STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROHAIME JAMAR HOPKINS,

APPELLANT

APPELLATE CASE NO. 2017-001224

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by admitting the cell phone and text message evidence (State's exhibits 7-9), since the probative value of that evidence was substantially outweighed by its unduly prejudicial effect under Rule 403, SCRE, the exhibits were not statements against penal interest as the court ruled, and they were confusing to the jury, including the text message, which even if sent by appellant was ambiguous, and where the court ruled the Verizon Wireless records custodian did not have the expertise necessary to impart the cell tower evidence to the jury?

2.

Whether the court erred by not exercising its discretion to exclude Michael Taylor's testimony which claimed that appellant burned his clothes in a barrel outside Taylor's home on the night of the murder, since Taylor made this claim for the first time on the day of the trial, the defense had no notice of this newly claimed devastating evidence prior to that time -- which violated fundamental fairness since it was "trial by ambush" -- and the court had the inherent authority, and duty, to ensure appellant received a fair trial?

STATEMENT OF THE CASE

Appellant was indicted for murder by the Jasper County Grand Jury. R. *. His case was called to trial on May 15, 2017, before the Honorable Perry M. Buckner, and a jury. Tr. 1. Scott Lee represented appellant. Mary Jones and Brian Hollen were the assistant solicitors. Tr. 2.

On May 17, 2017, the jury found appellant guilty of murder. Tr. 653. Judge Buckner sentenced appellant to life imprisonment. Tr. 672. This appeal follows.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

ARGUMENT

1.

The court erred by admitting the cell phone and text message evidence (State's exhibits 7-9), since the probative value of that evidence was substantially outweighed by its unduly prejudicial effect under Rule 403, SCRE, the exhibits were not statements against penal interest as the court ruled, and they were confusing to the jury, including the text message, which even if sent by appellant was ambiguous, and where the court ruled the Verizon Wireless records custodian did not have the expertise necessary to impart the cell tower evidence to the jury.

Introduction

This is a strange circumstantial case which teetered out of control as the state attempted to prove that appellant Rohaime Hopkins was the shooter, and where the jury also heard elaborate evidence that admitted "scammer" Antoine Drake was likely the murderer allegedly paid by Trey Graves to kill the decedent. Further, the state's case was largely made through the impeachment of its own witnesses, and through the testimony of suspect Drake, and an admitted murderer, Jailhouse Snitch Byron Singleton, who acknowledged he wanted sentencing consideration for claiming appellant confessed to him in the local jail.

Relevant Facts

Antoine Drake said Trey Graves was the man who put out "a hit on Terrence Johnson, [the decedent.]" Tr. 247, ll. 8-10. Drake acknowledged that he saw Graves at the Club Pluto, a strip club, a week after the decedent was murdered. Drake admitted he told Graves he wanted "to collect the money" for the hit because the decedent was dead. Drake claimed he was only trying to scam Graves out of the "hit" money, and he denied that he committed the murder. Tr. 246, l. 22 – 249, l. 7.

Drake later explained he got arrested at the Club Pluto with a gun, and that he went to jail on December 27, 2014, following the November 12, 2014, murder of the decedent. Drake denied the gun he was arrested with was the "same caliber gun that was used to shoot Terrance Johnson." Tr. 257, l. 4 – 258, l. 17.

Drake admitted he said, referring to appellant, "I can't stand that motherfucker," and that he would kill appellant. Tr. 277, ll. 4-20. Drake also make the self-serving claim that at the Club Pluto when Graves refused to pay Drake the fifteen thousand dollars for killing the decedent, that Graves said, "Hopkins told me he did it alone." Drake said Graves only bought him a drink that evening, and did not pay him any money. Tr. 280, l. 4 – 281, l. 13.

Drake denied that he fled to Philadelphia after the murder, and after talking to Graves. Tr. 281, l. 18 – 282, l. 16. However, Drake's girlfriend, Tutu, who was pregnant with another of Drake's children, as will be seen infra, admitted she went to Philadelphia after the murder. She claimed it was just an annual visit -- apparently every November -- and had nothing to do with the murder.

The state's theory of the case was that the decedent was killed between nine and ten o'clock on November 12, 2014. Justin Kesselring lived at 349 Knowles Island Road. Justin remembered that "we hear shots around there all the time. People clinging around with guns." However, on this rural island, Justin remembered on November 12, 2014, that "a little after nine" he heard multiple gunshots. He looked out his window but he did not see anything. Tr. 126, ll. 1-23.

The next morning as he was leaving for work, "there was a car across the street and there was a body laying next to it." Justin called 911. Tr. 126, l. 19 – 127, l. 6.

Shardaja Singleton lived at 44 Knowles Island Road. Singleton remembered on the morning of November 13, 2014, she missed the school bus, and she saw the decedent's body laying "in the dirt road." The passenger door of the car right next to the decedent's body was open. She remembered the night before at around nine p.m. she heard six gunshots. Tr. 130, l. 1 – 133, l. 2. The murder weapon was never recovered.

Robin Simmons lived on "Simmons Hill," and she remembered November 12, 2014, because they had a family gathering "because my grandmother had passed." Robin remembered seeing both the decedent and appellant at the gathering which lasted all day, from morning to night. Robin saw appellant around eight o'clock that evening. Tr. 183, l. 7 – 186, 11.

Robin Simmons testified that the decedent was dating her sister, Angel Simmons. She referred to appellant as "a family member" whom she had known all her life. She contended appellant had a black pistol tucked into his pants that evening. Tr. 183, l. 7 – 185, l. 4.

Robin admitted that appellant and the decedent left together "a couple of times," and came back. Tr. 185, ll. 20-25. Robin said when appellant returned with the decedent he was wearing a "black T shirt and black jogging pants." She did not claim to see appellant with a gun after he changed clothes. Robin acknowledged that appellant and the decedent were very close personal friends. She said they left together from Simmons Hill a second time at about eight o'clock that night. Tr. 186, l. 4 – 187, l. 25.

Latanya Singleton was called "Tutu" by everyone involved. Tr. 297, l. 7 – 298, l. 9. Tutu lived at 474 Knowles Island. She said she did not remember November 12, 2014 at all. Tutu was pregnant with Antoine Drake's child. She had another child by Drake. Tr. 298, ll. 7-20

Tutu remembered that she drove to Walterboro to talk to law enforcement at their request. She said she did not remember what she told them. "I don't want to lie, I really don't remember because I was high then." "I'm high almost everyday." She claimed she was "straight" on the day of appellant's trial because she was pregnant. Tr. 300, l. 1 – 301, l. 10.

Tutu remembered that Drake asked her whom she had texted on the day of the murder. There were two murders that happened that same November day. As will be seen infra, Byron Singleton committed the other murder, and, as will be seen infra, he attempted to tell the jury he got a jailhouse confession to the present murder from appellant.

Tutu, Drake's girlfriend, admitted she had a 9 mm High Point gun, which would have been consistent with the murder weapon that was never found, but she claimed she did not have the gun in November of 2014, when the murder occurred. Tutu admitted she went to Philadelphia that November after the murder, but she claimed she went to Philadelphia in November of every year. Tr. 306, l. 18 – 309, l. 5.

Angel Simmons also lived on Simmons Hill. She remembered the gathering after her grandmother died. Simmons had a criminal record for various thefts and bad checks. She said she was engaged to be married to the decedent at the time he was killed. She had known the decedent about a year. Tr. 320, l. 3 – 321, l. 7.

Angel said she was resting on November 12, 2014, because she and the decedent had been up "all night the night before." Tr. 323, ll. 3-15. Simmons said in her last conversation with the decedent she said: "'T.J., where are you?' And I said, 'T.J., where you at?' And I was like, 'I love you,' like that. And I kind of hear like a little scuffle and the phone hung up. And I kept calling." Simmons said all of her calls to the decedent went to voicemail after 9:30 that evening. Tr. 324, ll. 9-17.

Richard Johnson was the SLED agent involved. He went to Knowles Island Road in Jasper County on November 13, 2014. Tr. 331, ll. 11-24. Johnson remembered that both Tutu, Drake's girlfriend, and appellant lived within five hundred yards of where the decedent's body was found. Tr. 335, l. 3 – 337, l. 3.

Johnson said he later learned that Drake, appellant, "and others that he didn't identify were at Michael Taylor's house. He was also referred to as Mike-Mike." "When Hopkins stated to them that he was waiting on 'them boys,' Daytron Simmons said he was referring to Trey Graves to sign a contract." The allegation was apparently that there was going to be a written contract entered into to kill the decedent because he was "snitching." Johnson offered that Trey Graves was in federal prison. Johnson testified that he learned that both appellant and the decedent both liked cocaine, and they were using it on the night the decedent was killed. Tr. 337, l. 14 – 339, l. 8. When the solicitor asked Johnson about phone numbers he received during his investigation, the defense hearsay objection was sustained. Tr. 339, ll. 9-13.

Johnson admitted he executed an affidavit for Tutu's phone records because "Tutu has provided information to others that only a participant would know or witness." Tr. 355, ll. 3-25. Johnson admitted that Tutu abruptly left town and she went to Philadelphia. Johnson was not able to talk to her in person until February 1, 2015. Tr. 356, ll. 1-20.

Johnson said he knew Drake was "on the run" from other charges. However, Johnson did not arrest him because he said he wanted information from Drake. Tr. 357, l. 2 – 360, l. 10.

Johnson said after interviewing Drake, he continued investigating Drake and appellant. Johnson testified that Drake confirmed "if Trey Graves had any connection to this as well." Tr. 360, l. 11 – 361, l. 9. Johnson refused to admit that he was "scratching Drake's back," and

Drake was "scratching his back," so they both would get what they wanted. Tr. 360, l. 18 – 363, l. 20.

Johnson begrudgingly admitted on cross-examination he was aware of a "knife incident" between Drake and the decedent at Mike Taylor's house. Tr. 376, l. 18 – 378, l. 6. Johnson admitted that Drake told him he hated appellant and wanted him gone. Tr. 378, l. 17 – 379, l. 19.

Johnson said from the information he received there was jealousy between appellant and the decedent because "both of them were seeing Angel Simmons." Tr. 384, l. 24 – 385, l. 5.

Burned clothes surprise allegation

Michael Taylor was living in Jacksonville, Florida at the time of the trial. He had a criminal record for theft. Tr. 398, l. 4 – 399, l. 7.

On the night of the alleged murder, November 12, 2014, Taylor remembered getting off work from the Waffle House at nine p.m.. He came home to change clothes to go to the sister of his wife's house, but he did not see his wife or son once he got home. However, Taylor said appellant was inside his house sitting in his chair. Taylor maintained he did not know why appellant came to his house that night. Tr. 399, l. 13 – 401, l. 12.

Taylor said appellant was wearing all black. Taylor woke up his son and his wife. He claimed he asked his wife why appellant was sitting in their living room, and sitting in his chair. Taylor maintained his wife said she had been asleep, and she did not even know appellant was in their house. Tr. 401, l. 9 – 403, l. 22.

Taylor now testified that appellant asked him if he cared if he changed his clothes. Taylor maintained he told appellant "go ahead, change them." He offered that he did not know if appellant had gotten dirty walking to his house. Taylor claimed appellant changed his clothes, a*nd burned the clothes he had been wearing "in my barrel.*" Defense counsel Lee immediately

objected to the lack of notice of this claim and testimony. The judge said he would put his ruling on the objection on the record "at a later point in time." Tr. 404, l. 13 – 405, l. 5.

The following then occurred between the solicitor and Taylor:

> Q: Mr. Taylor, you spoke to the police a while ago back in 2014, didn't you?
>
> A: Yes.
>
> Q: Okay. **Why didn't you tell them about the burning clothes then?**
>
> A: I didn't -- you know, to tell the truth, I didn't -- I didn't think about it to be honest with you. And it really -- it really never really crossed my mind that it was him. **I never would have thought that it was Rohaime until -- until after I made the statement and then I started contemplating things.** Because, I'll be honest, I wasn't really myself. You know, I had a little something to drink or whatever. But I know that -- that everything that I'm saying is true. He wasn't with me. He wasn't with me during the day, none of that. He wasn't at home when I came home from work. I go next door an hour and half later, you are in my house. **No, I didn't like that. He never was in my house before like that. He never really was my friend.** I only met you through T.J.

Tr. 405, l. 9 – 406, l. 2. (emphasis added).

Taylor said he was aware of an incident of violence between Drake and the decedent, but Taylor claimed after it was over Drake and the decedent shook hands and were friends again. Taylor said he did was not injured that knife incident. Tr. 406, l. 13 – 407, 15.

