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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
Howard P. King, Circuit Court Judge
2009-GS-43-0059

Appellate Case No. 2011-203747

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTRELL R. FELDER

APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to allow cross examination of the investigator about the scope of his investigation and the fact that the victim had pending burglary charges, when the State argued that the motive for the shooting was retaliation for the victim burglarizing appellant's home?

2. Did the trial judge err in refusing to direct a verdict of acquittal when the State failed to place appellant at the scene of the crime?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Antrell Rashawn Felder, was indicted by the Sumter County Court of General Sessions Grand Jury on December 31, 2008 for murder and possession of a firearm during the commission of a violent crime. 2009-GS-43-0059. ROA 553-54. The charges arose from an incident in Sumter County on July 18, 2008 which resulted in the death of William McKenzie. The Appellant entered a not guilty plea before the Honorable Howard P. King, presiding judge. The Appellant was represented by Shaun C. Kent and Ray Chandler of the Sumter County Bar. The State of South Carolina was represented by Solicitor Chip Finney and Assistant Solicitor John P. Meadors of the Third Circuit Solicitor's Office. The trial was held before a jury from November 14 through November 18, 2011. On November 18, 2011, the jury returned guilty verdicts on both charges. ROA 536-37. A motion for new trial was made by Appellant and denied by Judge King. ROA 539-41.

After a sentencing proceeding, Judge King sentenced Felder to 42 years for murder and 5 years concurrent for possession of a weapon during the commission of a violent crime. ROA p. 552, ll. 11-16.

The Appellant filed and served a timely notice of appeal on November 23, 2011. This appeal follows.

ARGUMENT

I. The trial judge properly used his discretion in excluding irrelevant evidence that the victim had two pending burglary charges at the time of his death. The intended use of the evidence would create mere conjecture that a third-party may have had a similar motive but did not qualify as admissible third-party guilt evidence. Further, any speculative probative value is substantially outweighed by the prejudicial effect of merely showing a bad victim and a conjectural inference as to the commission of the crime by another.

The State's theory of the case against Antrell Felder was not complex. The State claimed that the shooting of Willie McKenzie was a reaction to McKenzie burglarizing Felder's home that evening.[1] On July 18, 2008, Felder became aware while he was at a party that his house was being burglarized by four (4) men. ROA 325-26. At some point, Felder also became aware, or thought, that Willie McKenzie was one of the perpetrators of the burglary. ROA 317, 339, 341. Felder located McKenzie standing on Highland Street while he was driving his mother's white four-door Buick with tinted windows around 12:30 a.m. ROA 156-162, 171. Felder stopped the car by the victim who was on the side of the road. ROA 163-64. Felder exited the vehicle, shooting as he came around the vehicle. ROA 159, 165, 171-75, 184–89, 198-99, 204-09. The shooting resulted in McKenzie's death. ROA 221, 304. Felder drove off, leaving his red baseball cap at the scene. ROA 207, 210, 221-22. The perpetrator is overheard saying something like "I got you or I got you now." ROA 199, 213, 215. The victim, at the time of the shooting, had a video camera in his possession, apparently from the burglary which included a

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[1] The facts and inferences set out in this argument in support of the State's theory are more fully set out in Argument II related to the directed verdict issue. In this argument, it is intended to be a summary of the State's theory, not a summary of the proof.

video of the Appellant's girlfriend at a party. ROA 341, 391-93.

Against the State's theory of the Appellant retaliating against McKenzie for the burglary that evening, the defense sought to create a speculative red herring by injecting some evidence that the victim - Willie McKenzie - was wanted for two other unrelated burglaries at the time of his death. The Appellant sought to present this concept through the cross-examination of Sumter Police Department Senior Detective William Lyons [who apparently was not aware of the victim's pending charges]. ROA 261-62[2] The defense stated that they wanted to ask Detective Lyons if there were two pending burglary charges against the victim and whether Lyons had investigated the other burglary charges. ROA p. 259, ll. 13-20.

In his initial assertion, Felder claims that the trial court erred in limiting his cross-examination of Senior Detective William Lyons of the Sumter Police Department concerning the existence of unrelated burglary charges pending against the victim, William McKenzie, at the time of his death.[3] At this time, the defense asserted that it was not his intent to offer the evidence for third-party guilt (ROA p. 253, ll. 10-11, p. 258, ll. 1-20), but that law enforcement's failure to investigate the other burglaries was deficient because they were claiming the burglary of Appellant's home was claimed to be the motive for the shooting of McKenzie. ROA 253-56. The defense claimed its purpose was to "impeach the investigation." ROA 258. In rejecting the proffer, Judge King found the questioning concerning burglary charges against the victim were not admissible for a series of reasons. Those reasons included: that the evidence was not relevant

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[2] The pending charges were apparently Sumter County charges rather than Sumter City charges. ROA 261-62.

[3] There was a discussion at the trial that the victim had never been arrested for the other burglaries, but was wanted. ROA p. 251, l. 23 - p. 252, l. 2.

(ROA 262-64), that it was not relevant to the issue to show anything in connection with the shooting (SCRE Rule 401, 402, 403), that under Rule 404(B), it was not probative of anything to show conformity, and third, that there is no evidence the victim had knowledge of them. ROA 264-65. The trial court further determined that it appeared that the sole purpose of the introduction was for the prejudicial effect which substantially outweighed the probative value. ROA 265. Importantly, the trial court found the impeachment value was outweighed because it would only show the victim was a bad person. The court rejected its admission where the evidence simply shows that they did not go as far as the defense thinks they should have in the investigation, but that it was not to impeach any improper testimony and not proper third-party guilt evidence. ROA p. 265, ll. 13-25. The trial court sustained the objection.

