

VOL II OF II

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEX ROBINSON,

APPELLANT

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT.
STATE'S EXHIBIT #5 (PHOTO), #6 (PHOTO), #7 (PHOTO), #8 (PHOTO), #9 (PHOTO)
AND #10 (DASH CAM VIDEO)**

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 that got found in his pants in his bedroom with his pregnant
2 girlfriend. And the car he's in right now is the same one
3 that was there, he's got to run.

4 Folks, connect the dots. The bill was in his name; his
5 brother was there; the pictures were there; his girlfriend was
6 there, pregnant; the car was there; he runs from police; the
7 bedroom with clothes that would fit him where the dope was
8 found; his picture is there; his mail is there delivered from
9 another address. It's an arrow and it points directly at the
10 defendant, folks, because he's guilty, guilty of trafficking
11 cocaine 100 to 200 grams. Thank you.

12 THE COURT: Thank you, Mr. Richardson, counsel for the
13 State and thank you counsel for the Defense.

14 Ladies and gentlemen, you've heard the final arguments,
15 I've given you the charge of the case, you found -- you've
16 heard all of the evidence and the case will be with you for
17 your deliberation. When you go to the jury room, your lunch
18 will be there. I'll leave it to you, Madame Foreman to decide
19 whether you want to negotiate during lunch or have your lunch
20 and then wait but that will be your decision. Now
21 unfortunately, our rules do not provide for the alternate to
22 go with you but I'll have to keep the alternate in case
23 something happens. Everybody looks well and healthy and I'll
24 think you'll be that way but I've had things happen so I've
25 got to keep the alternate separate from you.

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 Madame Alternate, anytime the jury has a question though,
2 I'll bring you back to keep you fully informed so that if
3 necessary you'll be able to take the place of a regular juror.

4 I've explained the jury forms to you, Madame Foreman,
5 there will be pencil and paper provided in the jury room and
6 if any of you have any questions about the law, please write
7 that down, let the Bailiff know and I'll call you out and be
8 glad to charge you as to that issue. Remember now, I cannot
9 tell you what the facts are. You and you alone decide that
10 issue. I remember a case I was trying in Darlington, South
11 Carolina when a young lady was charged with arson, having been
12 alleged she burned down a mobile home. Jury came out and said
13 did she smoke. Well, I knew she smoked, I saw her outside the
14 room smoking but that question was never asked and never
15 answered on the record. Consequently, I told the jury that
16 that issue was not discussed on the record. I tell you that
17 to say that whatever the evidence is not based on -- I mean,
18 your judgment is not to be based on speculation but it be
19 based on the law and evidence heard in this courtroom.

20 You may now retire and have your lunch. And I'll leave it
21 to you to decide when you want to begin your deliberation.

22 Alternate remain in the courtroom, please.

23 (REPORTER'S NOTE: The jury retires to the jury room.)

24 THE COURT: Counsel, escort the alternate to the
25 appropriate place and have lunch provided for her.

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 DEPUTY: Yes, sir, Your Honor.

2 THE COURT: Thank you.

3 All right. Come forward, let's agree what's ---

4 MR. HILLIARD: Judge, before we do that and after the
5 alternate get out ---

6 THE COURT: Pardon me?

7 MR. HILLIARD: I say before we do that and after the
8 alternate steps outside and I -- is she out -- okay. I am
9 uncertain what occurred but at the conclusion of the
10 prosecutor's argument, there was some -- and I make no
11 allegations or whatever you might call it but there was
12 something, noise, something from over here on the right-hand
13 side where those school kids are and one of the jurors looked
14 over there and smiled. I don't know what that was. Perhaps
15 it was nothing.

16 THE COURT: I didn't see or hear or anything, did you,
17 Josh? I certainly didn't see or hear or anything.

18 MR. HILLIARD: The folks that are -- there are people who
19 are here that we can call as witnesses ---

20 THE COURT: No, sir, I'm not gonna do that. The jury
21 fully understands that that they are to base on the law and
22 evidence heard in this courtroom and I saw nothing improper by
23 any -- did anybody have any comments that they made? What
24 comment -- come forward.

25 MR. HILLIARD: Stand up.

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 MS. HILLIARD: They were clapping ---

2 THE COURT: Come forward. What's your name?

3 MS. HILLIARD: My name is Bonnie Hilliard.

4 THE COURT: And what did you say or do if anything?

5 MS. HILLIARD: I didn't do anything. They were clapping.

6 I was ---

7 THE COURT: Do what?

8 MS. HILLIARD: They were clapping as Brad finished. The
9 students were clapping and then the juror in the second seat
10 looked over at them smiled.

11 MR. HILLIARD: It was the third juror from the right-hand
12 side on the ---

13 MR. RICHARDSON: I assume they were clapping because they
14 were glad lunchtime was here.

15 MS. BASS: Please.

16 THE COURT: I ---

17 MR. RICHARDSON: They asked earlier how long the argument
18 was gonna be and I told them ---

19 THE COURT: Ms. Hickman, did your class clap for any
20 reason.

21 MS. HICKMAN: I truly did not notice anyone clapping but
22 ---

23 THE COURT: Ma'am?

24 MS. HICKMAN: I did not notice anyone clapping but these
25 kids are really ---

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 THE COURT: I did not notice it either and don't think
2 that it influenced the jury in any way. I -- let's let the
3 jury understand they are to base the law and evidence in this
4 case.

5 MR. HILLIARD: Judge, I would request -- respectfully
6 request a curative instruction to the jury to the effect that
7 anything that was exhibited in the courtroom should not be
8 considered by them. I heard it. There's no question in my
9 mind what happened. I'm not trying to embarrass anybody. I'm
10 not trying to cause any trouble but it happened.

11 MS. HICKMAN: There may've been a noise. I really did
12 not notice -- I'm so sorry.

13 THE COURT: They jury is having lunch. I don't see a --
14 to do that would bring them back after lunch would just
15 disrupt the whole proceeding. I've been observing very
16 carefully and I didn't observe any clapping which would tend
17 to influence the jury.

18 MR. HILLIARD: All right, sir. Well, I would like to
19 make a proffer of the witnesses that I have here to testify
20 regarding that and I will say that ---

21 THE COURT: Which witnesses you got to testify?

22 MR. HILLIARD: I'll call Bonnie. Bonnie.

23 MS. HICKMAN: This student said that she did ---

24 THE COURT: Come forward, please. If you know anything
25 about the case, I want to know about it and want to know why

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 you did it.

2 What's your name?

3 MS. ALSTON: Aliyah. I did like this (indicating) by
4 accident. I wasn't clapping.

5 THE COURT: What?

6 MS. ALSTON: I did like this by accident but I wasn't
7 clapping.

8 THE COURT: You were not clapping?

9 MS. ALSTON: No.

10 THE COURT: Is this what you heard -- or who heard her?

11 All right. Who else did you hear clapping? Let me ask
12 you this, what is your involvement in this case in any way.

13 Who are you?

14 MR. HILLIARD: This is my wife, Judge, she is here with
15 me.

16 MS. HILLIARD: I've been working on this case since ---

17 THE COURT: You tell me who you heard clapping?

18 MS. HILLIARD: The kids over here were clapping ---

19 THE COURT: Pardon?

20 MS. HILLIARD: The kids were clapping over here.

21 THE COURT: They say they were not. Ms. Hickman, their
22 teacher, says they were not.

23 Bring the jury in and I'll tell them -- they'll have to
24 interrupt their lunch.

25 Bring the jury in.

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 THE COURT: Ms. Hickman, come forward, please.

2 Bring the jury back and let them interrupt their lunch.

3 MR. HILLIARD: Well, let's do one of the other, Judge.

4 (REPORTER'S NOTE: Brief bench conference with Ms. Hickman.)

5 Judge, if we could have -- I understand that you're

6 having a conversation with the teacher and ---

7 THE COURT: You may come forward and join it.

8 MR. HILLIARD: We need it on the record, Judge.

9 THE COURT: You're making an ado about nothing and it's
10 your wife that's doing it.

11 MR. HILLIARD: Let's go with this, Judge.

12 THE COURT: No, come forward. On the record, let's come
13 forward. Bring the jury in.

14 MR. HILLIARD: Judge, you can't bring the jury in while
15 we're trying to ---

16 THE COURT: I can do what I please; it's my court.

17 MR. HILLIARD: No question about that, Judge.

18 THE COURT: Okay, I didn't think there was. It may not
19 be necessary if the jury didn't hear anything or wasn't
20 necessary.

21 Bring the jury in, please.

22 (REPORTER'S NOTE: The jury returns to the courtroom.)

23 THE COURT: Ladies and gentlemen, at the conclusion of
24 the State's argument, there is some assertion that maybe one
25 of these young students clapped. That young student is

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 denying that, said she clapped not for the case but for her
2 own purposes. However, and I think one -- as the noise was
3 heard, one juror turned to the left which is fine. I say
4 again to you, if that occurred, which I don't think it did, I
5 didn't hear it, my law clerk didn't hear it -- if it occurred
6 I tell you that you must disregard that. You're to base your
7 law and evidence under the law in this case. We have with us
8 some young students, law students from a school who are
9 interested in the law and have given us their time to be here
10 and I think them for that. But if somebody made some gesture
11 back there and you saw it, please disregard it. Does anybody
12 want to tell me they are influenced by anything they may've
13 heard back from the students? Anybody?

14 (REPORTER'S NOTE: No response from jury.)

15 THE COURT: I think not. Go back and enjoy your lunch.

16 (REPORTER'S NOTE: The jury retires to the jury room.)

17 THE COURT: All right, counsel. Do you have any
18 witnesses you want to call under oath?

19 MR. HILLIARD: Yes, sir.

20 THE COURT: Which one? And the record -- the record is
21 going to reflect that your wife is the one that made this
22 accusation.

23 MR. HILLIARD: No, sir, Judge, the record -- well, the
24 record ---

25 THE COURT: She said she did, didn't she?

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 MR. HILLIARD: I made the accusation.

2 THE COURT: No, you identified her as your wife who said
3 it occurred. Don't change on me, now.

4 MR. HILLIARD: Judge, I'll -- I am asking ---

5 THE COURT: I am telling you that this accusation comes
6 from an assertion by your wife based on your conduct --
7 content. Now, if you've got a witness that you want to call,
8 call her.

9 MR. HILLIARD: The first thing I want to do, Judge, is
10 object to the Court's remarks to the jury. I believe that the
11 Court's remarks to the jury ---

12 THE COURT: What remark are you objecting to?

13 MR. HILLIARD: I'm objecting to the remark to the jury
14 that said that you did not believe that the event occurred. I
15 believe that that interjected the Court into the ---

16 THE COURT: No, sir. I did not hear it and I would lie
17 to the jury if I told them I did. I just said I did not hear
18 it and I'm satisfied with that. Now, what else have you got?

19 MR. HILLIARD: Well, Judge, the jury was brought out with
20 this poor student who is standing here in front of the group
21 and in the middle of the room and with the teacher before the
22 Court and at the point in time that Your Honor was making the
23 remarks commending the students for being here and ---

24 THE COURT: What -- well, you've been wasting my time for
25 two days, outside the presence of the jury, what witness do

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1 you wish to call to assert your position that this jury was
2 influenced by one young student putting their hands together.
3 If you got a witness call them and let's get on with it.

4 MR. HILLIARD: I call me, John Hilliard.

5 THE COURT: I'm not gonna accept you, you're ---

6 MR. HILLIARD: I'll call them, Your Honor. I'll call all
7 of them.

8 THE COURT: Pardon me?

9 MS. BASS: I'll call all of them and we'll move Mr.
10 Hilliard out of it. Let me just call all of them or let's
11 have every person raise their hand, my motion is ---

12 THE COURT: I'll ask them for you.

13 MS. BASS: Your Honor, I ---

14 THE COURT: I'm not gonna waste my time calling every
15 witness.

16 MS. BASS: Okay. Well, I move at this time on behalf of
17 Alex Robinson to ---

18 THE COURT: Pardon?

19 MS. BASS: I would move at this time on behalf of Alex
20 Robinson that I just be allowed to put the names of every
21 person on the record that said they heard clapping ---

22 THE COURT: Just wait a minute and let me hear ---

23 MS. BASS: --- to preserve the record ---

24 THE COURT: No, wait -- I can do it. How many of you
25 back there heard somebody clap? Please raise your hand. All

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 right. I want you two to come forward.

2 MR. HILLIARD: There's four, Judge.

3 THE COURT: All right. Four come forward.

4 Say what you got to say.

5 You understand now whether they clapped or not, the issue
6 is whether they were influenced or not. I have instructed the
7 jury about that.

8 Did you clap? What's your name?

9 MR. FILLMORE: Quan Fillmore

10 THE COURT: Talk a little louder.

11 MR. FILLMORE: Quan Fillmore.

12 THE COURT: Did you clap?

13 MR. FILLMORE: No, sir.

14 THE COURT: Sir?

15 MR. FILLMORE: No, sir.

16 THE COURT: Why are you standing here?

17 MS. BASS: Cause he heard clapping.

18 THE COURT: You heard it? Who did you hear clap?

19 MR. FILLMORE: It was her -- it was like -- she just did
20 like that (indicating).

21 THE COURT: Pardon me?

22 MR. FILLMORE: She just did like that.

23 THE COURT: Can you hear what he said? You gonna have to
24 talk louder.

25 COURT REPORTER: That's a microphone right there.

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1 MR. FILLMORE: I said, it wasn't really a clap, it was
2 just like that (indicating) because she was thinking it was
3 over and we could leave.

4 THE COURT: It was not a clap?

5 MR. FILLMORE: No, it was just (indicating) that.

6 THE COURT: Is that what you did? Who did that?

7 Who was the girl that put their hands together and why?

8 MS. ALSTON: (Raising hand) because I was ready to go.

9 THE COURT: Okay. Who else heard a ---

10 MS. BASS: Your Honor, what's her name and the correct
11 spelling, please.

12 MS. ALSTON: A-L-I-Y-A-H.

13 MS. BASS: A-L ---

14 MS. ALSTON: --- I-Y-A-H.

15 MS. BASS: Aliyah, what's your last name?

16 MS. ALSTON: Alston.

17 MS. BASS: A-U-S-T ---

18 MS. ALSTON: A-L-S-T-O-N.

19 MS. BASS: A-L-S-T-O-N.

20 MS. BASS: And this young man, what's his name? Correct
21 spelling, please, sir.

22 MR. FILLMORE: Q-U-A-N.

23 MS. BASS: Quan.

24 MR. FILLMORE: Q-U-A-N.

25 THE COURT: Wait a minute, now. You are beginning to

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1 badger guests of my courtroom and I am not going to permit it.

2 MS. BASS: Your Honor, I object to that.

3 THE COURT: Wait a minute. You be quiet please. Don't

4 -- let me talk a moment. I'm not going to let you badger

5 guests of my courtroom. Now, these young people -- did the

6 rest of you hear any clapping or any noise?

7 MS. PICKETT: I did hear it.

8 THE COURT: Tell me what you heard?

9 MS. PICKETT: I heard her clapping but I'm not sure if
10 she was clapping because of what the man said or ---

11 THE COURT: Wait a minute. Come forward.

12 COURT REPORTER: Name please.

13 MS. PICKETT: My name is Diamond Pickett.

14 THE COURT: Yes.

15 MS. PICKETT: And yes, I did hear her clapping. I'm not
16 sure if she was clapping because of what the man said or if
17 she was clapping because she was ready to go but she did clap.

18 THE COURT: That's fine. And who is the one that
19 clapped?

20 MS. PICKETT: Aliyah.

21 MS. ALSTON: Me.

22 THE COURT: Okay. Anybody else clap?

23 MS. HICKMAN: No, sir.

24 MR. HILLIARD: Judge, I recognize ---

25 THE COURT: No. I'm gonna end this for you right now.

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1 If I'm wrong, I'll let the appellate court say it. This jury
2 has told me -- I've told them not to be influenced by that,
3 they have not. I'm not going to let you badger these young
4 folks, not gonna do it. Stand aside. You can say what you
5 want to but you asked me to give a curative instruction to the
6 jury. At your request, I broke lunch and did that. Now, you
7 want to badger these young folks and I'm not gonna permit it.
8 If I'm wrong, say so. The jury has told me by words that they
9 were not influenced by this young girl putting her hands
10 together. Now, Madame -- Ms. Hickman, you were back there.

11 MS. HICKMAN: Yes, sir.

12 THE COURT: I want you to say for the record what -- tell
13 what you heard. You were right there in the middle of them.

14 MS. HICKMAN: I was sitting in front of these ---

15 THE COURT: Talk a little louder so she can hear you.

16 MR. RICHARDSON: Here you go.

17 MS. HICKMAN: I was sitting in front of these children
18 and I -- when he was finished speaking I heard a noise and I'm
19 used to, as a teacher just being attuned to noises because I
20 cautioned the kids when we come in here to be very quiet. And
21 so immediately I turned around to see and I really didn't see
22 what the noise was, I just heard a noise. And I just said,
23 shh, be quiet, and that was all that I heard or seen.

24 THE COURT: Now, you want to question her on what she
25 heard, I'll be -- permit that. Not both of you now, the rules

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1 requires one, I'll permit either one of you.

2 MS. BASS: All I wanted to know was the correct spelling
3 of Quan's name and the ---

4 THE COURT: Again, you're harassing. I didn't ask you
5 that. I asked you to cross examine her on her witness -- on
6 her statement.

7 MS. BASS: Ma'am, could you please identify what are the
8 names of the students and so I could spell their names, that's
9 all. Correct spelling, that's all.

10 MS. HICKMAN: I have given it to this lady here also.
11 This is Quan Fillmore.

12 MS. BASS: Okay. Thank you.

13 MS. HICKMAN: Aliyah Alston.

14 MS. BASS: I've got that one, thank you.

15 MS. HICKMAN: Diamond Pickett.

16 MS. BASS: Diamond Pickett.

17 MS. HICKMAN: Taquilla Bellamy and Sha'Mara Henderson.

18 THE COURT: In the meantime, bring my jury back out.

19 Bring them back out. Bring the jury back out.

20 DEPUTY: Yes, sir, Your Honor.

21 (REPORTER'S NOTE: The jury returns to the courtroom.)

22 DEPUTY: Waiting on the alternate, Your Honor.

23 THE COURT: Bring the alternate in too.

24 DEPUTY: All right.

25 THE COURT: We need to wait on the alternate. Any time I

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1 discuss any issue with you, I need to have that alternate
2 present.

3 Ladies and gentlemen, at the conclusion of the State's
4 case, there was apparently some noise or clapping or whatever
5 it was in the background. Now many of you happened to hear
6 whatever it was? Please raise your hand. Somebody turned.
7 Okay. Did that influence any of you in any way with regards
8 to your judgment as finders of the facts in this case?

9 (REPORTER'S NOTE: Jury unanimously indicates in the
10 negative.)

11 THE COURT: If any of you were influenced by whatever
12 occurred back there, raise your hand and I'll excuse you from
13 the trial of this case.

14 (REPORTER'S NOTE: No response from jury.)

15 THE COURT: Now you're all under oath. And you are
16 saying to me that you heard some type of disturbance back
17 there, is that right, some of you, but all of you under oath
18 are saying to me that that would not influence whatever
19 decision you make as finders of the facts in this case. Is
20 that what I hear?

21 (REPORTER'S NOTE: Jury unanimously indicates affirmatively.)

22 THE COURT: Then you -- I'm not gonna interrupt your
23 lunch again. Go ahead. Thank you.

24 (REPORTER'S NOTE: The jury retires to the jury room.)

25 THE COURT: All right. Anything further?

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1 MR. HILLIARD: Judge, if I could point out for the
2 purpose of the record that I counted as an officer of the
3 Court at least eight jurors that raised their hand and said
4 that they had heard what we had previously described. The
5 reason -- you know, I don't take any pleasure in this. I'm
6 not -- this is uncomfortable for me, okay ---

7 THE COURT: You're not making -- let me interrupt that,
8 whether they did or did not, each of these jurors have told me
9 under oath that they heard some noise of some kind back there
10 and I've told them that I would recuse any one of them who was
11 affected by it. I'm comfortable with that statement.

12 I am uncomfortable with you and your wife embarrassing
13 the guests of this Court in such a manner. It is totally
14 improper. It did not occur in the manner that you say. If it
15 occurred at all it was very slight and I don't think it was
16 proper for you to embarrass these young folks in that way and
17 that's all I'm gonna say about it other than to say I've
18 discussed with the jurors, none of them were affected by it,
19 all of them were under oath saying that they will base their
20 verdict on the law in this case and I'm comfortable with it.
21 We are in recess for lunch. Thank you.

22 MR. RICHARDSON: Thank you, Your Honor.

23 MR. HILLIARD: We move for mistrial, Judge.

24 THE COURT: I reject that.

25 MR. HILLIARD: Thank you, Judge.

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1 THE COURT: I think you had a fair trial and it's up the
2 jury. I'm not going to mistrial based on what your wife said
3 she heard. Nobody else heard it.

4 MR. HILLIARD: I ---

5 THE COURT: Wait a minute. You don't understand. I've
6 told you I'm through with this. Now, you fool with me and I'm
7 gonna deal with you in a harsh way. We are in recess. I deny
8 your motion for a mistrial and think it's absurd on the face
9 of it.

10 MR. RICHARDSON: We need to go through ---

11 THE COURT: You want to be heard?

12 MR. RICHARDSON: No, sir, Your Honor. We just need to go
13 through the exhibits so they can go back to the jury.

14 THE COURT: All right. Thank you.

15 Ms. Hickman, I express to you, and again I want to be on
16 the record, my -- Ms. Hickman, I express to you on the record
17 my appreciation for your group's presence here.

18 MS. HICKMAN: Thank you.

19 THE COURT: Conclude absolutely that their conduct was
20 not improper under the circumstances, apologize for the
21 inconvenience of this and thank you again for being here.

22 MS. HICKMAN: Thank you, sir.

23 (REPORTER'S NOTE: Exhibits reviewed and approved by counsel
24 for State and Defense before being submitted to jury.)

25 (REPORTER'S NOTE: Deliberation begins at 2:00 p.m.)

State v. Alex Robinson (November 9, 2011)
QUESTION OF THE JURY

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1 *****OFF THE RECORD*****

2 (On the Record.)

3 THE COURT: Bring the jury in, please.

4 I am -- let the record reflect that I have received a
5 communication which has now made a part of the record, have
6 shown it to the State and to the Defendant, this provides as
7 follows: Law of possession. Obviously, they want the law of
8 possession which I am prepared.

9 COURT'S EXHIBIT NUMBER FOUR

10 MARKED FOR IDENTIFICATION

11 (REPORTER'S NOTE: The jury returns to the courtroom.)

12 THE COURT: Good afternoon. I trust that you got your
13 lunch down though you were interrupted so much. Sometimes
14 these things occur and I hope you understand.

15 You've done exactly as I asked you to do and that was if
16 anybody has any further questions about the law, please let me
17 know. I have received a communication wherein your
18 distinguished jury, Madame Foreman, desires a further
19 instruction with regard to the law of possession. The
20 statutory laws of South Carolina regarding cocaine mandate
21 that if a person is in possession, actually or constructively,
22 of a quantity of cocaine of more than 100 and less than 200,
23 they are guilty of trafficking in cocaine. Now, let me
24 describe for you the various elements and define for you
25 possession. There are certain elements of this offense which

State v. Alex Robinson (November 9, 2011)
QUESTION OF THE JURY

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1 the State must prove beyond a reasonable doubt. Before the
2 Defendant can be convicted and found guilty, each of these
3 three elements must be found by you the jury beyond a
4 reasonable doubt and should you fail to find beyond a
5 reasonable doubt that all of these elements exist, your
6 verdict must be for the Defendant. First, the jury must find
7 beyond a reasonable doubt that this Defendant did possess a
8 quantity of a controlled substance at the time and place and
9 in the manner alleged in the indictment. Possession requires
10 that a person be in the actual or constructive possession of
11 the controlled substance with actual knowledge of its
12 presence. Possession of a controlled substance exists when
13 the controlled substance is found in the actual physical
14 custody of the person charged with possession and constructive
15 possession of a controlled substance exists when a person
16 although not in actual physical possession of the controlled
17 substance exercises dominion and control over the controlled
18 substance or has the right to exercise dominion and control
19 over the controlled substance. A person has possession of a
20 controlled substance within the meaning of the law when he has
21 the power and intent to control its disposition or use. It
22 must be shown that the Defendant had possession of the
23 controlled substance actual or constructive and that the
24 Defendant knew he had the controlled substance in his
25 possession, actual or constructive. Knowledge of the presence

State v. Alex Robinson (November 9, 2011)
QUESTION OF THE JURY

578

1 of the controlled substance by the defendant is essential.
2 The defendant's knowledge and possession may be inferred if
3 the substance was found on the premises or property under the
4 defendant's control. You, as the jury, are free to accept or
5 reject this permissive inference of knowledge and possession
6 depending upon your view of the evidence. The second
7 condition you must find beyond a reasonable doubt is that the
8 substance was cocaine, which I charge you is a controlled
9 substance. And the third thing that you must find beyond a
10 reasonable doubt is that the quantity of the controlled
11 substance was 100 grams or more but less than 200. That is
12 the charge with possession, actual or constructive.

13 You may now return to your deliberations. Thank you.

14 (REPORTER'S NOTE: The jury retires to the jury room.)

15 THE COURT: Gentlemen, I have this instruction that I
16 absolutely read. If you desire me to, I'll be glad to send it
17 in. What say the State?

18 MR. RICHARDSON: I have no objection, Your Honor.

19 MR. HILLIARD: Judge, we would ask that the instruction
20 not be sent to the jury and we would further ask that they be
21 instructed that in order for there to be possession,
22 constructive possession, that the Defendant must have
23 knowledge ---

24 THE COURT: I said that.

25 MR. HILLIARD: Yes, sir, but after that it was said that

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 knowledge of the existence of the controlled substance could
2 be inferred by the right to control the property. I would
3 submit to the Court that that gives them the opportunity ---

4 THE COURT: This is the same sentence -- same that I gave
5 at the initial conference and there was no objection to it.
6 I'm gonna leave it like it is.

7 MR. HILLIARD: All right. Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. RICHARDSON: Thank you, Your Honor.

10 At ease, Your Honor?

11 THE COURT: Sir?

12 MR. RICHARDSON: We're at ease?

13 THE COURT: Yeah, but don't go so far that -- the jury
14 may have another ---

15 MR. RICHARDSON: Yes, sir. I was just downstairs in my
16 office.

17 THE COURT: Yeah, we are at ease, that's fine.

18 MR. HILLIARD: Thank you, Your Honor.

19 THE COURT: All right.

20 *****OFF THE RECORD*****

21 (On the Record.)

22 THE COURT: Thank you, be seated. Ladies and gentlemen,
23 I have received a communication from the jury that they have
24 reached a unanimous verdict in this case. I have absolutely
25 no idea as to what the verdict is. However, whatever the

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 verdict is, it will impact on various folks within the sound
2 of my voice. I want everybody to know that I will permit no
3 outburst, no statement of any kind, no noise. If any of that
4 occurs, I'm gonna find somebody in contempt of court and deal
5 with it in a most serious manner. This is a most solemn
6 moment whether the verdict is not guilty or guilty and must be
7 treated as such and I assume that y'all will do that. I
8 certainly hope so.

9 Bring the jury in.

10 (REPORTER'S NOTE: The jury returns to the courtroom.
11 3:52 p.m.)

12 THE COURT: Bring the foreman in, please. Is the
13 foreman in?

14 Madame Foreman, have you and your distinguished jury
15 reached a unanimous verdict?

16 MADAME FOREPERSON: Yes, we have.

17 THE COURT: If this be the unanimous verdict of all
18 twelve, please signify by raising your right hand.

19 The jury has so signified. Please accept the verdict and
20 hand it to me.

21 And where is the indictment, did they bring it? What
22 happened to the indictment.

23 MADAME FOREPERSON: It's still in the room.

24 THE COURT: Please get it. Have the Bailiff ---

25 DEPUTY: She did, Your Honor.

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 THE COURT: Okay. Madame Foreman, you will recall that
2 in addition to this form verdict to assist you, I also sent in
3 the indictment. On the back of that indictment is the word
4 verdict. I'm gonna ask that you put on the back of the
5 indictment under the word verdict the exact thing that you
6 found here for me.

7 Give that to the -- show her the word verdict on the back
8 and hand her this indictment please. Madame Clerk, hand her
9 this.

10 Using the same language on this document, please put it
11 on that and sign your name.

12 Now, may I see the back of the indictment? Please put --
13 hand them back. Put the quantities involved.

14 I thank you for this. This is an exact conformity with
15 your findings of fact.

16 Please read the verdict.

17 CLERK: Yes, sir.

18 THE COURT: You can read it off the other statement.
19 They're the same thing so read it either way you want to.

20 CLERK: Yes, sir. Indictment Number 2009-GS-26-3445,
21 State of South Carolina, County of Horry versus Alex Lorenzo
22 Robinson, we the jury unanimously find the Defendant Alex
23 Lorenzo Robinson guilty of trafficking cocaine in the amount
24 or 100 grams or more but less than 200 grams. Signed by
25 foreperson Janice Galbraith, dated November 9th, 2011.

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 THE COURT: Show both forms first to the State and then
2 to the Defendant so there will be no question about it.

3 Is there any question by the Defense about the form or
4 the verdict?

5 MR. HILLIARD: No question about the form or the verdict,
6 Your Honor.

7 MR. RICHARDSON: No, sir, Your Honor.

8 THE COURT: Anything else required before I discharge
9 this distinguished jury?

10 MR. HILLIARD: We'd ask that they be polled, Your Honor.

11 THE COURT: Sir?

12 MR. HILLIARD: We would ask that they be polled, Your
13 Honor.

14 THE COURT: Poll the jury. You're entitled to that.

15 CLERK: When I call your juror number if you will please
16 stand. Juror Number 35, is this your verdict?

17 JUROR 35: Yes.

18 CLERK: Is it still your verdict?

19 JUROR 35: Yes.

20 THE COURT: Thank you.

21 319, is this your verdict?

22 JUROR 319: Yes.

23 CLERK: Is it still your verdict?

24 JUROR 319: Yes.

25 CLERK: Thank you.

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 214, is this your verdict?
2 JUROR 214: Yes.
3 CLERK: Is this still your verdict?
4 JUROR 214: Yes.
5 CLERK: Thank you.
6 296, is this your verdict?
7 JUROR 296: Yes.
8 CLERK: Is this still your verdict?
9 JUROR 296: Yes.
10 CLERK: Thank you.
11 60, is this your verdict?
12 JUROR 60: Yes.
13 CLERK: Is this still your verdict?
14 JUROR 60: Yes.
15 CLERK: Thank you.
16 362, is this your verdict?
17 JUROR 362: Yes.
18 CLERK: Is this till your verdict?
19 JUROR 362: Yes.
20 CLERK: Thank you.
21 79, is this your verdict?
22 JUROR 79: Yes.
23 CLERK: Is this still your verdict?
24 JUROR 79: Yes.
25 CLERK: Thank you.

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 126, is this your verdict?
2 JUROR 126: Yes.
3 CLERK: Is this still your verdict?
4 JUROR 126: Yes.
5 CLERK: Thank you.
6 104, is this your verdict?
7 JUROR 104: Yes.
8 CLERK: Is this still your verdict?
9 JUROR 104: Yes.
10 CLERK: Thank you.
11 123, is this your verdict?
12 JUROR 123: Yes.
13 CLERK: Is this still your verdict?
14 JUROR 123: Yes.
15 CLERK: Thank you.
16 92, is this your verdict?
17 JUROR 92: Yes.
18 CLERK: Is this still your verdict?
19 JUROR 92: Yes.
20 CLERK: Thank you.
21 95, is this your verdict?
22 JUROR 95: Yes.
23 CLERK: Is this still your verdict?
24 JUROR 95: Yes.
25 CLERK: Thank you.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 THE COURT: The jury has been polled. Anything further
2 before I discharge the jury?

3 MR. HILLIARD: Nothing further, Your Honor.

4 THE COURT: Madame Foreman, ladies and gentlemen, none of
5 you asked to come to court this week and none of you certainly
6 asked to be in this trial. But as citizens of Horry County
7 and the State of South Carolina, you have come forth and have
8 done your duty as jurors. I have nothing to say with regards
9 to the verdict except that the evidence if believed and
10 obviously it was, would certainly justify your verdict in this
11 case. As finders of the facts, it was your decision to make
12 and you've made it unanimously and we thank you for your
13 services.

14 This will end your services for the week. We had one
15 other case to try and it has been resolved. I'm told that
16 there's no civil cases. Is that right down there to be tried?

17 CLERK: Yes, sir.

18 THE COURT: I'm not gonna send my jury back down there
19 anyway.

20 You are now discharged with my thanks and gratitude.
21 Thank you so much.

22 (REPORTER'S NOTE: Jury is dismissed and leaves courtroom.)

23 THE COURT: Have the Defendant come forward for
24 sentencing and then I'll hear any motions.

25 MR. HILLIARD: We'll hear the motions before the

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 sentencing, Your Honor?

2 THE COURT: I will -- whatever you prefer.

3 MR. HILLIARD: Thank you, Your Honor. Judge we would
4 renew our motion for mistrial in connection to the case. I
5 recognize that the Court has ruled on the motion but at the
6 same time we believe that -- and I recognize that the Court
7 has asked the jurors whether or not they were influenced by
8 the occurrences in the court and they have indicated in the
9 negative. However, I would submit to the Court that it is
10 under the circumstances impossible for them not to have been
11 influenced by that and we would ask you to mistry the case on
12 the basis of that.

13 THE COURT: You know, that's interesting. Your folks
14 apparently heard a lot of noise up here. My court reporter
15 heard nothing. I heard nothing. And my law clerk heard one
16 solid sound but you would say there was a big applause back
17 there and that just did not occur. Under any circumstances, I
18 called the jury back out twice and asked them were they
19 influenced by it in any way and they said no. I even said if
20 anybody was influenced in any way I would discharge them from
21 this jury and so I -- we are fully protected on the record.
22 These young students were high school or college students and
23 certainly were not disruptive in any way and if you or anybody
24 else said they were you are in error, period. That motion is
25 respectfully denied.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 MR. HILLIARD: Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. HILLIARD: We further, Your Honor, renew our motion
4 made at the conclusion of the State's case and at the
5 conclusion of our case for a directive verdict of not guilty.
6 We would submit to the Court that the evidence even taken in a
7 light most favorable to the State is insufficient to go to the
8 jury and allow them to convict Mr. Robinson of trafficking in
9 cocaine. We believe it is insufficient.

10 THE COURT: I understand your position but as I said
11 before the evidence was overwhelming that he lived at this
12 place. The evidence was overwhelming that the drugs as found
13 were in his bedroom. Evidence was overwhelming that it was
14 more than 100 and less than 200, that's undisputed. And it
15 was found in his britches and I could very well see how a jury
16 could've found him guilty of possession actual or
17 constructive. The evidence was just overwhelming if believed
18 and so I would respectfully say to you, sir, that that was a
19 question for the jury based on the totality of the evidence
20 and they have found this guilty verdict which I think under
21 the testimony if believed is proper.

22 MR. HILLIARD: Thank you, Your Honor.

23 THE COURT: So, I would respectfully deny that motion.
24 You wish to be heard on that issue?

25 MR. RICHARDSON: No, sir, Your Honor.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 THE COURT: All right. Anything further?

2 MR. HILLIARD: Thank you, Your Honor. Judge, we would
3 again renew our motion for the search warrant to be quashed
4 and would ask that Your Honor recuse yourself from hearing
5 this case based on the fact that the search warrant was signed
6 by Your Honor thus making you the determiner of whether or not
7 there was sufficient information to go forward on the search
8 warrant. We renew that motion.

9 THE COURT: Well, your -- the record will reflect that
10 you made such a motion.

11 MR. HILLIARD: Yes, sir.

12 THE COURT: And the record will reflect that I denied it.

13 MR. HILLIARD: Yes, sir.

14 THE COURT: It's a two-pronged issue, one separate from
15 the other. And the first issue was, was the affiant's
16 affidavit on the face of it sufficient for a search warrant.

17 MR. HILLIARD: Yes, sir.

18 THE COURT: I concluded that it was. The second issue
19 was raised in court on the record was whether or not that the
20 affiant gave true and correct statements and I could make that
21 determination separately from being the judge who issued the
22 search warrant and I did. I see absolutely no conflict in
23 that position. So, that's respectfully denied.

24 MR. HILLIARD: Thank you, Your Honor. And once again we
25 renew our motion to dismiss the case based on the destruction

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 of evidence, we would submit to the Court is favorable to our
2 client.

3 THE COURT: Well, the record will reflect that at your
4 suggestion I charged the jury with the appropriate spoilage
5 charge. I do conclude that the evidence that they destroyed
6 was relatively insignificant, saw no probative value one way
7 or the other but do not believe that it impacted on the
8 fairness of the trial but you are protected on that issue.

9 MR. HILLIARD: Thank you, Your Honor.

10 THE COURT: Anything further? Ms. Bass, I'll be glad now
11 to hear you since he's sat down.

12 MR. HILLIARD: That's all we have, Your Honor. Thank you
13 very much.

14 THE COURT: I will say this for both of you, the case was
15 very vigorously tried. Thank you so much. We are now -- no,
16 bring the Defendant forward.

17 MR. RICHARDSON: Your Honor, for the record, I assume the
18 motion for new trial was during the mistrial motion?

19 MR. HILLIARD: Motion for new trial is denied as well,
20 Your Honor?

21 THE COURT: Yes, sir.

22 MR. HILLIARD: Thank you, Your Honor.

23 THE COURT: There is ample evidence sufficient for the
24 jury's consideration to arrive at the verdict that they did.
25 And on those other issues, you are protected on the record.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 MR. HILLIARD: Thank you, Your Honor.

2 THE COURT: All right, sir. What's the prior record of
3 this Defendant if any? Come forward.

4 MR. RICHARDSON: One second, Your Honor. Court's
5 indulgence.

6 Your Honor, he is ---

7 THE COURT: Talk to me. You're talking down to the ---

8 MR. RICHARDSON: Yes, sir, Your Honor. He has a
9 probation -- he got put on probation in 2004, February of 2004
10 for receiving stolen goods, 1,000 to \$5,000. That's his prior
11 record, Your Honor.

12 THE COURT: All right, sir.

13 Counsel, anything you want to be heard on?

14 MR. HILLIARD: Yes, sir, Judge. You have seen and heard
15 the evidence in connection with this case. My client has been
16 convicted, I understand that. I have come to know him
17 personally over the period of time that I have represented him
18 and I can tell you as an officer of the court that I have
19 found him to be a respectful individual who has been polite,
20 prompt, he has come and spoken with me on any number of
21 occasions and I can tell you also as an officer of the court,
22 Your Honor, that his child support is current. That was one
23 of the things that I checked on prior to this trial commencing
24 on Monday, last week because it was of interest to me and he
25 is paying child support. I recognize that he won't be paying

State v. Alex Robinson (November 9, 2011)
SENTENCE OF THE COURT

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1 child support but he has regularly paid child support through
2 the Clerk of Court for Horry County. He had been working in
3 the recording business up until this point in time and I
4 understand that he faces the maximum sentence in court and I
5 told him to anticipate if we were unsuccessful that he would
6 likely get the maximum sentence.

7 THE COURT: I have no discretion in the matter.

8 MR. HILLIARD: All right, sir.

9 THE COURT: The sentence is imposed by legislature.

10 SENTENCE OF THE COURT:

11 THE COURT: The evidence in this case, if believed and
12 the jury apparently believed it was that there was a
13 significant drug activity on these premises and that was the
14 basis of the search warrant and the search warrant appeared to
15 be true. There is testimony unfortunately for him that that
16 significant quantity found in his bedroom where his girlfriend
17 was and was found in jeans identified as his, that was for the
18 jury to consider and that was substantial testimony in this
19 case as against him. As I said before and I'll say again to
20 you and to him, the case was very vigorously tried by both of
21 you and submitted to the jury under the charge to which there
22 was no exceptions or additions. The jury deliberated at
23 length and fairly I thought and reached a verdict that they
24 did of guilty in the quantity of 100 -- more than 100 and less
25 than 200. The statute as made and provided requires that

State v. Alex Robinson (November 9, 2011)
SENTENCE OF THE COURT

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1 somebody convicted of trafficking in cocaine in this amount
2 must be sentenced to twenty-five years. Our legislature
3 regards as a very serious matter the trafficking in cocaine
4 and that's their judgment. In accordance with my duty as an
5 officer of the court it be the sentence of this judge that he
6 be confined in the state penitentiary for a period of twenty-
7 five years and pay a fine of \$50,000. Thank you so much.

8 MR. HILLIARD: Thank you, Your Honor.

9 (ADJOURNED)

10 *****END OF TRANSCRIPT OF RECORD*****
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WITNESSES

Kent Donald Horry County Police Department

DOCKET NO. 2009-GS-26-03445

The State of South Carolina

County of Horry

Scott Graustein

08H04220

COURT OF GENERAL SESSIONS

SEPTEMBER, 2009 TERM

REST WARRANT NUMBER

J321135

CDR: 0280 44-53-0370(e)(2)(c)

DOA: 10/1/2008

THE STATE

VS.

Alex Lorenzo Robinson
R/M

CONWAY SC 20507-3007

DOB:

SSN:

ATTORNEY: Williams, Brana J.

Indictment for

TRAFFICKING COCAINE (100-200 GRAMS)

J. Gregory Hembree, Solicitor

TRUE BILL

Foreperson of Grand Jury SEP 24 2009

RDICT

Foreperson of Petit Jury
Date:

536

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

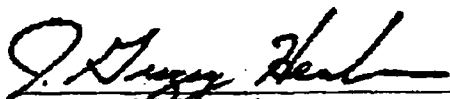
At a Court of General Sessions, convened on AUGUST 27, 2009, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE
(100 GRAMS OR MORE, BUT LESS THAN 200 GRAMS)

(CDR: 0280 44-53-370(e)(2)(c))

That **Alex Lorenzo Robinson** did in Horry County on or about September 25, 2008, knowingly, sell, deliver, purchase or bring in to this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of 100 grams or more, but less than 200 grams, the same being a controlled substance, a within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law, and being in violation of Section 44-53-370(e)(2)(c), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Kent Donald Horry County Police Department

DOCKET NO. 2009-GS-26-

03446

The State of South Carolina

County of Horry

Scott Graustein

08H04220

COURT OF GENERAL SESSIONS

SEPTEMBER, 2009 TERM

REST WARRANT NUMBER

J612710

CDR: 0065 56-05-0750(B)(1)

DOA: 10/1/2008

THE STATE

VS.

Alex Lorenzo Robinson
B/M

Conway, SC 29527-3007

DOB:

SSN:

ATTORNEY: Williams, Brana J.

Indictment for

FAILURE TO STOP FOR BLUE LIGHT

J. Gregory Hembree, Solicitor

TRUE BILL

Michael H. Williams
Foreperson of Grand Jury

SEP 24 2009

RDICT

Foreperson of Petit Jury

Date:

538

ORIGINAL

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF HORRY)

At a Court of General Sessions, convened on AUGUST 27, 2009, the Grand Jurors of Horry County present upon their oath:

FAILURE TO STOP FOR BLUE LIGHT/SIREN

CDR: 0065 56-05-0750(B)(1)

That **Alex Lorenzo Robinson** did in Horry County on or about September 30, 2008, while operating a motor vehicle on a road, street, or highway of the State of South Carolina, did refuse and fail to stop his/her motor vehicle when signaled to do so by a law enforcement vehicle, by means of a siren and/or flashing light, in violation of Section 56-05-0750(B)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Kent Donald Horry County Police Department

DOCKET NO. 2009-GS-26-03445

C

The State of South Carolina

County of Horry

Scott Graustein

DBF04220

COURT OF GENERAL SESSIONS

SEPTEMBER, 2009 TERM

ARREST WARRANT NUMBER

J321135

CDR: 0280 44-53-0370(e)(2)(c)

DOA: 10/1/2008

THE STATE

VS.

Alex Lorenzo Robinson
B/M

Convay. SC 29527-3007

DOB:

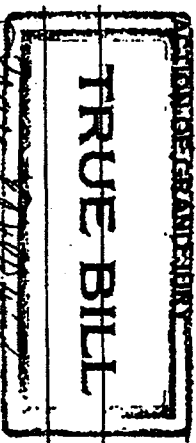
SSN:

ATTORNEY: Williams, Brana J.

Indictment for

TRAFFICKING COCAINE (100-200 GRAMS)

J. Gregory Hembree, Solicitor



Foreperson of Grand Jury SEP 2 4 2009
Date:

VERDICT

Guilty 11/9/09
James J. Williams
100-2006161ams

540
Foreperson of Petit Jury
Date:

ORIGINAL

2011 NOV 17 AM 11:26
CERTIFIED COPY
Clerk of Court
Horry County
Myelaine M. Ward

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on AUGUST 27, 2009, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE
(100 GRAMS OR MORE, BUT LESS THAN 200 GRAMS)

(CDR: 0280 44-53-370(e)(2)(c))

That Alex Lorenzo Robinson did in Horry County on or about September 25, 2008, knowingly, sell, deliver, purchase or bring in to this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of 100 grams or more, but less than 200 grams, the same being a controlled substance, a within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law, and being in violation of Section 44-53-370(e)(2)(c), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY MCBREE
FIFTEENTH CIRCUIT SOLICITOR

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NOV-15-2011 16:49 From: Horry Clerk Court

8439156081

To: 95271400

P. 1/4

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE VS.
Alex Lorenzo Robinson

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
TO: Drugs / Trafficking in cocaine. 100 g or more, but less than 200 g

INDICTMENT/CASE#: 2009GS2603445A/W#: J321135Date of Offense: 9/25/2008S.C. Code §: 44-53-0370(e)(2)(c)CDR Code #: 0280

SENTENCE SHEET

☒ CONVICTED OF orin violation of § 44-53-0370(e)(2)(c) of the S.C. Code of Laws, bearing CDR Code # 0280

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or 2nd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: SCB68305

Richardson, Bradley C

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed 1 yearand/or to pay a fine of \$ \$50,000; provided that upon the service of days/months/years and/or months/yearsof \$; plus costs and assessments as applicable*, the balance is suspended probation for months/years

with South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114 (BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$ 50,000.00

\$ 5,375.00

\$ 100.00

\$

\$

\$ 25.00

\$ 100.00

\$

\$ 3719.40

\$ 107,099.40

Clerk of Court/ Deputy Clerk

Clerk of Court

Presiding Judge

Judge Code:

Sentence Date: November 9, 2011

RECEIVED

CERTIFIED COPY



STATE OF SOUTH CAROLINA

HORRY COUNTY
SOUTH CAROLINA

ORIGINAL

SEARCH WARRANT

September 17, 2008

Detective
Kent Donald

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SEARCH WARRANT

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR
OF THE MUNICIPALITY OF *HORRY COUNTY, SOUTH CAROLINA*.

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

**DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED**

From Hwy. 501, turn right onto Brown Dr. and travel approximately .3 miles to Stoneybrook Dr. Bear left onto Stoneybrook Dr. and travel approximately .1 mile to 1251 Stoneybrook Dr. #34, which is the 6th house on the right side of the street. The residence is described as a white single-wide with green shutters, with a wooden set of steps and porch leading to the front door which also has a glass storm door. The rear door has no steps leading to it. The house sits perpendicular to the road. There is a green in color plastic mailbox with the numbers "1251" on it in front of the residence.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

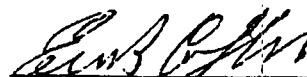
Specifically cocaine, heroin, crack cocaine, marijuana, and any other illegal controlled and controlled substances. Items used to facilitate the distribution of controlled substances such as scales, baggies, vials, containers, etc., firearms, ledgers, books and papers. Any paraphernalia used to facilitate the use of any controlled substances such as pipes, bong, spoons, straws, hypodermics, and etc. that would show that the occupants of the residence are involved with the possession, personal use/or sale of controlled substances. Any currency, monies, or merchandise related to the sale of cocaine or any other illegal controlled substances. Items of personal property that may establish ownership and control of areas searched. Any outhouses, garages, sheds or vehicles, storage units located on the property.

This Search Warrant shall not be valid for more than ten days from the date of issuance. A written inventory of all property seized pursuant to this Search Warrant shall be made to, within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Horry County, South Carolina

Sept 17, 2008

 (L.S.)
Signature of Judge

Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1978

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Personally appear before me, one Detective Kent Donald who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Specifically cocaine, heroin, crack cocaine, marijuana, and any other illegal controlled and controlled substances. Items used to facilitate the distribution of controlled substances such as scales, baggies, vials, containers, etc., firearms, ledgers, books and papers. Any paraphernalia used to facilitate the use of any controlled substances such as pipes, bong, spoons, straws, hypodermics, and etc. that would show that the occupants of the residence are involved with the possession, personal use/or sale of controlled substances. Any currency, monies, or merchandise related to the sale of cocaine or any other illegal controlled substances. Items of personal property that may establish ownership and control of areas searched. Any outhouses, garages, sheds or vehicles, storage units located on the property.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

From Hwy. 501, turn right onto Browns Dr. and travel approximately .3 miles to Stoneybrook Dr. Bear left onto Stoneybrook Dr. and travel approximately .1 mile to 1251 Stoneybrook Dr. #54, which is the 6th house on the right side of the street. The residence is described as a white single-wide with green shutters, with a wooden set of steps and porch leading to the front door which also has a glass storm door. The rear door has no steps leading to it. The house sits perpendicular to the road. There is a green in color plastic mailbox with the numbers "1251" on it in front of the residence.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

I am a police officer, certified in South Carolina. I have been employed by the Horry County Police Department for 10 years with 7 years as a Detective. I have received training in the following: Drug Investigator Level I and Level II 80 hours, and Narcotics Commanders Course 40 hours. I have been involved in other search warrants relating to the seizure of illegal narcotics. I am authorized to make searches and seizures. A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as 1251 Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1978

Sworn to and Subscribed before me
This 17 day of Sept, 2008
[Signature] (L.S.)
Signature of Judge

[Signature]
AFFILIANT
Address 2516 S. Main St
Conway, SC 29526
Phone 1 843 915 2041

Form Approved by
S.C. Attorney General
Section 17-13-160
March 13, 1978

RETURN

I received the attached Search Warrant on 9-17-08, and have executed it as follows:

On 9-25-08 at 0740 hours.

I searched (residence) described in the warrant and

I left a copy of the warrant at the with
Kenneth Durant

Name of person searched or "at the place of search" with
Together with a receipt for the items seized.

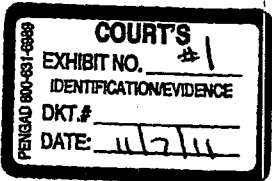
The following is an inventory of property taken pursuant to the warrant:

Hi-point C9 semi P127306 w/ magazine w/ 8.9mm rounds, box containing
4 rounds of Federal Premium, bag of off white compressed powder, bag
of off white rock like substance, bag w/ three blue circular tablets, bag
w/ two bags w/ green leafy substance, two surveillance cameras w/ monitor
JVC compact VHS recorder w/ black carry case, digital scale, box open
of clear sandwich bags, black box of marijuana, long silver box w/ marijuana
long medicine bottle w/ prescription order issued to Tiffany Smith, DG
Aspirin bottle w/ 5 assorted prescription tablets, Sony Ericsson phone, two
memory cards, Kingston 1GB memory card, SC driver's license, SSN and birth
certificate issued to Gil Yakob, 316 US currency, marijuana, ashtray,
sketches ashtray, digital picture frame, multi-colored glass pipe w/ bowl
marijuana residue, marijuana roaches, money ashtray, box Remington 12 gauge
shotgun shells, various paperwork in the name of Alex Robinson, wallet
bottle w/ hidden compartment, Kenneth Durant SC driver's license

I swear that this inventory is true and detailed account of all the property taken by me on
the warrant in the presence of Ashley Hardin, Danny Furr, Derrick Ande, Van
Sisall, Craig Hutchinson.

SWORN to before me this 14
Day of October 2008
[Signature] (L.S.)
Signature of Judge

[Signature]
(Signature of Officer Executing Warrant)



State v. Heath, 370 S.C. 326, 635 S.E.2D 18 (S.C. 2006)

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635 S.E.2D 18 (S.C. 2006)

370 S.C. 326

The STATE, Respondent,

v.

Ted Lee HEATH, Appellant.

No. 26200.

Supreme Court of South Carolina.

August 14, 2006

Heard April 6, 2006.

James W. Boyd, of Boyd & Jordan, of Rock Hill, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Thomas E. Pope, of York, for Respondent.

TOAL, Chief Justice.

A jury found Ted Lee Heath (Appellant) guilty of trafficking in crack cocaine. This appeal followed. We reverse and hold that Appellant was entitled to a directed verdict because the State failed to present evidence that Appellant was in constructive possession of crack cocaine.

Factual / Procedural Background

Appellant, who was twenty-two years old at the time of the arrest, lived in a house with his mother and a young child. Appellant's mother owned the house.

The police obtained a warrant to search for crack in and around the house. When the police arrived at the house to execute the warrant, Appellant and his brother were outside in front of the house. Appellant appeared to have just finished washing his car in front of the house. Appellant remained by

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the car in front of the house as the officers approached.

Upon the police officers' arrival, Appellant's brother immediately ran into the house and locked himself in the bathroom. After Appellant's brother was restrained, the police discovered crack cocaine and approximately two thousand, five hundred dollars in cash. In addition, the officers discovered scales and a small crack rock in the house. Further, officers discovered numerous plastic baggies; allegedly the type used by crack dealers.

Additionally, and at the center of this appeal, a police dog discovered a car-washing mitt in a recycling bin near the back door of the house containing 43.48 grams of crack cocaine.

A jury convicted Appellant of trafficking crack cocaine and Appellant was sentenced to 25 years imprisonment. We certified this case from the court of appeals pursuant to Rule 204(b), SCACR. Accordingly, the issue before this Court is:

Did the trial court err in failing to direct a verdict in favor of Appellant because of the State's failure to establish an essential element of the crime?

Law / Analysis

A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In determining whether the trial court erred in denying a motion for directed verdict, we must view the evidence in the light most favorable to the State. *State v. Ballenger*, 322 S.C. 196, 198, 470 S.E.2d 851, 853 (1996).

The State alleges that Appellant violated South Carolina Code section 44-53-375(C). The Code provides that a "person ... who is knowingly in actual or constructive possession of ten grams or more of ... crack cocaine ... is guilty of" trafficking in crack cocaine. The record reflects that the police found 43.48 grams of crack cocaine at Appellant's residence. The State does not dispute that Appellant was not in actual possession of the crack. Accordingly, the issue presented is whether the State proved that Appellant was knowingly in constructive possession of crack.

Mere presence is insufficient to prove constructive possession. *State v. Tabor*, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). In order to prove constructive possession, the "State must show a defendant had dominion and control, or the *right to exercise dominion and control* over the [illegal substance]." *State v. Halyard*, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) (emphasis added). Further, the State may establish constructive possession by either circumstantial or direct evidence. *Id.* The defendant's knowledge and possession may be inferred if the substance was found on premises under his control. *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987) (emphasis added).

In the present case, the police discovered crack in a car-washing mitt in a recycling bin outside near the back door of the house. The State presented no direct or circumstantial evidence linking Appellant to the 43.48 grams of crack. As a result, the question becomes whether Appellant had dominion and control over the property where the crack was found.

We hold that the State failed to present evidence that Appellant could exercise dominion and control over the area where the crack was found. Appellant lived in the home where the crack was found. However, the home is owned by Appellant's mother. As a result, it is arguable that Appellant merely had a right to access the area where the crack was found, not actual dominion and control of the property.

Conclusion

Accordingly, we reverse Appellant's conviction because the State failed to establish an essential element of the crime charged.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (S.C. 2002)

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563 S.E.2d 315 (S.C. 2002)

349 S.C. 326

The STATE, Respondent,

v.

Jamie MIZZELL and Jimmy Allen "Tootie" Mizzell, Petitioners.

No. 25456.

Supreme Court of South Carolina

April 29, 2002.

Heard March 20, 2002.

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Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense; and Robert Edward Lominack, of Law Offices of David I. Bruck, of Columbia, for petitioners.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

BURNETT, Justice.

Brothers Jamie Mizzell ("Jamie") and Jimmy "Tootie" Mizzell ("Tootie") (collectively, "petitioners") were charged with first degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime. At trial, a jury convicted petitioners of second degree burglary and grand larceny. The Court of Appeals affirmed. See *State v. Mizzell*, 341 S.C. 529, 535 S.E.2d 134 (Ct.App.2000). We granted certiorari to review the Court of Appeals' decision. We reverse.

FACTS

On September 24, 1996, Howard Woods' ("Woods") home was burglarized. Woods stated he left his home in the afternoon, returning later to find the front door kicked in and numerous guns missing. Woods testified knowing petitioners from a hunting club.

Investigator Fowler ("Fowler"), the lead investigator, testified that upon reaching Woods' home, he found the door opened. He

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discovered no fingerprints or any other physical evidence to further the investigation. After receiving a tip, Fowler went to the home of Thomas Harley ("Harley") and recovered nine of Woods' rifles. Harley admitted buying rifles from petitioners. Harley testified a man and woman were in the truck with petitioners when he bought the rifles.

The State's key witness, Donald Steele ("Steele"), testified he and his wife accompanied petitioners to Woods' home. Steele drove a small pick-up truck to the home. After arriving, Steele claimed petitioners kicked in the door and entered. Steele testified petitioners exited the home carrying guns. Steele further testified to witnessing petitioners sell several of the guns to a man, presumably referring to Harley.

On cross-examination, Steele admitted the State charged him with the same crimes as petitioners. The trial court excluded evidence of the possible sentence Steele faced but permitted petitioners to examine Steele about the sentence in general terms.

ANALYSIS/DISCUSSION

Petitioners argue the trial court erred in violating their rights under the Sixth Amendment's Confrontation Clause^[1] by limiting the cross-examination of Steele. Specifically, petitioners assert the trial court should have permitted defense counsel to elicit from Steele the possible punishment he could receive if he were convicted of the charged crimes. We agree.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment.^[2] See *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991). "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. *Witnesses* § 560a (1957)); see Rule 608 (c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

A criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited

from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986). The trial judge retains discretion to impose reasonable limits on the scope of cross-examination. *State v. Sherard*, 303 S.C. 172, 399 S.E.2d 595 (1991); accord *Delaware v. Van Arsdall*, *supra*. Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate. *State v. Graham*, *supra*. If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error. *State v. Brown*, *supra*.

The trial judge prohibited questioning Steele about a specific possible sentence because the charges against Steele and petitioners were the same. "The purpose of preventing disclosure of the potential sentence facing the defendant is that such evidence is irrelevant to the jury and could possibly prejudice the State's right to a fair trial." *Illinois v. Brewer*, 245 Ill.App.3d 890, 185 Ill.Dec. 917, 615 N.E.2d 787, 790 (1993). We implicitly recognized this interest in *State v. Brown*, *supra*.

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The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence.

In *State v. Brown*, *supra*, we held the trial court erred in excluding evidence of a witness' possible punishment because it would allow the jury to learn of Brown's own potential sentence, if convicted.

The witness admitted, on direct examination, she testified in exchange for being charged with only one count of conspiracy for which she could face a maximum sentence of seven and one-half years. On cross-examination, the trial judge precluded the defense from asking the witness the maximum punishment she faced if found guilty of trafficking in cocaine, the crime initially charged against her.

We found Brown was unfairly prejudiced because the witness "was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy [was] critical evidence of potential bias that appellant should have been permitted to present to the jury." *Id.*, 303 S.C. at 171, 399 S.E.2d at 594. Moreover, the witness provided the only evidence to link Brown to the cocaine trafficking. *Id.*, 303 S.C. at 171-72, 399 S.E.2d at 594.

Because of the error of law and the unfair prejudice to Brown, we held the denial of meaningful cross-examination outweighed the State's interest in excluding the evidence. *Id.*, 303 S.C. at 172, 399 S.E.2d at 594.

The case *sub judice* is distinctive because the co-conspirator witness was charged with the same crimes as petitioners but had neither agreed to a plea bargain nor pled guilty. Petitioners assert the State should not be allowed to rely on this distinction to exclude this testimony because the absence of the agreement, if anything, suggests the witness will testify more favorably to the State's position. Petitioners argue Steele would reasonably have felt the quality of his cooperation would determine the degree of benefit he would later receive. See *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) ("[A] promise to recommend leniency (without assurance of it) may be interpreted by the promisee as

contingent upon the quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor."). We agree.

Generally, a judge may prevent the introduction of evidence which informs the jury of the possible sentence defendants may receive if convicted because it is either irrelevant or substantially prejudicial. See *Illinois v. Brewer, supra*; *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991) (construing Rule 403, SCRE, to allow a judge to exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value); Rule 402, SCRE ("Evidence which is not relevant is not admissible.").

The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency. Accordingly, we conclude the Court of Appeals erred in holding the trial judge properly excluded testimony concerning Steele's potential sentence if convicted of the same crimes as petitioners.

Our inquiry does not end upon finding the trial court committed an error in limiting the cross-examination of Steele. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" if the "error was harmless beyond a reasonable doubt." *Graham*, 314 S.C. at 385, 444 S.E.2d at 527. Whether an error is harmless depends on the particular facts of each case and upon a host of factors including:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

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Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438, 89 L.Ed.2d at 686; see *State v. Clark*, 315 S.C. 478, 445 S.E.2d 633 (1994) (applying *Van Arsdall* factors); see also *State v. Graham, supra*, (the *Van Arsdall* factors are not exhaustive).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). In determining whether an error is harmless, "the reviewing court must review the entire record to determine what effect the error had on the verdict." *Clark*, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (Toal, J. dissenting); see, e.g., *Arnold v. State, supra*.

Considering the *Van Arsdall* factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses. Both Woods and Fowler testified the front door to the home had been kicked in or tampered with to gain entry. Harley testified he bought rifles from petitioners and observed a male and female (presumably Steele and his wife) in the truck.

Critically, however, Steele was the only witness to testify as an eyewitness to petitioners' burglary of the home. The lack of physical evidence placing petitioners at the scene enhanced the importance of Steele's testimony. As in *Brown*, the co-conspirator witness is the only link placing petitioners at the scene of the crime.

The State contends any error is harmless because the trial judge permitted petitioners to cross-examine Steele about any plea agreement and to question the veracity of his testimony. Additionally, the State asserts the trial court's error did not prejudice the outcome of the trial because Steele was allowed to testify, if convicted, he could go to jail for a "long time."

Steele's general admission he "could get a long sentence for these crimes," denies petitioners' Confrontation Clause rights under the Sixth Amendment. A "long sentence" may have different meanings to different jurors.

We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him. A witness admitting he is subject to a "long sentence" is quite different from a witness admitting he could be sentenced to a maximum of life in prison, the sentence faced by Steele if convicted of first degree burglary.

[3] See S.C.Code Ann. § 16-11-311(B) (Supp. 2001).

In *State v. Sherard*, *supra*, two juvenile co-conspirators implicated Sherard in a robbery-murder scheme. In exchange for their testimony, the two were allowed to plead guilty as accessories in family court. Sherard was waived up to general sessions court on charges of murder and attempted armed robbery.

On cross-examination one of the co-conspirators admitted his charges of murder and attempted armed robbery were reduced in exchange for his testimony. He further testified that if he were found guilty of murder in general sessions court, he would face a mandatory life sentence. However, the trial judge prevented Sherard from asking the second co-conspirator witness the penalty he could have suffered if convicted of the original charges. The trial judge did allow the witness to testify he knew the reduced charges would result in much less severe penalties.

We found Sherard suffered no prejudice from the trial court's decision. Critically, we distinguished our decision from *Brown* where "no evidence was presented to the jury regarding the sentence the witness avoided in pleading guilty and testifying for the State." *Id.*, 303 S.C. at 175, 399 S.E.2d at 596. While we found the trial court afforded the defense ample opportunity to demonstrate the bias of the witnesses, we found it critical that "during cross-examination of [the first co-conspirator witness], the jury was made fully aware that a charge of murder carries a mandatory life sentence." *Id.* In the present case, the jury only knew Steele was subject

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to the vagaries of a "long" prison term, whatever that may mean.

Because Steele was the only witness to directly link petitioners to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. See *Arnold v. State*. Accordingly, we find the trial court committed prejudicial error in limiting petitioners cross-examination into Steele's possible sentence.

CONCLUSION

For the aforementioned reasons we REVERSE the court below.

TOAL, C.J., MOORE and WALLER, JJ., concur.

PLEICONES, J., concurring in result.

Notes:

[1] U.S. Const.Amend. VI.

[2] U.S. Const.Amend. XIV.

[3] A "[b]urglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years." S.C.Code Ann. § 16-11-311(B) (Supp.2001).

State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (S.C. 2000)

Page 675

536 S.E.2d 675 (S.C. 2000)

342 S.C. 121

The STATE, Petitioner,

v.

Lorenzo Labelle JONES and Melvin Patrick Riles, Respondents.

No. 25188.

Supreme Court of South Carolina

Aug. 21, 2000.

Heard June 6, 2000.

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Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia, and Solicitor E.L. Clements, III, of Florence, for petitioner.

Frederick A. Hoefer, II, and Kevin M. Barth of Harwell, Ballenger, Barth & Hoefer, L.L.P., for respondents.

PLEICONES, Justice:

We granted certiorari to review the Court of Appeals' holding in *State v. Jones*, 331 S.C. 228, 500 S.E.2d

499 (Ct.App.1998) that probable cause did not exist to issue a search warrant when the affidavit contained a false statement. We affirm.

ISSUE

Did the Court of Appeals err in holding that a magistrate did not have a substantial basis for finding probable cause to issue a search warrant even when an affiant substituted truthful oral information for false information he had intentionally included in the affidavit?

FACTS

The Drug Unit of the Florence Police Department received a tip from a confidential informant that cocaine had been stored at a particular home in Florence and that a shipment would be arriving that weekend. The informant described the van that would be used to transport the drugs, and told the officers that the van would pull behind the house, to prevent it from being seen from the road.

The Drug Unit set up surveillance of the house. After the arrival of the van, an officer took an affidavit for a search warrant to a magistrate. The affidavit stated:

Over the past three weeks an agent of the Florence Combined Drug Unit has observed a quantity of cocaine being stored on the premises. That agent has been responsible for the seizure of illicit drugs and the arrest of illicit drug violators in the past. Information given by this agent has been corroborated by surveillance agents pertaining to this case. (emphasis added).

The affiant, a police officer, verbally advised the magistrate that he had intentionally used the term "agent" instead of "informant" in the affidavit in order to protect the identity of his informant. The affiant truthfully repeated the information his informant had given him and also told the magistrate about the surveillance by police agents.

The magistrate found that probable cause existed to search the house and signed the warrant. Cocaine and other incriminating evidence were found in the house, and Lorenzo Labelle Jones and Melvin Patrick Riles (Defendants) were arrested.

Defendants moved during the trial to suppress the evidence obtained as a result of the search warrant, arguing that the informant was falsely identified as an "agent" in the affidavit. In an evidentiary hearing, the magistrate testified that even after the verbal information provided by the affiant, he was under the impression that the "agent/informant" was a police officer. And he would possibly have asked more questions had he known that such was not the case. The trial court denied Defendants' motion, holding that the magistrate had a substantial basis to find probable cause.

Defendants were convicted of trafficking cocaine, and sentenced to imprisonment of thirty years.

In *State v. Jones*, 331 S.C. 228, 500 S.E.2d 499 (Ct.App.1998), the Court of Appeals reversed

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the trial court and remanded for a new trial. The Court of Appeals held that the evidence should be suppressed because the false affidavit circumvented the affidavit requirement of S.C.Code Ann. § 17-13-140 (1985) and *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). The Court of Appeals then denied the State's petition for rehearing.

We granted certiorari, and now affirm.

DISCUSSION

When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions,^[1] a magistrate may only issue a search warrant upon a finding of probable cause. See *State v. Bellamy*, 336 S.C. 140, 519 S.E.2d 347 (1999).

A defendant has the right to challenge misstatements in a search warrant affidavit. See *Franks v. Delaware*,^[2] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) ; *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975). A defendant is entitled to an evidentiary hearing if the following criteria are met: (1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement. Further, if the foregoing criteria have been met, and the remaining content is insufficient to find probable cause after the allegedly false or reckless material has been set aside, the defendant is entitled to his hearing, under the Fourth and Fourteenth Amendments. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684, 57 L.Ed.2d at 677.

In this case, the affidavit contained false information, i.e., the identification of the informant as an "agent." The affiant admitted to the magistrate that he had intentionally used the term "agent" to mislead Defendants. While the officer attempted to correct this false statement with truthful oral information, the testimony of the magistrate indicates that the officer did not, in fact, correct the magistrate's misunderstanding. The magistrate's assumption that the informant was an undercover police officer was not altered, and the magistrate relied upon the false statement when making his probable cause determination. This is made clear from the magistrate's testimony that he "possibility" [sic] would have questioned the affiant more extensively had he known the informant was not a police officer. Setting aside the first three mentions of "agent" in the affidavit means that only the corroborating evidence of the police "agents" ' surveillance of the residence would remain. This evidence alone is insufficient to establish probable cause. Under a *Franks* analysis, probable cause did not exist under the Fourth Amendment of the United States Constitution.

The General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record...." S.C.Code Ann. § 17-13-140 (1985). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially

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insufficient to establish probable cause. See *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987).

The Court of Appeals characterized the false affidavit as the equivalent of not having an affidavit at all, and held that § 17-13-140 had been violated since *McKnight* requires a written affidavit. This conclusion is logical, because if an affidavit is not truthful, then the magistrate must depend totally on information provided orally by the affiant in order to determine if probable cause exists.

The Court of Appeals also correctly concluded, that because of utilization of the false term in the affidavit, the veracity of the informant was not established under the "totality of the circumstances" test. Under the "totality of the circumstances" test, a reviewing court considers all circumstances, including the status, the basis of knowledge, and the veracity of the informant, when determining whether or not probable cause existed to issue a search warrant. See *State v. Bellamy*, 336 S.C. 140, 519 S.E.2d 347 (1999) and *State v. Driggers*, 322 S.C. 506, 473 S.E.2d 57 (1996) (nonconfidential informants and eyewitnesses have more credibility than confidential informants).

In this instance, the magistrate erroneously believed the confidential informant to have been a police officer, and indicated his view that in these circumstances, a police officer would be more credible than a confidential informant. Therefore, we agree with the Court of Appeals that the magistrate did not have sufficient information about the informant's veracity to determine whether or not there was probable cause.

We agree with the Court of Appeals' holding that oral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant. See *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975) and *State v. Workman*, 272 S.C. 146, 249 S.E.2d 779 (1978) (search warrant can be validly amended prior to execution by sworn oral communication to the issuing magistrate).

CONCLUSION

Based on the foregoing discussion, the opinion of the Court of Appeals is AFFIRMED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

Notes:

[1] See *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997).

[2] The State claims that the issue of whether or not the term "agent" in the search warrant affidavit is a false statement under a

Franks analysis has not been preserved for review. However, the solicitor told the trial judge that the "controlling authority" in Defendants' pre-trial motion for suppression was *Franks*. The Defendants' attorney agreed, and the evidentiary hearing proceeded on that premise.

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524 S.E.2d 394 (S.C. 1999)

337 S.C. 548

The STATE, Petitioner,

v.

Victor Wyatt MISSOURI, Respondent.

No. 25031.

Supreme Court of South Carolina

Dec. 6, 1999.

Heard June 9, 1999.

Attorney General Charles M. Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail of Greenville, for petitioner.

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

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TOAL, Justice:

In this criminal case, this Court granted certiorari to review the Court of Appeals' unpublished opinion in *State v. Missouri*, 97-UP-448 (Ct.App.1997). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

During January and February 1995, Greenville detectives were investigating a crack cocaine ring with the help of a confidential informant. On February 3, 1995, the police obtained a search warrant to search the

home of Laura and Curtis Sibert a/k/a "Hot Sauce" for cocaine. The lead detective, Eric Cureton, submitted an affidavit in support of the search warrant. The affidavit states, in part:

Your affiant [Eric Cureton] states that on January 25, 1995 he received information from investigator Sam C. Cureton of the Greenville County Sheriff's Office pertaining to Victor Wyatt Missouri. The information that was relayed to your affiant that Missouri was involved in the manufacture and distribution of crack cocaine. The following is a chronological chain of events leading to your affiants [sic] belief that Victor Wyatt Missouri, and others not yet identified, are manufacturing and distributing crack cocaine....

The confidential source of information, who from here forward will be referred to as CSI, stated that for the past two months he has purchased a total of two kilograms of cocaine from Victor Missouri. He would receive this in half kilo quantities every two weeks.

On January 31, 1995 CSI stated that he had talked with Missouri and another subject who is only known as "Hot Sauce." During this conversation Missouri and "Hot Sauce" stated that they were going to Atlanta, Georgia on February 1, 1995 and obtain four kilos of powder cocaine. This cocaine would then be delivered to Greenville, South Carolina and cooked into crack cocaine. On February 1, 1995 this same CSI went by "Hot Sauce's" apartment at 400 Summit Drive apartment 5-D, Summit Place Apartments. During a conversation with "Hot Sauce" CSI was told that he had not been able to leave for the trip to Atlanta, that they had some things to get together beforehand. During this same conversation CSI told "Hot Sauce" that he wanted to purchase from him a half of a kilo. "Hot Sauce" told CSI that it would cost him around \$13,000.00 for the half kilo. CSI told "Hot Sauce" to call him when he left for Atlanta.

On February 2, 1995 at 4:00 in the afternoon, CSI went to Missouri's residence at 126 Sycamore Drive in the City of Greenville, South Carolina. At the residence was Missouri and "Hot Sauce." "Hot Sauce" told CSI that he was leaving for Atlanta around 4:30 and would return around midnight that same night. "Hot Sauce" told CSI that he would page him as soon as he got back in town.

On February 3, 1995, at 4:00 in the morning, Missouri called CSI and told him that "Hot Sauce" was back and they needed somewhere to cook the crack. He said he couldn't cook it at his (Missouri) house because he had relatives there. CSI told him he would give him an answer later and he ultimately told him no. Around 9:00 this same morning CSI paged "Hot Sauce" via his digital pager. "Hot Sauce" returned the call and told CSI they were still trying to get it together. At 10:15 another page was made to "Hot Sauce" with the same results. At 2:00 in the afternoon the CSI drove to "Hot Sauce's" apartment at 400 Summit Drive and went in to inquire about his portion of the cocaine. Your affiant wired the CSI with a body transmitter that would enable your affiant to monitor the conversations he had while inside this apartment. Your affiant, while monitoring the audio transmitter, heard a male voice, whom CSI later stated was "Hot Sauce", question CSI about the phone that had been used earlier trying to set the transaction up. This male appeared to be somewhat reserved about talking with CSI about the cocaine. CSI told your affiant that "Hot Sauce" did appear to be nervous about the deal they were trying to make. **"Hot Sauce" told CSI that he had the crack but he would call him when it was right.**

While officers of the Vice and Narcotics Bureau were surveilling 400 Summit Drive,

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Apartment 5-D on February 3, 1995, it was determined that Missouri, "Hot Sauce" and others who have not been identified, were in the apartment. Around 5:00 a black male and black female left the apartment in a white dodge van.... The van then traveled to Parkersway Foods at Worley Road and Rutherford Road. The female again went inside. After the female left Detective Sergeant T.D. Christy interviewed the clerk and he stated that the black female had purchased 5 boxes of Arm & Hammer baking soda. The van then traveled back to apartment 5-D and the female took a grocery bag into the apartment. She returned to the van and they left again. The surveillance on the van was terminated at this time.

Your affiant, through training, experience and working with other experienced investigators, believes that Victor Wyatt Missouri, "Hot Sauce" and others yet unknown are manufacturing crack cocaine inside of apartment 5-D Summit Place Apartments, 400 Summit Drive in the City of Greenville, South Carolina.

When the police executed the search warrant, officers found Missouri in the kitchen standing over a sink, facing a set of triple beam scales. Inside the sink was a quantity of cooked, crack cocaine. Missouri was arrested for trafficking in crack cocaine. At his trial, Missouri moved to suppress the evidence obtained in the search. Missouri argued the affidavit supporting the search warrant contained false information and further omitted critical, exculpatory information. The trial court denied the motion to suppress. In an unpublished opinion, the Court of Appeals reversed the trial court, holding that the omitted information was necessary for the magistrate's finding of probable cause. See *State v. Missouri*, 97-UP-448 (Ct.App.1997). Judge Hearn dissented in a separate opinion. This Court granted certiorari to address the following issue:

Did the Court of Appeals err in applying the test articulated by *Franks v. Delaware*^[1] for considering a challenge to the veracity of a search warrant affidavit?

LAW/ANALYSIS

The State argues that the Court of Appeals improperly applied the *Franks* test in deciding whether the magistrate had probable cause to issue the search warrant. We disagree.

At the suppression hearing, Officer Cureton testified that the following sentence in the warrant affidavit was in fact a false statement: " 'Hot Sauce' told CSI that he had the crack but he would call him when it was right." Officer Cureton stated that Curtis Sibert a/k/a "Hot Sauce" never told his informant there was crack in Hot Sauce's apartment. Further on cross-examination, Officer Cureton testified that his informant had gone into Hot Sauce's house at about 3:00 p.m. on February 3, and the informant was told that Missouri had the "stuff," but it was not there. The informant then left the residence and returned at about 4:00 p.m. after Missouri had returned to the house. A "wire" had been placed on the informant's body to enable the police to listen to the conversations. After the informant left Hot Sauce's house, he approached Officer Cureton and told him, "It's not there. It's not there." In addition, Hot Sauce had earlier told the informant that he did not want to cook the cocaine at his house because his wife was trying to go straight. This information was not provided to the magistrate in the supporting affidavit. The trial judge concluded that even with this information, the magistrate would have had a substantial basis upon which to find probable cause for issuing the warrant.

In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit

after the warrant had been issued and executed. [2] To summarize, the Court provided the following two-part test:

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(1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and

(2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Franks, 438 U.S. at 171-72, 98 S.Ct. at 2684, 57 L.Ed.2d at 682.

Franks addressed an act of *commission* in which false information had been included in the warrant affidavit. However, the *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit. See, e.g., *United States v. Colkley*, 899 F.2d 297 (4th Cir. 1990); *United States v. Vazquez*, 605 F.2d 1269 (2d Cir. 1979). To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. [3] There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause. See *Colkley*, *supra*.

The instant case involves both an act of commission and an act of omission by Officer Cureton in drafting the warrant affidavit. We find that Officer Cureton at least acted recklessly in making the false statement and in omitting the exculpatory information. He testified unequivocally that the statement was false, and his informant had, in fact, made a statement to the contrary. Thus, the primary issue before this Court is whether excluding the false information and inserting the exculpatory statement, there remains a substantial basis upon which the magistrate could have found probable cause to issue the warrant. In doing so, this Court must apply the "totality of the circumstances" test of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). See *Colkley*, *supra*.

The supporting affidavit begins with the allegation that Victor Missouri and others "are manufacturing and distributing crack cocaine." The affidavit then discusses a series of chronological events which are intended to support this prefatory allegation. The affidavit's description of the informant's contact with the suspects on the day the search warrant was obtained culminates with the false statement that Hot Sauce told the informant he had the crack but would call him when it was right. If our task were simply to consider the affidavit without this statement, we would likely find a substantial basis for probable cause. The absence of the false statement makes the location of the drugs less certain, but this uncertainty is negated by the other events recounted in detail in the affidavit.

However, under *Franks*, our inquiry does not end here. We must also consider the effect of adding the informant's statement, "It's not there," as well as the information that Hot Sauce did not intend to cook the cocaine at his apartment. In doing so, we hold that the affidavit would not support a finding of probable cause to

search Hot Sauce's apartment.

We begin with the presumption that the Fourth Amendment does not require an affiant

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to include all potentially exculpatory evidence in the affidavit. See *Colkley, supra*. A presumption to the contrary "would perforce result in perniciously prolix affidavits that would distract police officers from more important duties and render the magistrate's determination of probable cause unnecessarily burdensome." *Colkley*, 899 F.2d at 303. However, in the instant case, the omitted information goes to the very heart of the affidavit's purpose, which is to establish probable cause to search Hot Sauce's apartment for crack cocaine. Instead of simply creating some uncertainty in the affidavit, the inclusion of the omitted information creates an affirmative hurdle which the remaining portions of the affidavit must overcome. These other portions reveal that the suspects had arranged to sell a quantity of crack cocaine to the confidential informant. The suspects purchased cocaine in Atlanta and transported it to Greenville for this purpose. The affidavit further reveals that the suspects purchased baking soda and brought it back to Hot Sauce's apartment. Baking soda is known to be a common cutting and drying agent when converting powdered cocaine into crack cocaine. Standing alone, these facts are not conclusive as to the presence of crack cocaine in Hot Sauce's apartment, but they make it a fair probability. Yet, when the omitted information is inserted, the probable presence of the crack cocaine in the apartment is defeated. This, in turn, erodes the basis upon which a magistrate could find probable cause to search Hot Sauce's apartment. The remaining portions of the affidavit fail to rehabilitate this basis. [4]

We realize this case presents a close call on the probable cause determination. However, the combination of the police officer's deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant. There is no doubt that the officer intended to mislead the magistrate in obtaining the search warrant. We realize that police officers routinely leave out facts they believe are immaterial to the probable cause determination. Yet, when an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but that a statement in the affidavit to the contrary was necessary for establishing probable cause. We recognize that under *Franks* our role is not to punish dishonest police officers but, rather, to ensure that a substantial basis exists to find probable cause. That said, the depth of the prevarication perpetrated by the officer in this case undermines any remaining legitimacy the affidavit might possess. Under these circumstances, this Court is required by the Constitution to invalidate the search warrant where the facts create such a close call on the probable cause determination.

CONCLUSION

Based on the foregoing, we AFFIRM the Court of Appeals.

MOORE, J., concurs.

FINNEY, C.J., concurs in result only.

BURNETT and WALLER, JJ., dissenting in a separate opinion.

I respectfully dissent. Although Officer Cureton's conduct is reprehensible, the issue is whether probable cause existed in spite of the investigator's inclusion of a false statement and omission of exculpatory information from the supporting affidavit. ^[1] In my

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opinion, probable cause remained in spite of the officer's misrepresentations. ^[2]

In *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983), the United States Supreme Court adopted the "totality of the circumstances" test for probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

See *State v. Bellamy*, 336 S.C. 140, 519 S.E.2d 347 (1999).

"In dealing with probable cause ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Dupree*, 319 S.C. 454, 458, 462 S.E.2d 279, 282 (1995), quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949).

Here, Officer Cureton included the following false statement in his affidavit: "'Hot Sauce' told [the informant] that he had the crack but he would call him when it was right." The majority concludes that, disregarding this false statement, there still existed a substantial basis from which to find probable cause. I agree.

In addition, Officer Cureton failed to inform the magistrate of certain exculpatory information. First, he did not tell the magistrate that when the informant first returned from Hot Sauce's apartment on February 3, the informant stated he was told respondent had the "stuff," but it was not there. Furthermore, the investigator failed to tell the magistrate respondent subsequently entered Hot Sauce's apartment. As a result, while wearing a wire, the informant again entered Hot Sauce's apartment and, upon return, stated, "It's not there. It's not there." Finally, the investigator did not advise the magistrate Hot Sauce had earlier told the informant he did not want to cook the cocaine at his apartment because his wife was trying to "go straight." The majority concludes if Officer Cureton had included the omitted information in the supporting affidavit, probable cause to search Hot Sauce's apartment would not have existed. I disagree with this conclusion.

Considering the totality of the circumstances as reflected in the supporting affidavit, minus the false statement, and with the addition of the exculpatory information, there remains a substantial basis from which to find probable cause. The totality of the circumstances indicate Hot Sauce and respondent planned to go to Atlanta and obtain cocaine which they would then cook into crack cocaine in Greenville. The informant wanted to purchase cocaine in the same quantity as he had purchased it from respondent every two weeks for the past two months.

Three days later, respondent called the informant and said Hot Sauce had returned and they were looking for a location to cook the cocaine. The informant paged Hot Sauce twice the same morning. Hot Sauce returned the pages and told the informant he was continuing to look for a location to cook the cocaine. In the afternoon, the informant entered Hot Sauce's apartment. Hot Sauce suddenly appeared nervous and unwilling to discuss the drug buy. Hot Sauce indicated respondent, who was not present, had the cocaine and stated he did not want to cook the cocaine at his apartment because his wife was trying to "go straight."

After the informant left, respondent arrived at Hot Sauce's apartment. Two other individuals left Hot Sauce's apartment, purchased

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large quantities of baking soda, which is known to be used to process powder cocaine into crack cocaine, and returned to Hot Sauce's apartment with the baking soda. ^[3]

These circumstances provide a fair probability that contraband or other evidence of a crime could be found at Hot Sauce's apartment at the time the search warrant was issued. Even assuming the informant unequivocally knew the drugs were not present in Hot Sauce's apartment, i.e., either because Hot Sauce had become suspicious and, hence, told the informant the drugs were not there or because respondent did not enter the apartment after the informant left, there was still probable cause to believe evidence of a crime could be found in the apartment. A warrant need not be based on the probability of discovering an illegal item on the premise to be searched. ^[4] Although common household items like baking soda are not incriminating, the purchase of a large quantity of baking soda by individuals associated with a recent drug purchase and looking for a location to cook cocaine is evidence of a crime. While officers may ultimately choose to wait until contraband is on the premise before obtaining a search warrant, knowledge the illegal substance is not on the premises does not automatically negate a finding of probable cause.

In my opinion, the trial judge properly ruled the evidence seized as a result of the search warrant should not be suppressed. *State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997) (In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law). I would reverse the decision of the Court of Appeals.

WALLER, J., concurs.

Notes:

^[1] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

^[2] In *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975), this Court also addressed whether a defendant could attack the veracity of facts supporting a search warrant when the warrant was valid on its face. Noting that the United States Supreme Court had not yet

squarely addressed this issue, this Court answered the question in the affirmative, providing the following limited test: "Did the officer, or other government official, in such capacity, intentionally, recklessly, or in bad faith recite facts he knew or should have known to be erroneous, without correcting the error by additional affidavit or affirmation, to obtain the issuance of a warrant?" *Sachs*, 264 S.C. at 555, 216 S.E.2d at 509. The Court further provided the following caveat: "However, even if the officer was delict, so long as probable cause was established by affidavit or affirmation without the aid of the erroneous fact, the warrant satisfies the constitutional demands." *Id.*

[3] See Edward Gregory Mascolo, *Controverting An Informant's Factual Basis for a Search Warrant: Franks v. Delaware Revisited and Rejected Under Connecticut Law*, 15 Q.L.R. 65 (1995).

[4] The cases cited in Judge Hearn's dissent are inapposite to the instant case because they do not involve the reckless or intentional omission of material facts. Rather, these cases deal with the constitutionality of including in the search warrant affidavit reconnaissance information gathered from thermal imaging machines. In addressing this issue, the cases found that even without the thermal imaging information, there was sufficient information in the affidavits to support a finding of probable cause. See *United States v. