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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
The Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

Respondent,

v.

ANTWON D. GOODWIN,

Appellant.

Appellate Case No. 2018-000144

INITIAL BRIEF OF RESPONDENT

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II. Whether the trial court erred in denying defense Counsel's motion to be relieved as Counsel due to a conflict of interest?

III. Whether the trial court erred in admitting evidence that the Appellant's trial attorney previously represented one of the State's witnesses, Darrell Royal?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The appeal is untimely and must be dismissed.

II. Counsel did not move to be relieved as counsel, instead moving to suppress the testimony of a witness, or, in the alternative, moving for a continuance, so the issue is not preserved for appeal. Even so, Goodwin did not move to have Counsel relieved and waived any potential conflict of interest.

III. The evidence of Counsel's representation of Royal was not prejudicial because the credibility of the witness was compromised when he claimed he lied to investigators and then recanted on the stand. Any error in the admission of the testimony was harmless.

STATEMENT OF THE CASE

In December of 2002, a Charleston County Grand Jury indicted Appellant, Antwon Goodwin, for murder. (Indictments.) Appellant proceeded to a jury trial on January 6, 2003, before the Honorable Paul M. Burch. (Transcript, January 6, 2003 ("T1").) Appellant was represented by James W. Smiley IV, Esquire. (T1. p. 1.) Assistant Solicitors Shaun Kent and Bentley Price, of the Ninth Circuit Solicitor's Office, represented the State. (T1. p. 1.)

The jury found Appellant guilty of murder. (T1. p. 678, lines 13-20.) Judge Burch sentenced Appellant to life imprisonment. (T1. p. 690, lines 4-13.) Counsel for Appellant asked to reserve post-trial motions, and Judge Burch agreed and indicated he would hear the motions "two weeks from now." (T1. p. 690, lines 14-19.)

On August 31, 2005, Applicant filed an application for post-conviction relief in the Charleston County court of common pleas. The PCR court held a hearing on August 20, 2007. That application was dismissed without prejudice by order of the Honorable R. Markley Dennis on September 26, 2007. (PCR Order of Dismissal.) In the Order of Dismissal, Judge Dennis wrote, "The parties agreed the time for the Applicant's direct appeal from the murder conviction and sentence will not begin to run until the motions are heard and ruled upon." The Order then cited to Rule 203(b)(2) of the South Carolina Appellate Court Rules. (PCR Order of Dismissal, p. 2.) The Order further said "Because the timely post-trial motions are still pending regarding the murder conviction and/or sentence, jurisdiction of the matter is in the Charleston County Court of General Sessions, and thereafter, with the appellate courts if the Applicant elects to pursue the appeal he indicates he wishes to pursue after the post-trial motions are ruled upon." (PCR Order of Dismissal, p. 2.)

On February 26, 2014, Tricia A. Blanchette, Esquire, filed a motion requesting to be

substituted as counsel for Appellant. (Transcript, August 31, 2017 ("T2"), p. 10, lines 5-11.) On March 5, 2014, the Honorable Jeffrey Young signed an order substituting counsel and directing the motions be filed in accordance with the PCR order of dismissal. (T2, p. 10, lines 12-17.)

By motion dated March 27, 2017, Appellant moved for a new trial pursuant to Rule 29(a) and (b), of the South Carolina Rules of Criminal Procedure. (Motion for New Trial.) On August 31, 2017, Judge Burch held a hearing on Appellant's motion. (T2, p. 1.) Deputy Solicitor D. Bruce Durant represented the State, and Tricia A. Blanchette, Esquire, represented Appellant (T2. p. 1.) By order filed January 19, 2018, Judge Burch denied Appellant's Rule 29(a) motion as untimely. Judge Burch also denied the motion on the merits as an additional sustaining ground. (Order Denying Motion, p. 3.) As to Appellant's Rule 29(b) motion, Judge Burch denied the motion on the merits. (Order Denying Motion, pp. 4-5.)

Appellant filed a notice of appeal, and Jeremy A. Thompson, Esquire, and Tricia A. Blanchette, Esquire, filed the Initial Brief of Appellant on October 5, 2018. Along with this Brief of Respondent, Respondent also submits its Motion to Dismiss the appeal as untimely.

STATEMENT OF FACTS

On the afternoon of December 12, 2000, Freddie Green picked up his friend Edwin Middleton in his car, and the men rode around the west side of Charleston together smoking marijuana. (T1. p. 251, line 8 – p. 253, line 18.) Green dropped Middleton off, and the two parted ways until a few hours later, when Green asked him if he wanted to get high again. (T1. p. 252, line 22 – p. 253, line 5.) Green said he wanted to buy marijuana from someone on the east side of Charleston, so the men rode together toward George's Sweet Shop, a local gathering spot where people drank and played pool. (T1. p. 125, line 3 – p. 135, line 22; p. 253, line 6 – p. 254, line 2.) Green left the car with fifteen dollars to buy drugs. T1. p. 254, lines 4-11.) A crowd of people congregated outside George's that night. (T1. p. 137, lines 11-23.) Some in the crowd were from the east side and others were from the west side. (T1. p. 277, lines 2-12.) Antwon Goodwin, who had been talking outside George's, walked into the business. Freddie Green began to walk in behind him. (T1. p. 278, lines 3-22.) Green approached the door, and then turned around to walk back out. (T1. p. 279, lines 14-23.) Goodwin followed Green out of George's, raised his hand, pointed a gun at the back of Green's head, and shot him. (T1. p. 279, line 14 – p. 280, line 20.) The crowd outside scattered when the shot was fired. (T1. p. 281, lines 1-4.)

Witness Darrell Royal gave a statement to law enforcement on December 31, 2002. (T1. p. 379, lines 4-7.) In his statement, Royal said he was selling drugs outside of George's on the night of the murder. (T1. p. 387, lines 11-19.) Royal also said he was intoxicated and had taken two ecstasy pills. (T1. p. 388, lines 1-11.) Royal said he heard a shot between 9:30 pm and 10:30 pm and learned Freddie Green had been killed. (T1. p. 388, lines 1-7.) Royal said in 2001, he and Goodwin had a discussion about loyalty and not talking to police if anyone asked them about the murder. (T1. p. 401, line3 9-13.) In his statement, Royal said Goodwin told him before the

murder that if Freddie Green or his associates, the Frazier boys, tried to "cross me or try to take me out ... I kill them first." (T1. p. 401, lines 15-23.) Royal said Goodwin told him "if anybody cross him in our street family he going to kill them and they family." (T1. p. 401, lines 14-17.) Royal said Goodwin moved to another part of the city to get away from the Frazier boys, but they found out where he was living. (T1. p. 406, lines 2-6.)