STANDARD OF REVIEW.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct.App. 2003). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Mattison, 352 S.C. at 583-84, 575 S.E.2d at 855.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct.App. 2004). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice

to the defendant. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct.App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Adams, 354 S.C. 361, 377-78, 580 S.E.2d 785, 793-94 (Ct.App. 2003). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

RELEVANCE AND RULE 403

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Holder, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Stated another way, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Salley, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (citing Rule 401, SCRE); State v. Bixby, 388 S.C. 528, 544, 698 S.E.2d 572, 581 (2010) (evidence of title search done by title abstract witness was not relevant because he only looked for records of the right of way at the Abbeville County Clerk of Court's office and because he did not search for a record of the right of way in the county tax assessor's office where S.C. Code § 57–5–570 requires that they be maintained, his testimony did not have the tendency to make it more or less probable that 1) Appellant had a

good faith belief that there was no right of way on his family's land, and 2) the records concerning the right of way were not easily accessible to the public).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Cooley, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Tynes, _ S.C. _, _ S.E.2d _ (S.C.App. April 3, 2013); State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." State v. Lee, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (S.C. App. 2012) (alteration and emphasis in original; quotation marks and citations omitted).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct.App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct.App. 2003). The appellate court will review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct.App. 2001): State v. McLeod, 362 S.C 73, 606 S.E.2d 215 (S.C. App. 2004).[4]

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[4] In McLeod, the trial judge determined the evidence would be more prejudicial than probative. The judge found the only way the State could contradict the evidence would be to call the solicitor as a witness. The individual who allegedly received a deal, Leroy Porter, did not testify at trial. He wore a wire to record a conversation with Brooks, which was played at the McLeod trial. Brooks' words spoke for themselves. The appellate court concluded that it is hard to discern what benefit there would have been for the jury to know the solicitor and police agreed "to help him on some charges."

RIGHT TO PRESENT A DEFENSE

The United States Constitution guarantees a criminal defendant the right "to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14 (2009). See S.C. Code Ann. § 17–23–60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct.App. 2008). In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302, 93 S.Ct. 1038. However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." U.S. v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are "not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " Id. (quoting Rock v. Arkansas, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). In this case, Burgess's argument that his right to present a defense was violated is refuted by the trial judge's correct application of the law of third-party guilt to the facts of the case.

The appellate court further concluded that any attempt to introduce the impeaching evidence to raise the issue of Porter's possible guilt in the crime is not a proper reason for its admittance. "Our Supreme Court has imposed strict limitations on the admissibility of third-party guilt." State v. Mansfield, 343 S.C. 66, 81, 538 S.E.2d 257, 265 (Ct.App. 2000). "Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt." Id.

THIRD-PARTY GUILT

The admissibility of evidence of third-party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). See State v. Cope, 385 S.C. 274, 292–93, 684 S.E.2d 177, 186–87 (Ct.App.2009) (quoting State v. Gregory as the rule governing admissibility of evidence of third-party guilt); State v. Swafford, 375 S.C. 637, 641–43, 654 S.E.2d 297, 299–300 (Ct.App.2007) (affirming application of State v. Gregory). In Gregory, our supreme court stated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104–05, 16 S.E.2d at 534–35 (internal citations omitted). See also Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (holding that to prohibit, on the strength of the prosecution's case, evidence of third-party guilt proffered by an accused violated the right of the accused to present a complete defense).[5] Accord, State v. Burgess, 391

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[5] The Appellant may argue that this case is controlled by the decision of the United States Supreme Court in Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). In Holmes, the U. S. Supreme Court concluded "the rule applied in [State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004)] the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.' " 547 U.S. at 331, 126 S.Ct. 1727 (quoting Crane, 476 U.S. at 690, 106 S.Ct. 2142). However, it was not the rule of Gregory which offended the defendant's rights. Rather, it was the "radically changed and extended" rule of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and State v. Holmes. 547 U.S. at 328–31, 126 S.Ct. 1727. In fact, the U. S. Supreme Court specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence.

S.C. 15, 21-23, 703 S.E.2d 512, 515 - 516 (S.C. App. 2010). Evidence of third-party guilt may include: (1) facts that are inconsistent with the defendant's guilt; and (2) evidence raising a reasonable inference as to the accused's innocence. State v. Rice, 375 S.C. 302, at 317, 652 S.E.2d 409, at 416 (S.C. App. 2007)[6]; See Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (the holding in Holmes v. South Carolina essentially permits a defendant to introduce evidence of third-party guilt regardless of the strength of the State's case, if the evidence meets the following criteria: "evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. Before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party."); State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008), cert. dismissed as improvidently granted, 386 S.C. 597, 689 S.E.2d 638 (2010) (although the United States Supreme Court recently addressed the issue of the

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547 U.S. at 328, 126 S.Ct. 1727. Holmes v. South Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third-party guilt.

[6] In Rice, the Court concluded that an alleged prior inconsistent statement concerning third-party guilt was inadmissible in prosecution. The court found that evidence defendant asserted in support of introducing third-party guilt testimony implicated an individual with one name at times, and an individual with another name at times, with no clarification as to whether they were the same individual. The Court found that the record was void of facts or circumstances, other than co-perpetrator's inconsistent statements, linking anyone other than defendant to victim's murder, and proffered evidence cast only a "bare suspicion" on third-parties and failed to connect either to murder by way of facts and circumstances surrounding the particular crime. State v. Rice, 375 S.C. 302, at 317, 652 S.E.2d 409, at 416 (S.C. App. 2007).

admissibility of evidence of third-party guilt in Holmes v. South Carolina, that decision overruled the application of the limits on such evidence only to the extent that these limits rely on the prosecution's evidence against the defendant rather than on the strength of the evidence proffered by the defendant to establish third-party guilt); State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010)[7] (the Holmes Court specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence; Holmes v. South Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third-party guilt).

In Lorenzen v. State, the Court held the sexual offender registry listing the victim's father's name would not have been admissible under either a pre- or post-Holmes third-party guilt standard. Significantly, the victim's father was listed on the registry for committing the crime of assault with intent to commit criminal sexual conduct in the first degree which would have involved an adult victim whereas defendant was charged with criminal sexual conduct with a minor. Defendant's counsel at the PCR hearing acknowledged there was nothing on the registry to indicate the victim's father committed a crime against a child. Furthermore, defendant's allegation that the victim's father may have been the perpetrator was so nebulous that it would have had no other effect than to "cast a bare suspicion." Therefore, the Supreme Court did not believe these facts would be inconsistent with defendant's guilt or raise a reasonable inference of his innocence. In State v. Mitchell, the Court concluded that the fact that telephone directories

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[7]In Burgess, the Court of Appeals concluded that the trial judge properly excluded evidence from five witnesses that the victims had been threatened over their drug debts in the months leading up to the murders. The trial judge concluded that the evidence related to the events occurred between eight months and two weeks before the murders and that none of the evidence was inconsistent with Burgess's guilt and that it was "mere conjecture or surmise."

may have contained listings of individuals with names that were either identical or similar to the name a witness initially gave to the police is simply not evidence that any of these individuals was involved in the incident and therefore the directories were properly excluded and not admissible as third-party guilt evidence without evidence to connect the person to the crime. The Court also determined that there was no error in the exclusion of the directory as evidence concerning the thoroughness of the investigation.

Even if testimony is inadmissible as substantive evidence of third-party guilt, it may still be admissible for witness impeachment purposes. See State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). However, in Cooper, the Court noted the limitation to this matter of impeachment. In Cooper, the Court found that defendant could not call an otherwise irrelevant witness for the sole purpose of impeaching her with a prior inconsistent hearsay statement concerning that witness' guilt of crime with which defendant was charged, where it was not admissible as free-standing third-party guilt evidence. However, in State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998), a State's witness testified concerning the circumstances surrounding the murder. On cross-examination, defense counsel asked the witness if he had previously told his girlfriend that he was the one who killed the victim. The witness denied making the statement. Defense counsel then sought to admit extrinsic evidence of a prior inconsistent statement made by the witness. The Supreme Court held that even if the evidence was inadmissible as evidence of third-party guilt, it was admissible for impeachment purposes.

ANALYSIS

Appellant claims that the trial judge erred in rejecting the proffer concerning the existence of the victim's two pending burglary charges for various reasons. First, he contends that it was

relevant. Second, he contends that the probative value of the evidence was not substantially outweighed by unfair prejudice. Thirdly, he contends that the trial judge erred in rejecting it as third-party guilt evidence because it was not offered to show that the shooting was committed by another and that it was merely intended to challenge the scope of the investigation as narrow. Lastly, assuming the above, he contends that its exclusion was not harmless error. Respondent submits that each of the positions set forth undermines the other positions and supports the trial court's discretion in excluding the evidence. The trial court did not abuse his discretion in the exclusion.

The Trial Court's Holding

The analysis must begin with the trial court's rejection of the evidence concerning the victim's two unrelated burglary charges. The trial court stated:

> The issue before The Court is whether the defendant through his counsel will be allowed to ask Mr. Lyons, the investigating officer in this case and the case officer in this case 1 or 2 or 3 questions regarding the outstanding burglaries that the defendant (sic) had at the time of this incident.
>
> One of the questions he wanted to ask him was, are you aware of the outstanding burglaries against the victim? I think Mr. Lyons' original answer was, no. But assuming he establishes that he reviewed the NCIC that was in the file, that it showed that there were some burglary . . .charges against the victim, the next question would be, did you do any investigation of them?
>
> Those were the things that Mr. Kent wished to ask this witness. My understanding is that the purpose of this is not to establish third-party guilt, which Mr. Kent and the defense concedes they have no right to do, but to impeach the investigatory work on the part of law enforcement. And that the purpose of it is for impeachment purposes.
>
> The first thing that strikes me about it, Counsel, is that I'm not sure why you want to do this, because I think it helps the state show motive. Which, if they claim is burglary, and as I understand it, the state [290] does contend that is their theory -- but at the same time, the state does not have to prove motive. They can

show motive, but it is not something that they have to prove. But I'm not sure where it helps the defense to show that the victim had prior burglaries, that this defendant thought his house had been burglarized so he shot him, and the fact that he had prior burglaries that is a double-edge sword it seems like to me. It might buttress the state's motive because the victim was shot in retaliation for the shooter thinking the victim had burglarized the defendant's house.

Be that as it may, I have reviewed the cases that were submitted to The Court. One being [State v. Fossick], 333 S.C. 66, 508 S.E. 2d 32; [State v. Beckham,] 334 S.C. 302, 513 S.E. 2d 606, and also [State v Saltz,] 346 S.C. 114, 551 S.E. 2d 240, as well as the U.S. Supreme Court case of Delaware v. Van Arsdall.

The Court has also studied and looked at Rule 404 (A) regarding character evidence or 404 character evidence in general and 404 (A) (2), which deals with character evidence of the victim. That rule provides that evidence of a pertinent trait of character of the victim of the crime offered by an accused or for the prosecution to rebut the same or evidence of a character trait for peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

[291] After having studied the matter and thought about it, I first of all do not find that the testimony is relevant under 403 -- 401, 402, and 403, is not relevant to the issue to show anything in connection with the shooting. It simply would be from a standpoint of supposed motive, but I don't see where the burglary has anything to do with the actual shooting.

Neither do I think that under 404 (A) (2) that it is probative of anything to show action in conformity therewith.

And, third, I'm not sure this victim (sic) has any knowledge of it.

After having -- seemed like to me the sole purpose of the prejudicial effect outweighs the probative value substantially outweighs the probative value of the impeachment because what it would tend to do is to simply show that the victim was a bad person. And even further than that, that it may be for the purpose of showing third-party guilt, which I just don't think is appropriate in this case, and I don't think it's an appropriate questioning for impeachment purposes, especially just to show that the impeachment was not with regard to any improper testimony on the part of the witness in this case, but simply to show that they didn't go as far as the defense thinks that they should have in the investigation.

[292] The objection to the testimony is sustained.

ROA p. 263, l. 1- p. 266, l. 2. The issue was raised again at the conclusion of the case and rejected. ROA p. 453, ll. 8-15).

The Evidence Was Not Relevant

In the first assertion, Felder contends that the trial court erred in finding that the evidence was "irrelevant." In his brief, he asserts that because the State made the burglary of Felder's home the motive to support Felder's shooting of McKenzie it made the other pending burglary charges relevant. Although he claims this is not a third-party guilt proffer[8] - which he conceded at trial he could not meet - he claims that the questioning would have a tendency to show "the state's theory that the motive for the shooting is less probable as the shooting could have been connected to the pending burglary charges rather than the burglary of appellant's home." Initial Brief of Appellant, p. 7-8.[9] However, the dichotomy between third-party guilt and his claim below and here that it was to "impeach" the investigation are mischaracterizations of what he was attempting to do - to suggest that there were other people who had a similar motive - but admitting that those people would not satisfy the Gregory standard for admissibility. The State argued below that this was "classic (inadequate) third-party guilt evidence" and that it was their attempt to assert that law enforcement should have gone back and looked at other burglaries that

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[8]Throughout his argument before the trial court, defense counsel claimed this victim burglary charge evidence was not "third-party guilt"evidence. ROA p. 247, ll. 20-25 ("third-party guilt case law would not allow me to simply say there's somebody out there who possibly could have done this. ROA p. 253, ll. 6-11 ("I'm not offering it for third-party saying somebody else did it."). Although not relied on by the trial court, Detective Lyons stated in the proffer, he did not investigate other burglaries for the motivation for the murder "because we had a hat there at the scene that was told to us that the shooter was wearing that we had gotten the defendant's fingerprint off of."

[9]Counsel claimed at trial that third-party guilt case law allowed him to "impeach the investigation." R .p. 247, l. 25.

he was charged with and determine if those victims had done the murder. ROA 257. The defense asserted that because they were not specifically pointing to a particular person they could bring it up because the state was asserting that Felder's particular motive was the burglary that immediately preceded his shooting of the victim. However, the court noted that this was just an attempt to go through the back door by the defense counsel to bring in what he could not bring in through the front door. ROA 258. Counsel claimed that their defense was that the police did not fully investigate the case.

The State stated that this inquiry would not "impeach" the officer and that it was prejudicial to the State and that they were also merely showing this was a bad victim due to other criminal acts allegedly against others. Importantly, the State claimed, under Gregory that the evidence was not inconsistent with the Appellant's guilt. ROA p. 259-60, l. 15.

Contrary to the claims of the Appellant, this evidence was not intended to impeach the investigator or investigation, but was expressly intended to suggest that there were two other equally possible perpetrators. The problem with the Appellant's suggestion is that attempts to do what State v. Gregory precludes. The fact that Appellant had experienced a burglary similar to two other individuals does not equate with the others having a motive to kill McKenzie on July 18. To the contrary, the Appellant made no showing that this evidence was either "inconsistent with his own guilt", or that the facts raised a reasonable inference as to his innocence. To the contrary, there was no evidence to suggest the other burglary victims were the guilty party. Rather, the evidence of the victim being charged with two burglaries can have no other effect than to cast bare suspicion upon two innocent families or to cast a conjectural inference as to the commission of McKenzie's murder by the other burglary victims. There is no proof presented of

the connection of those victims to the crime. As Gregory so cogently held, remote acts (here being burglary victims), disconnected and outside of the crime itself cannot be proved for such purpose.

The Appellant's attempt to characterize the other crime evidence as admissible to impeach the investigation is a "red herring." The trial court saw through this in rejecting the claim, noting it was not relevant and not qualifying as third-party guilt. Further, the trial court found that the parsed argument presented supported Appellant's guilt because it enhances the showing of the personal motive to kill by Appellant due to his contemporaneous burglary.

This assertion was similar to the Court's rejection in the recent case of State v. Burgess, supra. In Burgess, the defendant sought to present evidence that over a period of time the victim had been threatened over his drug debts. However, the Court concluded that none of the evidence was inconsistent with the defendant's guilt and that it was merely conjectural. Like Burgess, the excluded evidence was not inconsistent with Felder's guilt and was mere conjecture.

The Appellant further asserts that assuming it is relevant, the probative value of allowing cross-examination about the victim's pending charges was not substantially outweighed by the danger of unfair prejudice. He claims it was "highly probative of the officer's failure to fully investigate the case." *Initial Brief of Appellant*, p. 8. However, the Appellant fails to explain why this examination is relevant or probative to the defense. In his brief, he claims that there is a probative link between the pending burglary charges with other victims and the shooting of McKenzie because the State claimed that Appellant's motive was the victim's burglary of Appellant that night. *Initial Brief of Appellant*, p. 11. The trial court properly rejected this alleged probative value under Gregory.

The Appellant seeks to distinguish State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (S.C. App. 2008), to support his claim of relevance and probative value. However, in Lyles, it plainly supports the court's discretion in excluding the remote evidence concerning the victim's pending charges. In Lyles, the Court found that evidence regarding a prior drug sale solicitation and the presence of drugs next to the murder victim was irrelevant. Like Burgess and the instant case, the Court found that there was causal probative link by the fact that drugs were offered for sale outside of the apartment several months before or that marijuana was located next to the victim where it did not serve as a defense or excuse or mitigate the defendant's actions. The court concluded the evidence was unduly prejudicial because it would insinuate that a key witness was a drug dealer and could have unfairly impugned character of the victim and state witness and cloud the issues.

Here, the prejudical clouding of the issues was the only actual effect the admission of the victim's charges could have. As noted above, absent any connection to McKenzie's shooting, the evidence only created mere suspicion toward two other victims without any relation to the actual crime, as conceded by the Appellant at trial. Like Lyles, the excluded evidence of the charges had no probative link to McKenzie's murder on July 18. Even if McKenzie committed the burglaries at an earlier time, there was no causal link to this crime, nor did it negate Felder's motive that evening.

Further, the evidence, like Lyles is unduly prejudicial because it suggests a decision on an improper basis by insinuating other burglary victims had an intent to kill by the fact of their victimization and that the victim was of bad character. Like Lyles, the risk of confusion and misdirection is evident. Like Lyles, under Rule 403, given the tenuous link to other burglary

victims, the prejudicial effect substantially outweighs the probative value. With deference due the trial judge's conclusion, the decision to exclude must be upheld.

At trial, the Appellant relied upon State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998) for the proposition that he should be entitled to cross-examine Detective Lyons about the victim's burglary charges. Apparently by characterizing the evidence as "impeachment" evidence, Appellant claims to get around its deficiency under Gregory's third-party guilt threshold. While in Fossick, the Court noted defective third-party guilt evidence that cannot be introduced as substantive evidence, may be admissible for impeachment purposes, here it was never being introduced to impeach the credibility of Detective Lyons. Instead it was only being offered as substantive evidence.

Similarly, his reliance at trial on State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) was misplaced. In Beckham, the defendant claimed the trial court deprived him of his right to present third-party guilt evidence. The Court rejected it because the proffered evidence would not exculpate him. However, the Supreme Court found error under Fossick in not allowing evidence presented to impeach a SLED investigator's denial on cross-examination that he had been looking for two men on the night of the murder as impeachment evidence. According to the proffer, there was evidence that the investigator had been looking for two men, contrary to his testimony. Unlike the instant case concerning the victim's burglary charges, the proffered evidence in Beckham was found to be proper impeachment by inconsistent statements of the investigator. Here, there were no inconsistent statements by the witness that would have been

impeached by the collateral evidence.[10]

The trial court did not abuse its discretion in excluding this evidence. The evidence would have injected a red herring into the case which could have only led to confusion of the issues before it where there was no tie shown of the burglary charges to the shooting. Like the situation in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001), while there is a right to a meaningful cross-examination, it does not mean that the trial court cannot exercise its discretion in limiting the scope of cross-examination. Like the rejected inquiry in Saltz, the proposed inquiry of Detective Lyons would not elicit a fact to show bias on his part. Since the inquiry was inappropriate, the trial court properly exercised its discretion in not allowing the cross-examination.

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[10] Since the trial court properly excluded the evidence, Delaware v. Van Arsdall, 475 U.S. 673 (1986) provides no basis for relief.

II. The Trial Court did not abuse its discretion in denying the motion for a directed verdict. There was sufficient direct and circumstantial evidence with reasonable inferences that the Appellant drove to the crime scene, shot the victim and then left with a motive arising from his belief that the victim had participated in a contemporaneous burglary of Felder's home. Contrary to the claim of Appellant, there was substantial circumstantial evidence that Appellant was present on Highland Street at the time of the shooting.

The Appellant claims that the only evidence linking Appellant to the crime scene is the red baseball hat. However, he only claims in his brief that the state failed to establish that he was wearing the hat at the time of the shooting. *Initial Brief of Appellant*, p. 14. Respondent submits that there was sufficient evidence that Felder was at the scene of Willie McKenzie's shooting. This was supported not only by the presence of the hat worn by the shooter at the crime scene with Appellant's fingerprint and DNA present, but also by the identity of the vehicle driven by the perpetrator consistent with the vehicle owned by Appellant's mother that he was seen driving moments before the incident .3 miles away and his attempt to evade questioning by his attempt to falsely identify himself to law enforcement, among other matters. The Appellant's argument goes to the weight of the evidence - not its sufficiency. There was sufficient evidence presented at trial, considering the evidence in the light most favorable to the prosecution, by which a rational trier of fact could find the Appellant guilty beyond a reasonable doubt of murder as the shooter . This issue is without merit.

HOW THE ISSUE WAS RAISED AT TRIAL

The Defense Motion

At the close of the state's case, the defense made a motion for a directed verdict. ROA

451. The defense pointed out that Antrell McFadden, who witnessed the shooting initially claimed that he would be able to identify the shooter, but was later unable to identify Felder in a photographic line-up. Defense counsel recognized that while the defendant's DNA was in the hat found at the scene, that there was an unidentified third-party's DNA also present. ROA 451.[11] He also pointed out that a witness had reported that the vehicle seen at the shooting had silver handles whereas the vehicle connected to the Appellant had white handles. ROA 452.

The State's Response.

Counsel for the prosecution urged that the directed verdict motion be denied because of considerable direct and circumstantial evidence. Particularly, the prosecution stated that there were two eyewitnesses who described the shooter with white shirt and dark pants. Both witnesses noted that the shooter had a hat and one described it as a red hat. The prosecutor also pointed out that in the Appellant's admitted statement, he described himself as wearing a white shirt and pants that evening. Solicitor Meadors noted that a four-door white car described in the statement was traced to the Appellant's mother which is consistent with the eyewitness statements that the white four-door car had come forward with the person wearing a white shirt and dark pants. ROA 454. Though there was a discrepancy between the two eyewitnesses concerning the number of shots fired, the eyewitnesses stated that they saw the individual get shot.

In addition the prosecutor addressed the presence of the hat found at the scene and its link

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[11]The Appellant is not making the same claim at trial as he is making in his brief. Plainly he expressly asserts that the State did not prove that he was wearing the hat on the night of the incident and therefore the State's case fails. *Initial Brief of Appellant*, p. 14. However, at trial, this same argument was not expressly made.

to the Appellant. Assistant Solicitor Meadors described that it was proven by direct and circumstantial evidence. He noted that the hat had the DNA of the defendant and that it also had his fingerprint on it.

Concerning motive, which the prosecution admitted that it did not have to prove - Meadors pointed out that a camera was located on the victim's body. He stated that the evidence revealed that the camera was used to video the Appellant's girlfriend's birthday party. Meadors declared that this tied the victim to the contemporaneous burglary of the Appellant's home. He contended that the defendant's motive was supported by the timing of the break-in, the call to Appellant about the break-in, [his return and departure from his home] to the killing point (.3 miles from his home). The prosecution argued that this was sufficient evidence to require rejection of the motion. ROA 455.

The Trial Judge's Denial of the Motion.

In denying the motion for directed verdict, Judge King declared:

> Rule 19 of the South Carolina Rule of Criminal Procedure control the matter of motions made at this point. Rule 19(A) specifically provides that the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed if there is a failure of competent evidence tending to prove the charge in the indictment.
>
> I've always felt that the use of the word competent in that rule is unfortunate because it implies believable or credible evidence. But I do not believe that that's the way competent is meant in that rule. I think the word competent as used in the rule means admitted evidence or evidence in the record.
>
> And the rule goes on to clarify that by saying in ruling on this motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight.
>
> Most of the points which -most if not all of the points which are made on behalf of the defendant by Mr. Kent are matters that go to the weight of the

evidence and not to its existence.

> I think there is evidence in the record , both direct and circumstantial, that place the defendant at the scene. There is evidence by which it could be inferred from the record –could be – the jury could find from the record that the defendant was the individual who fired the shot, even though there is no direct testimony to that. There is both circumstantial evidence of that and direct evidence of his wearing the hat and his DNA on the hat, and the hat that was found at the scene and other things that Mr. Meadors referred to.
>
> I believe that if I were to direct a verdict, I would be weighing the testimony and inserting my judgment for that of the jury. And I do not believe I could do this, so I would respectfully deny the motion.

ROA p. 455, l. 8- p. 456, l. 17.

STANDARD OF REVIEW

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

The standard of review on appeal for a directed verdict is well founded.

> A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. State v. Martin, 340 S.C. 597,

602, 533 S.E.2d 572, 574 (2000).

State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).[12]

In ruling on a motion for a directed verdict, a trial judge is concerned only with the existence of evidence, not with its weight. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997); State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct.App. 2003) (citing State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)). "[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). An appellate court may reverse a trial court's denial of a motion for a directed verdict if there is no evidence to support the trial court's ruling or if the ruling is based on an error of law. State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct.App. 2008).

ANALYSIS

Although not cited to in the Appellant's opening brief, this case is not analogous to the situations that arose in State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004);

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[12]In Jackson v. Virginia, the U. S. Supreme Court stated that the "critical inquiry on review of the sufficiency of the evidence to support a criminal conviction ... [is] whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The question to be answered in applying the standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319, 99 S.Ct. 2781. (italics in original). Conflicting inferences presented by the facts in the historical record are presumed to have been resolved in favor of the prosecution "even if it does not affirmatively appear in the record, and we must defer to that resolution." Jackson, 443 U.S. at 326, 99 S.Ct. 2781; Wright v. West, 505 U.S. 277, 297, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) or State v. Odems, 395 S.C. 582, 587, 720 S.E.2d 48, 51 (2011). In Martin, the South Carolina Supreme Court found there was not substantial circumstantial evidence the defendant was involved in a murder because there was no evidence that placed the defendant in the apartment where the crime occurred. Martin, 340 S.C. at 602-03, 533 S.E.2d at 574-75. The evidence presented indicated that a car matching the defendant's description was at the victim's apartment complex. However, the Supreme Court noted there was no evidence that conclusively indicated the car seen was the defendant's car, and there was no evidence that both the defendant and his co-defendant arrived at the scene in the car. Further, the Supreme Court found there was no evidence either defendant entered the victim's apartment, and there was no evidence the victim's death occurred during the time the car matching the defendant's was at the apartment complex. Id.

In Schrock, this Court reversed the trial court's denial of a directed verdict motion because nothing in evidence placed Schrock at the scene of the crime. Id. at 132, 322 S.E.2d at 452. The State had presented a footprint found at the murder scene that was similar to footprints found in an area where the defendant had admitted he had been, cigarette butts that were of the same brand the defendant smoked, and an oil can found at the scene that could not be tied to the defendant. Id. at 131-32, 322 S.E.2d at 451. Also, the State presented testimony that could only place the defendant within, at best, one mile of the murder scene. Id.

In Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), the Court affirmed the Court of Appeals' reversal of a denial of a motion for a directed verdict in a murder case. The Court noted the fact that the BMW the victim borrowed on the last day he was seen alive was found abandoned in Tennessee (which was where the defendant was located), raises a suspicion of guilt but is not

evidence that the defendant killed the victim. Id. at 390, 605 S.E.2d at 531. The Court also noted that there was no evidence the defendant was at the scene of the crime, which according to the State's theory was in Colleton County. Id.

In Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Court reversed the trial court's denial of a motion for a directed verdict. The Court found there was no direct evidence linking Bostick to the crime scene or the items found in the burn pile. Id. at 141, 708 S.E.2d at 778. There was also no testimony tending to establish that Bostick had control over the burn pile. Id. The Court determined that the circumstantial evidence that was introduced by the State at trial, at most, only raised a mere suspicion that Bostick committed the murder. Id. at 142, 798 S.E.2d at 774.[13]

In Odems, the State relied on four pieces of circumstantial evidence to acquire a conviction of the defendant on charges of robbery in the first degree, grand larceny, criminal conspiracy, and malicious injury. The evidence was : (1) the defendant was located in the getaway car shortly after the time of the robbery, (2) the items stolen from the victim's home were found in the getaway car, (3) the defendant fled from law enforcement when the car was pulled over, and (4) the defendant enlisted the assistance of an uninvolved individual in his

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[13] This case is also not analogous to State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, the Court affirmed the Court of Appeals' reversal of the denial of a directed verdict and found the defendant was entitled to a directed verdict in a first-degree burglary case because the circumstantial evidence that was presented only raised a mere suspicion of guilt. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127. The Court noted the only evidence linking Mitchell to the burglary was a fingerprint on a screen. Id. The State did not present any evidence whether the screen was on the window at the time the window was broken or when the screen had been removed. The Court found the fact that Mitchell's fingerprint was on a screen propped up against the house did not prove entry because Mitchell had been in and around the victim's house as least three times prior to the burglary. Id.

attempt to evade arrest. Odems, 395 S.C. at 586-87. According to the Supreme Court, "[t]he circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury." Id. The Supreme Court reversed the defendant's conviction.

Appellant's case is inapposite to all four of these preceding cases. There was both direct evidence and substantial circumstantial evidence establishing Appellant was at the scene when the murder occurred. Unlike the facts in Martin, Arnold, Schrock, Bostick, and Odems the evidence presented in Petitioner's case did more than just cast "mere suspicion" that Felder was involved in the shooting. Viewing the evidence in the light most favorable to the prosecution, it was sufficient to support the denial of the motion for a directed verdict.

Evidence revealed the circumstances that led to the death of Willie McKenzie began in the late evening of July 17, 2008 with the telephone call from David around 11:59 that advised Appellant that four guys were breaking into the Appellant's house. ROA 325-26 (Appellant's Statement). At that point, Appellant left the party on Broad Street and returned to his home on Harry Avenue. Appellant reported to the police in his statement that when he left to go to Harry Street he was driving his car, a white vehicle titled to his mother, and his mother was following in a green car. ROA p. 326, ll. 1-7. He identified his car as a white Buick. ROA p. 327, ll. 1-14, p. 329, l. 16 - p. 333, l. 2. (State Exhibits 12, 13).

According to Felder, when he entered his home on Harry Street, he noticed matters missing. ROA p. 326, ll. 8-12. He stated that his girlfriend, Stacey Caughman, advised him to leave if he had something on him. Felder claimed he had marijuana on him "so he promptly left

by himself driving his white four-door Buick." ROA p. 326, ll. 14-15.[14] This was prior to the police arriving at Harry Street.

The Defendant's Clothes

The Appellant also admitted in his statement that he had been wearing black shorts and a black shirt that morning of the 18th, but admitted that he had changed earlier from a white shirt. ROA p. 327, ll. 10-13. [The eyewitness identified the shooter as wearing a white shirt and dark pants. ROA 157, 169-70, 184-86, 202-03].

The 911 Calls

On July 18, there was a 911 call about the burglary at __ Harry Street. ROA p. 232, ll. 18-24. Two minutes later, there was a second 911 call concerning the shooting on Highland Street. ROA p. 232, ll. 22-23, p. 233, ll. 5-9. Then, fifteen minutes later, there was a second call about the break-in at __ Harry Street. In response to the 911 call to the burglary at Harry Street, Officer Gabriel Blackwell arrived at 1 a.m. after a call went out at 12:37. ROA 429-30, 432, ll. 17-24. The Appellant's girlfriend, Stacey Caughman, was present at the time and stated that she had made the 911 call. ROA 430. According to the incident report, the call to Harry Street was at 00:37 and the call on the murder was 00:39. ROAp. 273.

The initial Harry Street burglary 911 call was made at 12:37 and 14 seconds a.m. ROA 414, l. 18 - p. 415, l. 8. The 911 call related to the Highland Street shooting was received at 12:39

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[14] In his statement, Felder claimed he went "the back way" to Sada's apartment after he left Harry Street. However, he could not name any of the streets and claimed he then left. It is apparent that this claimed way was an out of the way route that avoided Broad and Highland Street. Further, Felder claimed to leaving his Buick at Sada's house with the keys on the floorboard. ROA 327. He claimed he went with Boo to the Red Bay area until 3 a.m.. Id. However, he did not know Boo's real name or where he lived.

and 51 seconds am. ROA 415, l. 12-19. State Exhibits 51, 52.

The Eyewitnesses

Kayla McFadden testified that she and her cousin, Antrell McFadden, were walking to a convenience store and came upon a man, who requested a cigarette. After they gave him the cigarette, they walked away from him. She described a car pulling up, a white car with tinted windows pulled up and someone got out and fired shots and kicked the victim. ROA 156-57. Kayla described the shooter as wearing a "hat, white shirt, and some dark pants." ROA p. 157, ll. 24-25. Kayla identified the red hat (State Exhibit 17) as possibly the hat and confirmed that this was the hat on the ground in State Exhibit 1 at the crime scene. ROA 158.

Kayla confirmed that the man who got out of the car initially shot the other man over the car. She confirmed that she saw the shooter go around the car and then kick the victim. ROA 172-73.[15] She stated that the white car had come off Broad Street.

Kayla's cousin, Antrell McFadden, testified that he gave the victim a cigarette that night and the victim was not wearing a hat. ROA 183, 186. After they walked away, he stated a white car with tinted windows pulled up and a man got out of the car wearing a red and black hat, white shirt and blue jeans, about 5'7". ROA 184-86. He stated he heard one shot, but did not see the shooter's face. ROA 186. He said he then saw the hat on the ground and pointed it out to the police. ROA 189-91. He identified State Exhibit 1 showing the hat as the hat he saw on the person who got out of the car. ROA 190-91.[16] (State Exhibit 17). He stated the shooting

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[15] Dr. Janice Ross, the pathologist, testified that it would have been difficult to identify bruising on McKenzie's body after the death. ROA 304.

[16] On cross-examination, McFadden stated he was sure the person was wearing a red hat. ROA p. 207, ll. 16-20.

occurred after 12:30 that night. ROA 194. McFadden testified that he heard the person who shot the victim say "I got you now." ROA p. 229, ll. 17-18.[17]

During the trial Antrell McFadden's statement to the police on July 18, 2008 was also introduced. ROA 215 (State Exhibit 19) (ROA 557). In the statement, McFadden stated that the car had pulled up on the shoulder on the side the guy was walking. He described the car as an all-white four-door Buick with light tint on the windows. He described seeing the driver get out with a low fade and wearing a red and white Phillies hat (although the hat recovered was actually a red St. Louis hat). He described him wearing a white "wife beater" tee shirt and blue jeans. This was at 12:49, less than ten minutes after the shooting. State Exhibit 19 (Statement of Antrell McFadden). ROA 557.

The police confirmed that McFadden had pointed out the red hat to them. ROA 227. Also, ROA 221-22, 226.

The White Buick Identified

The evidence also reveals that later that morning, McFadden identified the Appellant's white Buick as consistent with the vehicle they had seen at the shooting. Kayla described that on their way home from the police station she saw a car that looked similar to the car that did the shooting. ROA 165. She stated she was in the police car with her cousin as they were being brought home. ROA p. 165, ll. 3-23. They were with Detective Lyons and Detective Potteiger. ROA 175-76. She stated that "I think it was the same car. It had tinted windows in it, it was white." ROA p. 176, ll. 11-12. Antrell testified that he thought it was the same car, but was not

[17]Although McFadden testified that he did not see the perpetrator's face, he did claim at one point that he could identify the shooter. ROA 186, 193, 211. However, he was not able to pick out the shooter from a line-up that included the Appellant. ROA 193, 211-12, 235-36.

positive. ROA 195-96, 212.

Detective Lyons confirmed that while he and Detective Potteiger gave the McFaddens a ride home from the police station a white car passed them at Willow Morand Apartments. The car was a white four-door with tinted windows. ROA 231. At that point the McFaddens stated that it looked like the car they had seen earlier, commenting that "it looks like the vehicle, that can be the vehicle, I'm not sure." ROA p. 231, ll. 6-11. Because they had passengers, Det. Lyons stated they could not stop the vehicle so they called it in and had other officers go to the complex and identify the vehicle. ROA 231. They were able to identify the vehicle as belonging to Ida Mae Felder, the Appellant's mother and driven by Stacey Caughman, the Appellant's girlfriend. ROA p. 231, l. 12 - p. 232, l. 12. Det. Lyons stated after they returned, they learned that a burglary had occurred at Harry Street and called in 2 minutes prior to the 911 call on the shooting. ROA 232.

The distance between Willow Morand Apartments and Harry Street was less than one mile and between Harry Street and the crime scene was less than ½ to 3/4 mile. ROA 234. Det. Lyons opined it would take less than a minute to get between Harry St. and Highland St. ROA 274. The distance between Harry and Highland was measured as .3 miles. ROA 441.

Det. Potteiger testified similarly about the ride with the McFaddens when they identified the white car and observed it turning into Willow Morand Apartments. ROA 315-16, 333. He stated it was one of the few vehicles seen on the roadway that morning. ROA p. 316, ll. 2-4.

The False Identity by Appellant

While the police were investigating the case, Detective Lyons went to Spanish Garden Apartments on the afternoon of the 18th to seek to locate the Appellant. When they asked for

Appellant, the Appellant introduced himself as Tavaras, the Appellant's brother. ROA p. 238, ll. 11-22. They were told that Appellant was not there. ROA p. 238, ll. 20-22. Detective Potteiger testified about the false identity event. ROA 318. He declared that when Felder turned himself in on the 19th, that he was the same man they saw on the 18th. ROA 318, 335,

The Tint Removal

As noted above, the vehicle the McFaddens saw the shooter driving was a white car with tinted windows. ROA 157, 184-85, 204-05. In addition, the car that was seen that morning and registered to the Appellant's mother was a white car with tinted windows after 1:30 a.m. ROA 165, 196, 231, 316.

However, the white Buick was later impounded. At that time, there was a tacky film-like substance on the windows. Detective Lyons testified that this was consistent with the tint being removed from the car windows. ROA 243. He stated that the vehicle was seized late on the 18th. ROA 243. He stated that the car in the impound did not presently have tinted windows. ROA p. 285, ll. 15-16. He stated this was 12 to 14 hours after the shooting. ROA 285. Detective Potteiger also stated that the lines on the vehicle were indicative of tint being removed. ROA 330-31. Similarly, Lt. Duggin opined that the marks left on the car at the time he took the photographs suggested the removal of tint. ROA 419-20.

Therefore, there was evidence that the particular car had tinted windows when first seen by Detective Lyons and Potteiger with the McFaddens, but later it was removed that day, prior to the seizure and impoundment.

THE APPELLANT'S RED HAT AT SCENE

The shooter was seen wearing the red hat left at the shooting scene. After recovery of the

hat, evidence from the hat was directly connected to Antrell Felder. First, there was a fingerprint from Felder's right middle finger located on the label of the hat. ROA 371-74.[18]

In addition, the Appellant's DNA was determined to be a major contributor to a swab from the baseball cap (State Exhibit 17) and the victim was excluded from the mixture. ROA p. 425, l. 11- p. 426, l. 17.

SUMMARY

The Appellant contends that the State failed to present any evidence to connect Appellant to the shooting. However, as noted above, this case was more than merely about the hat located at the scene. Unlike Shrock, where there was an inadequate connection with the cigarette butt at the scene and the crime, the particular baseball hat found at the this scene was viewed on the shooter - not the victim - and was directly connected to the crime. Further, the red hat was directly connected to Appellant through both the fingerprint on the label and the mixed DNA from the hat's swab. A white four-door vehicle similar to the shooter's car was directly connected to the Appellant who admitted driving the vehicle at a similar time that evening, an evening when few vehicles were seen on the roadways. That particular vehicle registered to the Appellant's mother was also connected to the Appellant through his DNA and a fingerprint on an item within the vehicle. That particular vehicle was left by Appellant, according to his statement at Sada's house with the keys on the floorboard while Appellant claimed he went to Red Bay between 12:25 and 12:35 and remained at Red Bay until 3 am. ROA 327. That particular vehicle was seen after 1:30 am being driven back to the Willow Morand Apartment by Appellant's

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[18] The Appellant's print was also located from the white Buick on a lottery ticket recovered from the car. ROA 376-77. Felder's DNA was also present in the car. ROA 413-14.

girlfriend - who had earlier remained at Harry Street when the police responded to the break-in call.

The giving of a false identity when the police were seeking to question him speaks of guilty knowledge. The Appellant's odd claim of taking an unusual "back way" route which avoided the crime scene in his statement and an alibi claim with an unknown person questions his credibility about the crime. ROA 326-27. The Appellant acknowledged wearing similar clothes that day as the shooter wore - white shirt and dark pants, but then claimed to have changed clothes into all black that morning. ROA 327.

The inferences drawn by the affirmative acts in changing matters from the time of the crime also suggest guilty knowledge. The timeliness of the removal of the window tint on the day of the crime, his false identification to police as Tavaras,[19] his change of clothes and his claim of leaving the car away from his home with the keys in it suggested guilt. See State v. Thompson, 278 S.C. 1, 10, 292 S.E.2d 581, 587 (False and conflicting statements are evidence of

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[19]The giving of the false name by Appellant to police and denying his own identity is similar to flight or evasion of arrest. See Beckham, 334 S.C. at 315, 513 S.E.2d at 612. "In South Carolina, we recognize that evidence of flight [is] proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." State v. Byers, 277 S.C. 176, 177-78, 284 S.E.2d 360, 361 (1981) (internal quotations omitted); see also State v. Grant, 275 S.C. 404, at 408, 272 S.E.2d 169, at 171 (1980) (stating that while a jury charge on flight as evidence of guilt is improper, admission of evidence and argument by counsel concerning it are allowed). The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Beckham, 334 S.C. at 315, 513 S.E.2d at 612; State v. Crawford, 362 S.C. 627 at 636, 608 S.E.2d 886at 891 (S.C. App. 2005). It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Crawford, 362 S.C. at 636, 608 S.E.2d at 891, citing Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142 (1974)). .

guilty knowledge and intent). Finally, his claimed alibi in being with the unknown "Boo", whose real name he did not know nor his address, was also more than merely suspicious under these circumstances.

Evidence was also presented that this was not the first break-in at Appellant's home. ROA 339. Further, there was evidence presented that Appellant knew the victim and that McKenzie had purchased "items" from Felder on occasion. ROA 339, ll. 15-20.

Against this backdrop was the contemporaneous break-in of the Appellant's home and the odd reporting only the thefts of shoes by his girlfriend [prior to her apparent knowledge of the shooting], while Appellant later reported clothes, shoes and hats after he turned himself in concerning the crime.[20] Compare ROA 431-32 with ROA 326-27. Against the backdrop was the presence on the victim at the crime scene of a camera which had recorded the Appellant's girlfriend's birthday party, implicitly suggesting the camera was a product of the break-in - - albeit unreported. ROA 391-92.

The Appellant seeks to attack the weight of the evidence by suggesting conflicts within the testimony of the witnesses concerning the particular clothes worn, the number of shots heard, whether the suspect's vehicle had silver handles or white handles, and the failure to identify the Appellant in the photographic line-up as the perpetrator as evidence to support the directed verdict motion. *Initial Brief of Appellant*, p. 13. However, a reasonable inference from the evidence in the light most favorable to the prosecution is the test. The Appellant turns that test on its head by taking the inferences in the light most favorable to the defendant. Contrary to his

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[20]As the state cogently pointed out in their closing, who breaks into a home to steal a baseball hat! ROA 483.

claims, as noted by the trial court, his argument goes to the weight of the evidence. This is not the proper standard.

There is no reasonable inferences that this was a mere random shooting at midnight of a person walking along the road. Evidence at the shooting was that the perpetrator stated "I got you now." ROA 199-200. Evidence beyond the baseball hat, but connected to its owner supplied sufficient evidence to send it to a jury. The trial court properly denied the motion for a directed verdict.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to affirm the ruling of the trial court as well as Appellant's underlying convictions.

Respectfully Submitted,

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May 28, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
Howard P. King, Circuit Court Judge
2009-GS-43-0059

Appellate Case No. 2011-203747

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTRELL FELDER,

APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondent's **Final Brief of Respondent** on:

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