Byron Singleton appeared for trial in prison garb. Singleton admitted he was incarcerated for another murder that also occurred on November 12, 2014. He had not gone to trial or pled guilty to that murder yet, and he openly admitted he wanted leniency in exchange for his testimony.[1] Tr. 436, l. 1 – 437, l. 18.

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[1] Singleton got the sentencing consideration he was seeking. This Court can take judicial notice of the fact that Singleton was sentenced to 30 years imprisonment for voluntary manslaughter.

Singleton claimed that he became friends with appellant in the Charleston County jail because they were both from Jasper County. Tr. 436, l. 13 – 438, l. 22.

Singleton admitted he contacted SLED agent Richard Johnson, and he told Johnson that appellant allegedly admitted to him that he shot and killed the decedent. Tr. 439, l. 4 – 443, l. 3. Singleton also maintained appellant told him it was a "murder for hire" involving "Trey.' Tr. 443, ll. 4-21.

Singleton acknowledged that he was on a prison bus ride with Antoine Drake. Singleton agreed that he, in fact, spoke with Drake but he denied he received the details of the decedent's murder from Drake. Even though Singleton openly admitted he wanted sentencing consideration, which he ultimately received, he denied receiving details of the murder from Drake, and that he agreed to testify against appellant for that sentencing consideration. Tr. 448, l. 13 – 451, l. 15; Tr. 452, l. 3 – 455, l. 15.

Singleton claimed all Drake ever told him was to tell appellant: "You got me hot. You got me hot. Police started knocking on my door. That's how the conversation started between me and Rohaime." Tr. 454, ll. 9-19.

As stated, the murder weapon was never found. The DNA of an unidentified male was found in the decedent's car. Appellant's palm print was on the car, which was not unusual since it was undisputed that appellant and the decedent were friends, and that appellant had ridden in his car. Tr. 483, ll. 7 – 12. Kimberly Mears, the SLED fingerprint expert, said that there were inconclusive findings on the prints of Antoine Drake, and she admitted she never received clear and complete fingerprint and palm prints of Drake's to compare. Tr. 484, l. 15 – 485, l. 19.

The Department of Correction Inmate Search Detail Report has Singleton being released on December 13, 2031, after 16 years of incarceration.

Verizon Wireless evidence

Karen Milbrodt was the business custodian out of the Tampa, Florida, office. Tr. 515, l. 18 – 517, l. 14. She provided the cell phone records in this case pursuant to a subpoena. Defense counsel objected to the cell phone records on numerous grounds. The trial judge ruled the cell phone records did not violate the confrontation clause, and they were not hearsay. Tr. 523, l. 4 – 525, l. 2.

The trial judge also ruled that the cell phone exhibits in this case were admissible as a statement against appellant's penal interest. Tr. 525, l. 10 – 526, l. 7. Defense counsel noted that the text message, in particular, which stated "Dats done need to holla at u" was "so amorphous and so ambiguous and confusing" that it should be excluded under Rule 403, SCRE. Tr. 526, l. 8, - 528, l. 20.

The judge replied that "There's no hit in there." Defense counsel Lee correctly noted the state would try and argue that the text message "means the hit is done." The judge said that that was a legal argument, but that was not the evidence itself revealed. The judge overruled all of appellant's objections, including his Rule 403, SCRE objection. Tr. 528, l. 25 – 530, l. 4.

The question then became whether the witness had the requisite expertise to give cell tower testimony. Milbrodt testified she did not recall ever being asked to be an expert in cell tower evidence. She said that she had talked with engineers about the operation of cell towers.

However, on cross-examination, she admitted she was not familiar with any of the cell towers in Jasper County, she had never driven by or inspected one, she was unaware of the topography of Jasper County, or the height of the towers, or the antennas. Tr. 542, ll. 2-25. Milbrodt was also not aware of any problems with Jasper County cell towers. Tr. 543, l. 1 – 545,

l. 3. Milbrodt admitted she was not aware of a computer program called "MapPoint." Tr. 545, ll. 8-20.

The judge questioned Milbrodt about her training. Milbrodt said she had no specialized training other than "on the job training." Tr. 546, l. 22 – 547, l. 18.

As to her education, Milbrodt said she was a high school graduate, and she was currently going to a community college. She had previously driven trucks for Pepsi Cola and Federal Express. Tr. 546, l. 5 – 547, l. 18.

The judge ruled that Milbrodt was not qualified to give any opinion testimony that pertained to cell phone towers evidence. Tr. 548, ll. 2-6.

In the presence of the jury, the judge then allowed the solicitor to question Milbrodt about State's Exhibit 7, 8, and 9, and admit them over all of the defense's earlier objections. Tr. 558, ll. 8-20; R. * (State's Exhibits 7-9).

As to State's Exhibit 9, Milbrodt testified, over objection, that the text message was delivered to the recipient at 9:56 p.m. and eleven seconds. Tr. 560, ll. 7-24. The November 12, 2014 message stated: "dats done, need to Holla at u." See State's Exhibit 9, R. *. Tr. 561, ll. 1-5. The document, and other information on it are before this Court, and defense counsel argued that it was confusing, and that its probative value was substantial outweighed by its undue prejudice. See Rule 403, SCRE. See Text message document. R. p.*.

Milbrodt testified that a later call at 11:17 p.m. it appeared all phone calls were forwarded to voicemail. Tr. 561, l. 21 – 564, l. 2. Milbrodt said Verizon did not have any records they could produce that would show whether the call actually "showed up on their phone." Tr. 564, ll. 6-12. The following occurred on cross-examination of Milbrodt:

Q: Just in general, if a tower -- if you don't know the answer, don't answer it -- if a tower is overloaded for some reason or not working, won't a cell phone call go to the next available tower?

A: Yes.

MS. JONES: Objection.

THE COURT: Ms. Jones? Yes, ma'am?

MS. JONES: Objection.

THE COURT: Sustained.

MR. LEE: All right. No further questions.

Tr. 564, ll. 16-25.

On redirect examination, Milbrodt said it appeared to her that every call from 9:38 p.m. to 1:53 a.m the next morning was forwarded to voice mail. Tr. 565, ll. 5-19.

Dr. Susan Presnell, the pathologist, testified the thirty-two-year-old victim was five foot ten, and he was shot five times. Tr. 568, l. 18 – 572, l. 3.

Closing argument

The solicitor argued the cell phone records in her closing. The solicitor said that the text message showed appellant was wanting to talk to "[Graves] because he wanted his money." "People don't even know T.J. is dead yet before that man wants his money." Tr. 602, l. 19 – 603, l. 3.

Discussion

Defense counsel correctly argued that the cell phone evidence and text message, State's Exhibit 7-9, were going to be confusing to the jury, unduly prejudicial under Rule 403, SCRE, and that they were not sufficiently tied to appellant. See R. p. *. (State's exhibits 7-9). The cell phone witness from Verizon, not only lacked any engineering experience, she was just a high

school graduate, and a former truck driver.[2] The judge correctly found she was not qualified to analyze the cell phone tower evidence. Yet, the state was allowed to introduce these records over the defense objections. State's 7-8 are confusing given the lack of an expert explanation. R. p. *. State's exhibit 9, the text message, invites sheer speculation that it supports the state's $15,000.00 murder for hire theory.

The solicitor would use the records to argue that they showed the decedent was with appellant, and a call was taken just before the decedent was killed. The solicitor would argue that "Dats done need to Holla at u" in the text message meant that appellant was saying he had killed the decedent and that he wanted to talk about collecting his money. The judge correctly stated that was a legal argument and not contained in the text message document itself. That was all the more reason why the text message document, State's Exhibit 9, should have been excluded as confusing, and unduly prejudicial under Rule 403, SCRE. The probative value of this confusing evidence was also substantially outweighed by its unduly prejudicial effect.

This was a very close case and the solicitor successfully used the text message evidence to bolster its weak case that appellant killed the decedent, and that he killed him as a "murder for hire." See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) (relevant evidence may be excluded where its probative value is substantially outweighed by the danger of undue prejudice); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (trial judge properly limited the defendant's presentation of certain evidence to guard against confusion of the jury).

In State v. King, 422 S.C. 46, 69, 810 S.E.2d 18, 29-30 (2017), the Supreme Court held that the probative value of recorded jail calls were outweighed by their unfair prejudice to the defendant. The calls had the undue tendency to suggest a decision on an improper basis.