At trial, Royal denied giving parts of the statement to police. (T1. p. 406, line 22- p. 407, line 1.) On cross-examination, he explained that law enforcement approached him on December 31, 2002, and told him other people heard Royal admit to shooting Freddie Green. (T1. p. 419, lines 15-23.) Royal said he told them about Goodwin because he feared he would be charged with the murder. (T1. p. 419, line 24 – p. 420, line 5.)

Maurice Fields, testified Goodwin told him he and Freddie Green had a discussion, and then when Green turned to walk off, Goodwin "bust him in the head." (T1. p. 442, line 24 – p. 447, line 18.) Fields said Goodwin described how Green approached him at George's Sweet Shop, and the men discussed "the situation about someone looking to kill him." (T1. p. 448, line 24 – p. 449, line 3.) Fields again said Goodwin told him that when Green turned to walk away, he "bust him in the head." (T1. p. 449, lines 3-4.) Fields acknowledged he was testifying against Goodwin pursuant to a plea deal. (T1. p 455, lines 13-25.)

Lastly, Freddie Green's mother, Ernestine Green, testified she received a phone call the night of his murder from Goodwin. (T1. p. 524, line 16 – p. 529, line 14.) Goodwin told Ms. Green he was present when Green was shot, but he did not commit the crime. (T1. p. 529, lines 15-21.) Goodwin said he was the last person with Freddie Green the night of his death. (T1. p. 533, lines 5-15.)

Antwon Goodwin did not testify at his trial. (T1. p. 574, lines 21-25.)

ARGUMENT

I. The appeal is untimely and must be dismissed.

Goodwin's post-trial motions were not timely filed during the ten day period following the conclusion of his trial, thereby depriving the appellate court of jurisdiction to hear the appeal when Goodwin also failed to serve and file a timely notice of appeal. Despite any attempt of the circuit court, Counsel for Goodwin, or the State to extend the time to file the motions, appellate jurisdiction is conferred by operation of law, and cannot be waived by agreement of the parties. Even assuming the State were permitted to agree in the 2005 PCR that the post-trial motions were still pending, the motions for a new trial were still subsequently untimely filed. Counsel delayed filing the post-trial motions for another three years after the substitution of counsel was granted, despite being directed to proceed with the filings in accordance with the previously dismissed application for post-conviction relief. Because the post-trial motions were untimely, Rule 29 of the South Carolina Rules of Criminal Procedure does not apply to extend the time for service and filing Goodwin's notice of appeal pursuant to South Carolina Appellate Court Rule 203. Consequently, this appeal is untimely and must be dismissed.

Standard of Review

A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion. *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983); *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). On review, the appellate court cannot make its own findings of fact, and the deferential standard of review requires the Court to affirm the trial court if reasonably supported by the evidence. *State v. Mercer*, 381 S.C. 149, 166–67, 672 S.E.2d 556, 565 (2009).

Moreover, the trial court is tasked with assessing the new evidence in a motion for a new trial. *State v. Deese*, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976). In the post-trial setting, appellate courts recognize the gatekeeping role of the trial court in making a credibility assessment. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial). Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial. *State v. Mayfield*, 235 S.C. 11, 35, 109 S.E.2d 716, 729 (1959).

How the Issue Arose: The Delay in Filing the Post-Trial Motions

Immediately following sentencing by Judge Burch on January 9, 2003, counsel for Goodwin told the court he had several motions, although he did not specify the nature of the motions, and asked, "Can I reserve that until later, Your Honor?" (T1. p. 690, lines 14-16.) Judge Burch responded, "Certainly. I will be back here two weeks from now." (T1 p. 690, lines 17-18.) No post-trial motions were filed within the weeks following the trial.

On August 31, 2005, Goodwin filed an application for post-conviction relief alleging ineffective assistance of counsel for failure to file an appeal. (PCR Order of Dismissal, p. 1.) According to the Order of Dismissal,[1] at the PCR evidentiary hearing held August 20, 2007, the parties agreed the post-trial motions were still pending. The parties also agreed the time for Goodwin's direct appeal would not begin to run until the motions were heard and ruled upon, in accordance with South Carolina Appellate Court Rule 203(b)(2) ("the time for appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or

[1] Respondent has confirmed with Court Administration a transcript of the PCR evidentiary hearing is no longer available.

denying" timely post-trial motions). (PCR Order of Dismissal, p. 2.) By order of dismissal filed September 26, 2007, the PCR action was dismissed without prejudice to allow Goodwin to pursue his post-trial motion and subsequent appeal. (PCR Order of Dismissal, p. 2.)

In 2011, Goodwin contacted Tricia Blanchette in an attempt to secure representation for his appeal. (T2 p. 9, lines 9-11.) Ms. Blanchette contacted Counsel James Smiley ("Counsel") to inquire about the status of the post-trial motions and to obtain permission to speak to Goodwin. Mr. Smiley informed Ms. Blanchette he would have the motions heard so that Ms. Blanchette could assume representation for the appeal. (T2 p. 9, lines 12-18.) After that discussion, Ms. Blanchette was unsuccessful in her attempts to reach Mr. Smiley, and the post-trial motions were not heard. (T2 p. 9, lines 18-20.)

On February 26, 2014, Ms. Blanchette filed a motion for substitution of counsel. (T2 p. 10, lines 5-7.) On March 5, 2014, Judge Jeffrey Young signed an order allowing the substitution of counsel and directing the post-trial motions to be heard in accordance with the PCR order of dismissal. (T2 p. 10, lines 12-17.) Ms. Blanchette "held off on filing a motion because [they] had become aware of some potential newly discovered evidence." (T2 p. 10, lines 18-20.) Ms. Blanchette then hired an investigator to investigate Goodwin's case.

On March 27, 2017, Ms. Blanchette filed the post-trial motions asking to renew all matters preserved at trial and asking for a new trial based on after discovered evidence. (Rule 29 Motion.) The motions were heard in a hearing before Judge Burch on August 31, 2017. (T2.) The State argued the motions were untimely, given the PCR was heard in 2007, and then Ms. Blanchette assumed representation in 2014 and was directed to file the post-trial motions in the order substituting counsel. (T2 p. 15, lines 4-24.) Ms. Blanchette then presented testimony in

support of the newly discovered evidence argument from the investigator, Maurice Fields, and Antwon Goodwin. (T2 p. 2.)

Peter Skidmore testified he was hired in 2014 to assist in the investigation of Goodwin's case. (T2 p. 16, lines 12-24.) Skidmore said he investigated the witnesses who testified in court, and he first spoke to Edwin Middleton. (T2 p. 17, lines 3-25.) Middleton directed Skidmore to Maurice Fields. (T2 p. 18, lines 1-22.) After talking to Fields, Skidmore prepared an affidavit for Fields to sign and then attempted to get Middleton to cooperate with Goodwin's defense. (T2 p. 19, line 9 – p. 20, line 4.) Skidmore was unable to obtain an affidavit from Middleton. (T2 p. 20, lines 5-8.)

