phone used by Appellant was in the area of the shooting, with one record claiming to show Appellant was very close to the shooting at the approximate time of the shooting. However, even the phone company that created the record did not stand by the record as the phone company indicated it had "a low level of confidence" in the accuracy and reliability of that particular record. Introduction of the phone records as manipulated by law enforcement presented a high level of confidence that the jury would rely on the evidence in an unfair way, would be confused regarding the issues presented, and would be misled by the evidence.

Only one conclusion may be drawn from balancing the extreme danger of unfair prejudice, confusion of the issues, and misleading the jury resulting from the admission of law enforcement's manipulation of the phone records - - any probative value of the manipulated records was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Examining the record as a whole revealed the state's circumstantial evidence case against Appellant. The state knew it had to combat the identification of Lesner "Creep" Gilliard by Taylor, an eyewitness. The only evidence of who was in the car with Taylor and Crum was the testimony of Taylor that she identified Gilliard as the passenger in her car for almost one hour. It was this person whom Crumm had followed into the apartment complex. Taylor never identified Appellant as her passenger or as the shooter. The state used the phone records in an attempt to refute Taylor's identification of Gilliard. Taylor, the state's own witness, explained how she and Crumm picked up

his friend, Creep, and drove around until arriving at the apartments. The state tried to use the phone records to show Appellant's phone was in the same areas described by Taylor.

The only evidence against Appellant was that he was in the area of the shooting around the time of the shooting in light of his catching a ride from Middleton. However, an abundance of evidence existed that someone else, Lesner "Creep" Gilliard, had likely killed Crumm. Taylor told police her passenger had been "Creep." The police created a photographic line-up, including a photograph of Gilliard, whom police knew went by "Creep." Taylor, without any assistance from law enforcement, selected Gilliard or Creep from that photographic line-up. This could not be mere coincidence. The police failed to investigate Gilliard's involvement in the shooting at all – the lead investigator explained this failure was because Gilliard refused to speak to police. Gilliard's refusal to speak to police or otherwise assist in the investigation was not a reason to end the investigation; rather, it was a reason to intensify the investigation. Law enforcement failed. The danger of unfair prejudice, confusion of the issues, and misleading the jury substantially outweighed any probative value of the manipulated phone records in this case.

CONCLUSION

Appellant respectfully requests that his conviction be reversed and that his case be remanded for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BYRON CHRISTOPHER KINSEY,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Byron Christopher Kinsey 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 record of Appellant's trial before Judge Maite Murphy, which was held on May 15-18, 2017, and, 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 Byron Christopher Kinsey.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 18th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

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BYRON CHRISTOPHER KINSEY,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Entire trial transcript;
(2) State's Exhibit #36 (CD – Verizon Data);
(3) State's Exhibit #45 (CD – Verizon Data);
(4) State's Exhibit #46 (CD – PowerPoint);
(5) True-billed indictments; and
(6) Sentence sheets.

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

April 18, 2018

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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."

April 18, 2018.

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