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[2] All work is honorable, but the witness simply was not qualified as the court correctly ruled. She nonetheless was able to do the damage with these exhibits and her testimony.

Here, the judge recognized that the text message evidence on its face did not support an argument that appellant or the person messaging was saying that they had killed the decedent, and that they wanted to talk to the person who hired them to kill the decedent so they could collect their money. The document itself does not reveal how it pinpoints appellant as the sender and Graves as the recipient. R. p. *. This was only a legal argument which piled inference upon inference to argue appellant had consummated the "murder for hire," and wanted to be paid.

The jury had earlier heard that Antoine Drake claimed that Graves told him in the strip club that Graves refused to pay Drake the fifteen thousand dollars, and he allegedly, and self-servingly for Drake, said: "Hopkins told me he did it alone." Tr. 280, l. 13 – 281, l. 5. Drake's testimony is as suspect as any witness's testimony could possibly be in a criminal trial. Drake was an admitted liar and scammer who had every reason to implicate appellant in the murder to save himself.

Moreover, the cell phone evidence, State's Exhibits 7 and 8, which went to the jury during their deliberations, are almost incomprehensible, and they invite speculation, without the required requisite expert witness analysis of these records. R. * (State's Exhibits 7-8). Without that expert analysis, the records are not relevant, and any relevance the state can argue that the records had, was substantially outweighed by their unduly prejudicial effect under Rule 403, SCRE, and their tendency to confuse. These evidentiary errors were very prejudicial to appellant in this slim case, and appellant should be granted a new trial.

2.

The court erred by not exercising its discretion to exclude Michael Taylor's testimony which claimed that appellant burned his clothes in a barrel outside Taylor's home on the night of the murder, since Taylor made this claim for the first time on the day of the trial, the defense had no notice of this newly claimed devastating evidence prior to that time -- which violated fundamental fairness since it was "trial by ambush" -- and the court had the inherent authority, and duty, to ensure appellant received a fair trial.

Relevant Facts

As seen, Michael Taylor testified he came home from working at the Waffle House, and he got to his house between 10:15 and 10:30. He saw appellant sitting in his chair. Tr. 400, l. 3 – 401, l. 14. Taylor said he woke up his wife, and he asked her how appellant got in the house. His wife responded, "I don't know. I was asleep. So I came -- I went and had conversation with him. I guess it went over his head a little bit. But other than that, we just had conversations." Tr. 401, ll. 13-23.

Taylor claimed that appellant asked if he could change his clothes, and Taylor told him he could. Taylor then testified that appellant changed clothes and *burned the clothes he had been wearing "in my barrel."* Tr. 404, ll. 9-21. (emphasis added). Defense counsel objected and argued that this burning his clothes claim had never been timely disclosed to him. The judge said he would put his ruling on that objection on the record at a later point. Tr. 404, l. 19 – 405, l. 5.

As seen, Taylor admitted that he talked to the police back in 2014. Taylor told the solicitor he did not tell the police about his burning the clothes allegation during that interview because "I didn't think about it to be honest with you. And it really -- **it really never really**

crossed my mind that it was him. I never would have thought that it was Rohaime until -- until after I made the statement and then I started contemplating things. Because, I'll be honest, I wasn't really myself. You know, I had a little something to drink or whatever. But I know that -- that everything that I'm saying is true. He wasn't with me. He wasn't with me during the day, none of that. He wasn't at home when I came home from work. I go next door an hour and half later, you are in my house. *No, I didn't like that. He never was in my house before that. He never really was my friend.* I only met you through T.J." Tr. 405, l. 12 – 406, l. 2. (emphasis added). In essence, Taylor later decided he thought appellant was guilty so he made this devastatingly prejudicial addition to that interview.

Thus, it was undisputed that the defense was never provided with this extraordinary accusation from Taylor in any of the discovery, and it was sprung on them on the day of trial.

After the testimony of Haley Quam Nelson, the judge noted that defense counsel objected to Taylor's testimony about appellant allegedly burning his clothes due to the lack of any notice. The judge reasoned that defense counsel should not have even objected to Taylor's surprise testimony about appellant allegedly burning his clothes because the solicitor "rightly went to Mr. Lee to give him the same notice she received about the content of that testimony," which was on the day of the trial. The judge said he therefore "did not sustain Mr. Lee's objection." Tr. 474, l. 9 – 475, l. 14.

Discussion

It has been noted, for example that a trial judge has the inherent authority to grant a new trial for any prejudicial error committed during the trial as a matter of fundamental fairness. See Ex Parte Kent, 379 S.C.633, 666 S.E.2d 921 (Ct. App. 2008); Howard v. State Farm Mut. Auto

Ins. Co., 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994). Trial judges have the inherent authority in many respects to ensure that a defendant receives a fair trial.

Another example, it is widely recognized that courts have the inherent authority to punish disobedience and vindicate its authority, and this inherent authority "has been many times decided and may be regarded as settled law." See United States v. Providence Journal Co., 485 U.S. 683, 704-705 (1988). Further, courts are universally acknowledged to be vested with the inherent authority to impose, silence, respect, and decorum in their presence, and submission to their lawful mandates. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998).

Rule 5, SCRCrimP, provides that the court upon a sufficient showing may require the production of any statement of any prospective witness prior to the time such witness testifies. However, it is the practice, as occurred in this case, to disclose such statements in the possession of the prosecution upon request.

Further, Rule 5(c), SCRCrimP, provides that if additional evidence which is subject to discovery or inspection should later be discovered, the party shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

In this case, it is undisputed that the witness, Michael Taylor, chose to claim appellant burned his clothes in a barrel at Taylor's house for the first time at trial. The solicitor apparently notified defense counsel of this devastating claim on the day of trial. However, even if the solicitor made a timely disclosure under Rule 5(c), SCRCrimP, that was not the end of the evidentiary analysis.

As seen above, Taylor's reason for not revealing his claim that appellant burned his clothes in a barrel on the night of the murder was incomprehensible. Again, it appears at some

point Taylor decided he believed appellant was guilty, and that this "burned his clothes" assertion would sway the jury to believe that appellant was guilty also. The judge had the inherent authority to assure appellant received a fair trial, and not a trial by absolute ambush. Ex Parte Kent, 379 S.C.633, 666 S.E.2d 921 (Ct. App. 2008); Howard v. State Farm Mut. Auto Ins. Co., 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994)(The court can even order a new trial given its inherent power to assure a defendant receives a fair trial).

Indeed, on a much broader scale more recently, the Supreme Court in State v. Langford, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012), held "[a] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'" *citing* Williams v. Bordon's Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) (The "adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.")

Once the solicitor chose to allow Taylor to make this extraordinary claim he never revealed before, the judge here abused his discretion under the extraordinarily unusual facts of this case by not sustaining the defense objection, and then ordering the jury to disregard this incompetent evidence. The evidence was incompetent because it was inherently unreliable, and the Rules of Evidence are based on what has proved inherently reliable over the years. Appellant was denied a fair trial in violation of fundamental fairness.

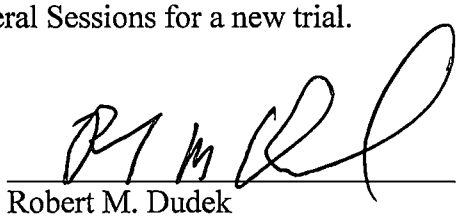
This Court in State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004), noted a new trial may be granted if fundamental fairness was violated because of a misunderstanding of the law. Judges have broad discretion in the admission of evidence and that must include the inherent authority to exclude evidence which by its nature is unreliable and denies a defendant his right to due process and fundamental fairness. The sound discretion of the trial judge to

exclude such evidence should be beyond question. See State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000).

The trial judge, respectfully, in this case reasoned that because the solicitor disclosed the surprising explosive evidence, which undisputedly was devastatingly prejudicial, to the defense when she discovered it on the day of trial that it was admissible. The judge said he therefore refused to sustain the defense objection. That, under the exceptional actual circumstances of this case, constituted an abuse of discretion for failing to exercise available discretionary authority. Defense counsel correctly objected to the fundamental unfairness of this lack of notice. The judge had broad discretion to exclude this evidence if he found it a discovery violation that violated appellant's right to a fair trial, and the defense's right to expect fundamental fairness from the court. Appellant respectfully should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Jasper County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROHAIME JAMAR HOPKINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Rohaime Jamar Hopkins, #235915, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of June, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of June, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.