Maurice Fields testified at the hearing that his testimony at trial, in which he said Goodwin admitting busting Green in the head, was not true. (T2 p. 24, lines 4-23.) Fields said law enforcement told him they would move his family to another location if he testified against Goodwin, but he also acknowledged there were no threats made against him if he did not testify. (T2 p. 25, lines 10-22.) When asked why he did not come forward sooner to recant his testimony, Fields said he had no reason. (T2 p. 26, lines 6-9.) Fields admitted he was taking OxyContin and Neurontin at the time of his testimony at trial, and also at the time of the motion hearing, but claimed his dosage at trial was higher. (T2 p. 27, line 22 – p. 28, line 19.) Fields also denied he received a downward departure from his sentence on federal drug charges in exchange for his testimony before a federal grand jury. (T2 p. 39, lines 3-21.) After a contentious cross-examination, Fields also suggested the solicitor made threatening sexual comments to him when the solicitor tried to talk to him about his testimony before the hearing. (T2 p. 41, lines 5-19.) Judge Burch dismissed Fields by telling him, "So I would suggest, if counsel is through with

you, that it might be in your best interest that you hit the door and go back to Charleston or wherever you live." (T2 p. 42, lines 8-11.)

Antwon Goodwin testified about the procedural history of the case, saying he filed his PCR application because he believed his post-trial motions had been heard. (T2 p.43, line 1 – p. 44, line 15.) Goodwin said he attempted to file the motions on his own behalf in 2005, but the documents were returned to him. (T2 p. 45, lines 3-22.) Goodwin said from 2007 until 2011, he was writing letters and calling Counsel in an effort to reach him. (T2 p. 47, lines 4-15.) Goodwin said he retained Ms. Blanchette to represent him so he could move forward with his appeal. (T2 p. 48, lines 8-18.) Goodwin said he knew Maurice Fields was lying during his testimony at his trial because Goodwin never told Fields he shot Freddie Green. (T2 p. 52, lines 4-19.) Goodwin said he did not have time before trial to investigate Maurice Fields and did not know what his testimony would be. (T2 p. 53, lines 5-22.)

In an order dated December 4, 2017, Judge Burch denied the post-trial motions as untimely. Specifically, with respect to the Rule 29(a) motion, Judge Burch found the following:

> Although I extended this time by allowing the Defendant to make his post-trial motions when I returned to Charleston two weeks after the Defendant's conviction, no post-trial motions were filed or heard. Even assuming this time was extended again by the Court when the Defendant's PCR was dismissed in 2007 and once again when Ms. Blanchette was substituted as Defendant's counsel in March of 2014, the motion for a new trial pursuant to Rule 29(a), SCRCrimP, was not filed until March 29, 2017, some three years after Ms. Blanchette became involved in the case. There has been no satisfactory explanation for the delay of over 14 years in filing post-trial motions pursuant to Rule 29(a). I find the delay is unreasonable and the relief requested pursuant to Rule 29(a), SCRCrimP, is time barred.

(Order of Dismissal, p. 3.) Judge Burch also reviewed the trial transcript and found no error entitling Goodwin to a new trial.

Judge Burch then addressed the Rule 29(b) motion, finding the testimony of Maurice Fields not sufficient to warrant a new trial pursuant to the *State v. Spann*, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999). (Order of Dismissal, p. 4.) The judge noted Fields had previously testified in two court proceedings that Goodwin confessed to shooting the victim. Even if the court were to grant a new trial, Fields' previous testimony would be used to impeach his testimony at a new trial. (Order of Dismissal, p. 4.) Judge Burch also made a credibility finding about Maurice Fields, concluding "his testimony lacks any scintilla of credibility." (Order of Dismissal, p. 5.) The judge found Fields disrespectful, argumentative, combative, and non-responsive to questions, even denying making statements at trial in spite of the transcript which clearly showed he did. (Order of Dismissal, p. 5.) "In short, the Court did not believe a word of his testimony." (Order of Dismissal, p. 5.)

Rule 29(a) Motion

Judge Burch ruled Goodwin's request for a new trial pursuant to Rule 29(a), SCRCrimP, was untimely. (Rule 29 Motions Order p. 3.) In support of his finding, Judge Burch noted the post-trial motion was not properly filed in the two-week period following the conclusion of Goodwin's trial, nor was it filed for over three years following the order in which Ms. Blanchette was substituted as counsel. Finding the delay unreasonable, Judge Burch denied the motion.

As Appellant argues in his brief, "It is critical for the motion to have been made timely because if the motion was filed in an untimely manner, then the Appellant's appeal from his underlying conviction and sentence is also untimely." (IBOA, p. 10.) Goodwin argues the trial court reserved its right "to hear a motion that had already been made." (IBOA, p. 11.) Respondent disagrees.

The State does not contend a judge would lack the authority to hear motions at a later

time when the motions are properly filed within the ten-day period following the conclusion of the trial. Nor does the State argue the issue turns on whether Judge Burch had to authority to extend the time beyond the ten day period, although the State does not believe a circuit court judge may extend the time limits imposed by a court rule.[2] Instead, the State agrees with Judge Burch that the motions were not made of filed at all in the post-trial period, despite counsel's claim he would do so. Regardless of Judge Burch's statement in his order that he extended the time to file the motion, he found the motion untimely. That finding is a finding of fact, not a conclusion of law about his authority to do so. Because Judge Burch's finding is supported by the record, he did not abuse his discretion in making this finding on the Rule 29(a) motion.

Because the Rule 29(a) motion is untimely, the instant appeal is untimely and must be dismissed. *See* Rule 203(b)(2), SCACR. ("When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion.") "Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Mears v. Mears*, 287

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[2] *See, e.g., Citizens & S. Nat. Bank of S.C. v. Easton*, 310 S.C. 458, 460, 427 S.E.2d 640, 641 (1993)("Here, the trial court was without authority to order a new trial beyond 10 days after entry of judgment, regardless of the pendency of the Rule 50(b) motion"); *see also State v. Campbell*, 376 S.C. 212, 215–16, 656 S.E.2d 371, 373 (2008) (holding a plea judge was without authority to hear a motion to vacate the sentence when the State did not timely file a motion following the imposition of the sentence). The Note to the 1991 Amendment to Rule 29, SCRCrimP, says the purpose of the language was to change "prior practice by allowing the parties up to ten (10) days to file post trial motions and by providing the circuit judge jurisdiction to hear and determine these motions despite the end of the term." Thus, though the term of court expires, a judge has authority to hear matters on the case as long as the motions are filed within ten days. Additionally, the instant case is distinguishable from the case cited by Appellant, *Baird Pacific West v. Blue Water Sunset Park Inc.*, 2004-UP-011, in which the court found the reservation of the issue of attorney's fees sufficiently extended the court's authority to hear the motion. In the instant case, there was no elaboration on any of the post-trial motions that would be filed, only a vague reference to "several motions" of an unspecified nature. (T1. p. 690, lines 14-15.)

S.C. 168, 169, 337 S.E.2d 206, 207 (1985); *State v. Brown*, 344 S.C. 302, 305, 543 S.E.2d 568, 570 (Ct. App. 2001), overruled on other grounds by *State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011).

Finally, to the extent Goodwin suggests he is entitled to a belated appeal because of Counsel's failure to file the post-trial motion, Respondent submits this consideration should not be made without a post-conviction evidentiary hearing in which Counsel offers some testimony concerning the discussions about the post-trial motions or Goodwin's desire to appeal. *See State v. Felder*, 290 S.C. 521, 522–23, 351 S.E.2d 852, 852 (1986) (holding the Court would not consider an ineffective assistance of counsel issue on appeal from a conviction and finding the claim should be brought in a proceeding for post-conviction relief.) Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal, and in the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citations omitted). The record before this Court is devoid of any testimony of Counsel Jim Smiley. During the motions hearing in 2017, Goodwin offered no testimony concerning his discussion with Smiley about his waiver of or his desire to pursue an appeal immediately following his conviction. (T2 pp. 43- 58.)

Rule 29(b) Motion

Judge Burch also denied Goodwin's motion for a new trial pursuant to Rule 29(b) because, though timely, the new testimony would not have changed the outcome of the case, was not material, was merely impeaching of previous testimony, and lacked any credibility. (Rule 29 Motions Order pp. 4-5.) Appellant does not challenge the court's ruling on the merits, so this issue is not before the Court.

DISCUSSION OF ISSUES TWO AND THREE, SHOULD THE COURT FIND THE APPEAL TIMELY FOR CONSIDERATION.

II. Counsel did not move to be relieved as counsel, instead moving to suppress the testimony of a witness, or, in the alternative, moving for a continuance, so the issue is not preserved for appeal. Even so, Goodwin did not move to have Counsel relieved and waived any potential conflict of interest.

This issue is not preserved for review because no motion was made to relieve Counsel – it was only offered as an alternative remedy in the event Royal's testimony was not excluded and if Goodwin elected not to waive any conflict of interest. The motion was not ruled upon by the trial court because Goodwin waived any conflict of interest. Even on the merits, Goodwin cannot show an actual conflict of interest existed because Royal divulged his previous role as a suspect in the crime. Counsel was not hampered by any attorney client privilege when he cross-examined Royal on his statement.

Standard of Review

Although the issue is not preserved, an appellate court must abide by the abuse of discretion standard on the merits of the underlying claim. *See State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) (A motion to relieve counsel is addressed to the discretion of the trial court and will not be disturbed absent an abuse of discretion); *State v. Graddick*, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). The movant bears the burden to show satisfactory cause for removal. *Childers*, 373 S.C. at 372, 645 S.E.2d at 235 (citing *State v. Gregory*, 364 S.C.150, 152, 612 S.E.2d 449, 450 (2005); *State v. Graddick*, 345 S.C.383, 385, 548 S.E.2d 210, 211 (2001)).

How the Issue Arose at Trial: Goodwin's Waiver of Conflict

After the jury was seated, defense counsel Jim Smiley moved to exclude the testimony of witness Darrell Royal, who was a former client of his. (T1. p. 60, lines 2-6.) If the court were not inclined to grant the motion, Counsel asked for a continuance to determine whether a conflict of interest existed from his representation of Goodwin and his prior representation of Royal. (T1. p. 60, lines 6-10.) Significantly, Counsel did not move to be relieved as counsel, nor did Goodwin make the request. Counsel explained Royal was initially a suspect in the case, but then law enforcement never followed up on that lead. (T1. p. 60, lines 11-14.) Counsel said in his review of the discovery, there was nothing to indicate Royal would take the witness stand. (T1. p. 60, lines 15-23.) Counsel said he represented Royal six months previously and had represented him multiple times in the past. Counsel said he had spoken with Royal specifically about the murder of Freddie Green. (T1. p. 61, lines 1-4.)

Counsel said he learned that Royal gave a statement the week before that inculpated Goodwin. (T1. p. 61, lines 10-15.) Counsel said the solicitor informed him the day before trial the State would be calling Royal. (T1. p. 61, lines 16-22.) Counsel said he still maintained an attorney-client relationship with Royal and asked that his testimony be excluded. (T1. p. 62, lines 1-13.) In the alternative, Counsel asked the court to grant a continuance so he could investigate whether a conflict of interest would prevent him from zealously representing Goodwin while protecting his attorney-client relationship with Royal. (T1. p. 62, lines 14-19.)

Judge Burch noted his primary concern was the interests of Goodwin, then Counsel, and then those of Royal. (T1. p. 62, lines 20-25.) The court instructed Counsel to consult with Royal

and determine if Counsel's cross examination of him would present any problems. (T1. p. 63, line 2 – p. 64, line 17.)

The solicitor told the court Royal said he contacted Counsel and told Smiley his name had been mentioned in the investigation of Green's murder, and Royal was concerned about retaliation from Green's family. (T1. p. 64, lines 18-25.) Royal said Smiley called the Green family and told them to leave Royal alone. (T1. p. 65, lines 1-7.) Again, the court asked Counsel, Goodwin, and the solicitor to meet with Royal to determine whether a potential for a conflict would arise. (T1. p. 65, line 25 –p. 66, line 3.)

The following day, after the consultation, defense Counsel attempted to summarize the situation before the court:

> The situation begins this way, is that Darrell Royal, who is a potential State's witness in the case, it became aware to me that he is an inculpatory witness on Sunday, January the 5th, at about 2:30. So this isn't a long-standing problem that we waited until court to take care of. It came up as the trial was being called.
>
> I represent Mr. Royal, represented him in the past. In connection with this case, Darrell Royal was a suspect in the beginning. Darrell Royal had communications with me as his attorney. Those are attorney – client conversations. I don't know that in any form or fashion that that attorney – client conversation can be used in this courtroom but it does exist.
>
> Mr. Goodwin, I have represented since he was arrested in this case. This case – the incident took place on December 12, 2000, and he was arrested in August 2002. I receive the initial discovery in this case on December 12, 2002. Then, as I said, the evidence concerning the conflict in just the last forty-eight hours.
>
> I have explained to Mr. Goodwin his 6th Amendment rights, his 5th Amendment rights. I've explained to him what "attorney-client privilege" means also, Your Honor.
>
> And I have explained to him that my job is to zealously represent him, and I've explained how those are competing interests.
>
> **I asked my client, Mr. Goodwin, last night to waive any potential conflict.** Because I didn't know if it would or could come up any way, in any situation, whether there were other attorneys sitting here are not. He certainly knows that I'm prepared and want to represent him.
>
> He is indigent client, a client that I took pro bono. I think that's important in this case. I am not a retained attorney. If I was not his attorney, he would rely

on the very qualified Public Defender's office for Charleston County or an appointed attorney, whatever the case may be.

After advising him of his rights, all of his rights, his options – and his options, as I see them, are two:

That is, to waive any potential conflict that may exist from his position; or To not waive them and asked that I be relieved.

He doesn't want to do either of those. He says that he wishes that I continue to be his attorney, but he doesn't want to waive any of his rights and a trial is important to his life is this.

I am in a precarious position, Your Honor, so I did not – I did not go any further than that. I want to tell you that I don't think that he's playing any games with anybody. I am clear on that. He's in a difficult position, being advised by me and a very difficult position. So any guidance that this court may be able to help us with, we would be inclined to – at this point, since he has not signed that, I would ask, as I did yesterday, first that the testimony of Darrell Royal be excluded as hearsay evidence that would be brought in through a party opponent admission – or under *Lyle*, if it gets past that stage, Your Honor.

In the alternative, I would ask that I be relieved. I don't know any other way to protect Mr. Goodwin's position and my position.

(T1. p. 83, line 20 – p. 86, line 18 (emphasis added).)

Judge Burch denied Counsel's motion to exclude the testimony of Royal, saying he would consider any objectionable portions of Royal's testimony when he testified. (T1. p. 86, lines 19-23.) The judge then inquired of Goodwin whether he understood the situation as described by Counsel, and Goodwin said he did. (T1. p. 86, line 23 – p. 87, line 2.)

The judge then noted that Counsel was still bound by his attorney client privilege to Royal, even if he were relieved, so Counsel could not release any information about Royal to another attorney representing Goodwin. (T1. p. 87, lines 7-17.) The court then asked Goodwin whether, knowing the potential difficulty his attorney faced, he still wished to go forward with Mr. Smiley as his attorney. (T1. p. 88, lines 4-15.) Goodwin said, "I do want him to remain my attorney but I would not like to waive my rights." (T1. p. 88, lines 17-19.) The judge accepted his waiver, saying, "That's fine. That's all I need to hear." (T1. p. 88, lines 20-21.)

The State asked to be heard, arguing there was no conflict and that the burden to prove a conflict was on the defendant. (T1. p. 89, lines 13-22.) The State went on to argue Counsel should have known about a possible conflict two years ago when Royal contacted him about being suspected of the murder originally. (T1. p. 89, line 23 – p. 90, line 8.) The solicitor argued Counsel had to show more than just the possibility of a conflict, and "that's just not enough." (T1. p. 90, lines 9-19.)

The trial court said Counsel had proceeded as he should have pursuant to the Code of Ethics by notifying his client and the court of a possible conflict. The judge found the client understood that position, and still wished for Counsel to continue in his representation, so he intended to abide by Goodwin's wishes. (T1. p. 90, line 20 – p. 91, line 6.)

When Counsel later renewed his objection, he did so during the testimony of Royal, in which he appeared to refer to an objection to the line of questioning, not to an objection to his continuing representation of Goodwin. (T1. p. 410, lines 10-12; p. 423, lines 11-14.)

Discussion

The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691(2003); *State v. Lee*, 350 S.C. 125, 564 S.E.2d 372 (Ct.App.2002). The courts have "consistently refused to apply the plain error rule." *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). "It is the responsibility of counsel to preserve issues for appellate review." *Id.* The court has recognized some exceptions to the issue preservation rule, such as a claim of subject matter jurisdiction, or when the objection would be futile, of when the interests of minors or incompetent defendants are involved. *See Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998) (addressing subject matter jurisdiction); *State v. Higgenbottom*,

344 S.C. 11, 542 S.E.2d 718 (2001) (addressing the futility doctrine); *Caughman v. Cau*ghman, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) (holding that "the duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review.")

None of the exceptions enumerated by the courts apply in the instant case. Counsel only posited the motion to be relieved as an alternative solution in the event Goodwin did not waive any conflict of interest. Counsel also informed the court he explained the potential conflict to Goodwin and asked him to waive the conflict before the trial court. In inquiring of Goodwin his wishes to retain Counsel, the trial court offered to Counsel the specific remedy he sought – a knowing waiver of the conflict. By his own representations to the court, Counsel had no need to ask to be relieved, and he did not do so. Goodwin cannot now challenge a motion was not made, and certainly not ruled upon by the trial court, below.

Even on the merits of the claim, Goodwin cannot show he was entitled to have Counsel relieved for a potential conflict of interest. The Sixth Amendment's protection to a criminal defendant of the right to effective assistance of counsel includes a right to counsel "unhindered by a conflict of interest." *Cuyler v. Sullivan*, 446 U.S. 335, 345–50, 355 (1980) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5, (1978)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *State v Gregory*, 364 S.C. 152, 612 S.E.2d 450 (citing *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993)). However, a defendant need not demonstrate prejudice if there is an actual conflict of interest. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) (citing *Cuyler*, 446 U.S. at 348-350). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001).

In *Duncan v. State*, the South Carolina Supreme Court set forth the following test to determine when an actual conflict of interest occurs:

> [W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.

Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (citing *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5th Cir. 1979)). In *Duncan*, an appeal from the denial of a PCR action, Duncan asserted the attorneys within the public defender office who represented him acted under a conflict of interest resulting in a denial of his sixth amendment right to counsel because that office also represented Leroy Davis, a witness who testified against him. *Duncan,* 281 S.C. at438, 315 S.E.2d at 811. In its opinion, the Supreme Court wrote:

> This is a case of concurrent representation. The Public Defender's Office represented both Duncan and Leroy Davis, a witness against Duncan. Steve Henry, an Assistant Public Defender, made a conscious decision not to reveal the prior inconsistent statement of Davis to Duncan or his attorney. Henry, representing Davis on an unrelated murder charge, felt he had an ethical duty not to reveal the statement. Thus, Henry states that he acted under what he perceived to be a conflict of interest.

Id. However, the *Duncan* Court found a conclusory statement of a perceived conflict of interest is insufficient in cases of concurrent representation at public defender's offices and there must be some evidence in the record to establish an actual conflict of interest. *Duncan,* 281 S.C. at 438, 315 S.E.2d at 811. The Court found Duncan failed to show an actual conflict of interest existed from this dual representation of a defendant and witness by the public defender's office. *Id.*

In the case before the Court, Goodwin has not shown an actual conflict of interest existed, even if he had made the motion to relieve counsel. First, Counsel did not represent Royal on the charge at the time of trial, so there was no concurrent representation. (T1. p. 373, lines 2-3.) In fact, the nature of the solicitor's questions to Royal, in which he questioned whether Royal changed his testimony after his meeting with Counsel, suggests Counsel did not represent Royal at that time. (T1. p. 410, line 15 – p. 413, line 7.) Royal's recanting of his statement was not in his best interest and had Counsel represented him, he would not have advised Royal to recant.

Second, Goodwin's interests were not adverse to Royal's because Royal explained why he recanted his statement to law enforcement. Goodwin argues Counsel was prohibited from zealously representing him because Counsel was required to maintain his attorney-client privilege with Royal and could not question Royal about his role as a suspect earlier in the case. (IBOA p. 17.) However, Royal himself provided that information to the jury when he testified on direct examination he was in prison at the time of the interview, and he thought he was going to be charged and prosecuted for the murder. According to Royal's testimony, he gave the statement implicating Goodwin because he "had to go with the plan." (T1. p. 369, lines 13-24.) By the time Counsel began his cross-examination, the jury was aware Royal had initially given a statement to police implicating Goodwin so he could save himself, and then later recanted that statement on the stand. Counsel could have pursued that line of questioning once Royal introduced it, but may have elected[3] not to because Royal's testimony on the stand was favorable to his client. Moreover, Goodwin has not specified any other privileged information that Counsel was aware of, but precluded from using to Goodwin's advantage. Goodwin cannot show Counsel

[3] Counsel's strategic reasons for not questioning Royal further on this issue are not known and would more properly be determined in a collateral evidentiary hearing. *See Felder*, 290 S.C. 521, 522–23, 351 S.E.2d 852, 852.

owed a duty to Royal or that their privileged communications in the past created an adverse interest to Goodwin.

Lastly, as the record indicates, Goodwin waived any conflict of interest. Counsel expressly informed the court he asked Goodwin "to waive any potential conflict," after explaining to Goodwin his 5th and 6th Amendment rights, attorney-client privilege, and his duty to zealously represent Goodwin. (T1. p. 84, line 11 – p. 85, line 6.) Counsel told the court Goodwin understood Counsel was fully prepared and wanted to represent him. (T1. p. 85, lines 4-6.)

To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." *See Thomas v. State*, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (citing *United States v. Swartz*, 975 F.2d 1042, 1048–49 (4th Cir.1992). Counsel was effusive in his declarations to the court on his conversations with Goodwin about the matter. The court asked Goodwin what his wishes were, and Goodwin told the court he wanted to keep Counsel as his attorney. (T1. p. 88, lines 7-15.) Goodwin answered he wanted to retain his attorney but did not want to waive his rights. Goodwin was faced with the same decision of the trial court, and he elected to retain his lawyer, thereby waiving any conflict. Goodwin never expressed any dissatisfaction with Counsel, nor asserted **his** right to a conflict-free counsel when the trial court could have entertained the motion. Only on appeal has Goodwin changed his mind. Goodwin cannot both retain his attorney and reserve a waiver issue for appeal. Further, Counsel's discomfort with his situation at trial does not equate to Goodwin's desire to remove him from representation. As our courts have said, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993). The purpose of the rules are "to regulate and guide the legal

profession by defining proper ethical conduct" *Id.* at 360, 426 S.E.2d at 795. Without showing how his right to a fair trial was violated, Goodwin is not entitled to relief based upon an allegation of a violation of the Rules of Professional Conduct.

In sum, the issue is not preserved because a motion to relieve counsel was not properly raised to, nor ruled upon by, the trial court. Goodwin cannot show Counsel suffered under an actual conflict of interest, and even if Counsel were conflicted, Goodwin made a knowing waiver. The trial court committed no abuse of discretion on the issue.

III. The evidence of Counsel's representation of Royal was not prejudicial because the credibility of the witness was compromised when he claimed he lied to investigators and then recanted on the stand. Any error in the admission of the testimony was harmless.

Darrel Royal was a difficult witness for both the State and the defense. Royal gave conflicting statements to law enforcement and at trial, so his credibility was questionable before the jury. Royal's motivation to recant his statement to law enforcement, if relevant, was admissible as evidence of bias pursuant to Rule 608(c), SCRE. However, because Royal's inconsistent testimony provided minimal value to either party, any error in the admission of the witness bias evidence was harmless beyond a reasonable doubt.

Standard of Review

In criminal cases, this Court only reviews errors of law. *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (citing *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Further, the decision to exclude evidence under Rule 403 should not be reversed simply

because an appellate court believes it would have decided the matter otherwise. *State v. Pipkin*, 359 S.C. 322, 327, 597 S.E.2d 831, 834 (Ct. App. 2004).

How the Issue Arose: The Testimony of Darrell Royal

When Darrell Royal took the stand, he was wearing his Department of Corrections uniform. (T1. p. 363, line 14 – p. 364, line 24.) The jury heard Royal had a criminal record for failure to stop for a blue light, possession of a stolen vehicle, possession with intent to distribute cocaine, and distribution of cocaine within a half mile of a school. (T1. p. 365, lines 2-25.) The solicitor asked some background questions, then asked Royal, "Darrell, who was the lawyer that represented you on your charge of -- " when defense Counsel interrupted and objected to the question. (T1. p. 366, lines 1-21.) The court held a sidebar, in which the following exchange occurred:

> THE COURT: Where're you going?
> MR. KENT: I think that it is relevant. Jim was his lawyer.
> THE COURT: How is that relevant?
> MR. KENT: Because – –
> THE COURT: Sustained.

(T1. p. 366, line 21 –p. 367, line 4.) Royal went on to describe his friendship with both Goodwin and Green. (T1. p. 367, line 7 p. 368, line 5.)

The solicitor then asked Royal whether Goodwin told him anything about the murder of Freddie Green. (T1. p. 369, lines 8.) The solicitor asked Royal if Goodwin discussed Green with him at all before the murder. (T1. p. 369, lines 12.) Royal offered the following:

> I have something to say, sir. I have something to say. Let me — I speaking about — the reason why I say this is because I feel like my words, whatever, whatever they though I say they put on the paper. I ain't had no lawyer present, I was already in prison. You hear me? So what they bring towards me, I think I being charged and I gonna be prosecuted on something I don't know about. So, I mean, I had to go with the plan and come in here and sit here and tell you' all what was

> going on. I feel like that ain't right. You know what I mean? If I gotta take time today, I take it. You hear me? But I ain't to put something on that boy and make him go to jail if I didn't see it. I mean — that's why I come in and tell you the truth, why I come up here and tell you the truth, you the judge.

(T1. p. 369, line 13 – p. 370, line 5.)

The trial court told Royal he had the right not to incriminate himself, then asked Royal if he was presently represented by an attorney. Royal said, "I had an attorney, Jim Smiley." (T1. p. 370, lines 6-19.) The court stopped him and said, "No, no, I am not talking about – are you presently represented by any attorney?" Royal answered, "No. sir." (T1. p. 370, lines 16-23.)

After sending the jury out, the judge asked the State if Royal had any pending charges. The State said he did not and told the judge nothing Royal said on the stand would be used against him, unless he lied. (T1. p. 371, lines 7-14.) The solicitor also denied any ongoing investigations into Royal. (T1. p. 371, lines 15-20.) The judge then advised Royal to answer the questions truthfully. (T1. p. 371, line 21 – p. 372, line 16.)

Counsel renewed[4] his "motion regarding the conflict of interest," arguing that if his motion to be relieved was denied, that the judge should give a curative instruction "so that there is not any underlying idea that – there's now been put out there this idea, by his attorney, that there is some kind of impermissible, I believe, not impermissible, but underlying idea that somehow I would prejudice his testimony, when in fact I do not represent him right now." (T1. p. 372, line 18 – p. 373, line 3.) Counsel said he was concerned "now they jury is looking to me like I'm in control of this witness." (T1. p. 373, lines 16-18.)

[4] As discussed in the previous issue, Counsel did not claim to renew a motion to be relieved as counsel.

The judge said he did not see anything wrong with the jury's learning of Smiley's prior representation of Royal. (T1. p. 373, lines 19-24.) Counsel said he was concerned with the jury's determination of credibility of Royal. Counsel argued:

> One of the instructions that you're certainly going to read to the jury at the end of this case is dealing with the credibility of a witness, and any bias or prejudice that they may have that would affect their testimony.
>
> That would not have occurred had he had a different attorney. Now I've got to somehow deal with that, Your Honor, and it dovetails into my potential conflict problem, which is a whole other area. I don't believe that Mr. Royal quite understands his position, but I can't explain it to him at this point.

(T1. p. 374, lines 5 –16.) The following exchanged occurred:

> THE COURT: Okay. Well, I am not going to – I am not going to say anything else. It's going to stay in the way it is. I mean, I don't see anything that – – I know you have concerns about it because of the position that you're in.
>
> MR. SMILEY: (Affirmative nod).
>
> THE COURT: But as far as the Court, I don't know that there is anything that requires me to instruct the jury about anything right now.
>
> MR. SMILEY: Please note my objection. I certainly respect this Court's decision, but I think I have an obligation to bring it forth.

(T1. p. 374, line 17 – p. 375, line 6.)

The solicitor then inquired whether he was allowed to explore the representation of Royal by Mr. Smiley, arguing it should be allowed because ordinarily a witness can be attacked for any reason of bias or prejudice. (T1. p. 375, lines 16-22.) The court responded, " I know of no reason- I know that Mr. Smiley doesn't like it, but I know of no reason, unless it would be some prejudicial effect, that he has already argued, that the court would need to stop that. I believe that you have a right to do that; you know, after I thought about it a while. (T1. p. 375, line 23 – p. 376, line 4.) Counsel argued the testimony would be irrelevant, but if the State argued it was

relevant, then it was prejudicial. (T1. p. 376, lines 6-9.) The judge apparently overruled the objection, saying, "I understand your position." (T1. p. 376, lines 10-11.)

Despite the discussion among the parties concerning Counsel's representation, the questioning of Royal when the jury returned focused on Counsel's meeting with Royal at the jail. When the jury returned, the solicitor asked Royal about the statement he gave to law enforcement approximately a week before, in which he told officers Goodwin made several incriminating statement about the shooting. Royal claimed he did not remember the statement. (T1. p. 377, line 4 – p. 385, line 19.) The jury stepped out again, and the solicitor read the statement to Royal. When the jury returned, Royal again denied remembering the statement. (T1. p. 386, lines 2-14.) The solicitor then read the statement again to the jury, and Royal admitted recalling parts of the statement, but denied giving the portions of the statement that implicated Goodwin. (T1. p. 387, line 10 – p. 389, line 11.)

Counsel objected to parts of the statement containing hearsay, and the jury was sent out of the courtroom while the parties conferred over which portions of the statement would be redacted before the jury. (T1. p. 389, line 9 – p. 400, line 12.) The jury returned and the solicitor resumed questioning Royal about his statement. Royal said he recalled saying some things, but denied others. (T1. p. 401, line 3 – p. 406, line 21.) Royal then equivocated about whether the signature at the bottom of each page of the statement was his. (T1. p. 407, line 7 – p. 408, line 18.) Royal claimed the investigator forced him to make the inculpatory statements, but he could not tell anyone that because he was not represented by counsel. (T1. p. 409, lines 3-15.) The following exchange occurred:

> Q. Actually the first time – – let me stop here. You and Antwon Goodwin are childhood buddies, you grew up together, is that correct?
>
> A. (No response)

Q. Who represented you when you went away to prison? Who was your lawyer?

A. Lori Proctor.

Q. Okay. Who represented you before that?

A. Smiley.

Q. Jim Smiley?

A. (Affirmative nod).

Q. Has Jim Smiley ever come to talk to you about this case?

MR. SMILEY: Please note my objection at this point, Your Honor.

THE COURT: Noted.

Q. Has Jim Smiley ever come and talked to you about this case?

A. No, sir.

Q. Never?

A. (No verbal response).

Q. Isn't it true that Mr. Smiley came to talk with you Monday of this week about this case?

A. He ain't – – no, sir. No, sir.

Q. Jim Smiley never came and talked to you about this case?

A. Not about this case.

Q. Not about this case?

A. (Negative gesture), not about this case.

Q. Isn't it true that you told our investigator, Matt Casey, that Jim Smiley did come and talk to you on Monday of this week about this very case.

A. No, he never came and talked to me about no case.

Q. So he's lying to? So, so far we've got Hollie Connolly that's a liar and Matt –

MR. SMILEY: Objection, Your Honor.

THE COURT: Rephrase the question, Solicitor.

MR. KENT: Yes, sir.

MR. SMILEY: Thank you, Your Honor.

(T1. p. 409, line 19 – p. 411, line 15.) The solicitor then went on to question Royal about whether he understood perjury. (T1. p. 411, line 23 – p. 413, line 9.)

On cross-examination, Counsel asked Royal about his statement to officers the week before. (T1. p. 419, lines 15-22.) Counsel asked Royal if the officers told him they suspected him in the shooting and if he did not give them information about the shooting, they were going to charge him with the crime. (T1. p. 419, line 20- p. 420, line 5.) Royal affirmed and said he told the officers what they wanted to hear. (T1. p. 420, lines 2-5.) The substance of Royal's testimony on cross examination was that he was present at George's the night of the murder, he was intoxicated, and he never saw the shooting. (T1. p. 420, line 6 – p. 421, line 24.) Royal testified he has trouble reading and claimed he signed the statement the officers put in front of him. (T1. p. 422, lines 3-17.) Counsel renewed his prior objection to the line of questioning, then asked Royal about his prior representation of him. (T1. p. 423, lines 11-18.)

Royal acknowledged he had talked to Smiley about the case, but Smiley only told him to tell the truth on the stand. (T1. p. 424, lines 3-8.) Royal agreed that Smiley had not asked him to lie for Goodwin and said he understood he could face perjury charges if he lied on the stand. (T1. p. 424, line 12 – p. 425, line 7.)

On redirect, the solicitor drew attention to Royal's inconsistent testimony about meeting with Smiley to discuss the case. (T1. p. 425, line 15 – p. 427, line 6.) The solicitor then asked Royal if he knew how to write and asked him to provide a handwriting sample for the jury. (T1. p. 427, line 23 – p. 428, line 16.)

On re-cross, counsel clarified from Royal what his testimony meant concerning when Counsel visited him in jail and when they discussed the case. (T1. p. 431, line 14 – p. 432, line 13.) Royal was then excused from the stand. (T1. p. 432, lines 13-19.)

Discussion

Goodwin argues the evidence of Counsel's prior representation of Royal was improperly admitted as irrelevant and, if relevant, unduly prejudicial in violation of South Carolina Rule of Evidence 403. The trial court initially agreed with Goodwin, sustaining Counsel's objection to the solicitor's question to Royal about who represented him previously. (T1. p. 366, lines 1-21.) Judge Burch later changed his mind, and found the evidence relevant as evidence of witness bias but not unfairly prejudicial. (T1. p. 375, line 23 – p. 376, line 4.)

"All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App. 1998). "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." *Id.* at 630, 496 S.E.2d at 429. In accordance with the rules of evidence, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. Considerable latitude is allowed in cross-examination to test a witness's bias, prejudice, or credibility. *Yoho v. Thompson*, 345 S.C. 361, 364, 548 S.E.2d 584, 585 (2001) "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *U.S. v. Abel*, 469 U.S. 45, 52 (1984); *see also State v. Rodriguez*, 814 S.E.2d 11 (2018) (finding permissible prosecution's introduction of evidence that one of defendant's trial counsel had previously hired prosecution's expert to testify on behalf of another client).

Here, the witness gave one statement to law enforcement, then recanted approximately one week later. Royal's credibility was immediately in question because of his inconsistency, not

because of the solicitor's questions. To paraphrase the classic inquiry, the jury was left to consider whether Royal was lying then to investigators or lying now on the stand. Plausible or not, Royal told the jury he changed his story at trial because he thought testifying to something untrue was not "right" because he did not want "to put something on that boy and make him go to jail if I didn't see it." (T1. p. 369, line 21 – p. 370, line 3.) The solicitor, apparently in an attempt to convince the jury Royal was lying on the stand, tried to inquire about the nature of Royal's conversation with Counsel after he gave the statement. The solicitor also questioned Royal about his statement to investigator Matt Casey, in which he claimed he discussed the case with Counsel. Because the solicitor investigated several inconsistencies in Royal's claims, there was little prejudice to Goodwin with the line of questioning about Counsel's prior representation of Royal. The jury knew Royal changed his story in Goodwin's favor at some point, perhaps coincidentally, after talking to Counsel. The remaining question was why Royal changed his story. The jury might have decided Royal changed his story to exonerate Goodwin in a fit of consciousness after a discussion with Counsel, not that Counsel convinced him to lie on the stand to save his client. The consideration of Royal's motivation to lie was not improper in this context,[5] nor was it unfairly prejudicial to Goodwin once Royal testified to lying to law enforcement.

Lastly, even if the evidence of Counsel's representation, or the influence of Counsel's visit to Royal, was inadmissible, any error in it admission was harmless. Even in his statement,

[5] As noted earlier, any allegation of a violation of the Rules of Professional Conduct from the line of questioning has no bearing on Goodwin's criminal conviction. The solicitor infringed on no right of Goodwin when developing evidence of bias by inquiring whether Counsel persuaded Royal to change his testimony. *See Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993)

Royal did not claim to be an eyewitness to the shooting. The State presented other compelling evidence of Goodwin's guilt, including the following:

1) Danielle Thompson saw both Antwon Goodwin and Freddie Green outside George's Sweet Shop the night of the murder. (T1. p. 197, line 20 – p. 199, line 12.)
2) Edwin Middleton, who knew both Antwon Goodwin and Freddie Green, testified he saw the men talking together that night. (T1. p. 271, line 9 – p. 278, line 22.)
3) Middleton witnessed Goodwin raise his hand to the back of Green's head and saw the flash of gunfire as Goodwin shot Green in the head. (T1. p. 279, line 20 – p. 280, line 17.)
4) Although she recanted on the stand, the State questioned Shamika Milligan about a statement she gave to her boyfriend in which she said she saw Goodwin pull out a gun and shoot Freddie Green in the back of the head. (T1. p. 338, line 1 – p. 348, line 4.)
5) Maurice Fields testified Goodwin confessed to killing Green, explaining he shot Green (or, "bust him in the head") after the men had a discussion about Green and some of his friends wanting to kill Goodwin. (T1. p. 446, line 4 – p. 449, line 4.)
6) Freddie Green's mother testified Goodwin told her he was the last person with Freddie Green the night of his death. (T1. p. 533, lines 5-15.)

As the record shows, the testimony of Darrell Royal, which was already questionable in value because of his inconsistency, was similar to that of Maurice Fields. An eyewitness to the murder identified Goodwin as the shooter. Other witnesses, including Goodwin himself in his statements to police, put him there with Freddie Green the night of the murder. Thus, even if the evidence of Counsel's prior representation of Royal was improperly admitted as evidence of witness bias, the error was harmless because it had no meaningful impact on Royal's credibility. Moreover, even if Royal's entire testimony were disregarded, the jury had compelling evidence

of Goodwin's guilt from other witnesses. Accordingly, although the appeal is untimely and should be dismissed, even on the merits of this ground Goodwin is not entitled to relief.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal must be dismissed as untimely, or, in the alternative, the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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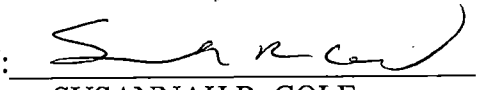
BY: 
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ATTORNEYS FOR RESPONDENT

January 7 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
The Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

Respondent,

v.

ANTWON D. GOODWIN,

Appellant.

Appellate Case No. 2018-000144

PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing two (2) copies of the same via inter-agency mail, addressed to his attorneys of record at:

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thomspon
P.O. Box 1834
Irmo, SC 29063

Tricia A. Blanchette, Esquire
P.O. Box 2147
Leesville, SC 29070

I further certify that all parties required by Rule to be served have been served.

This 7th day of January, 2019.

Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383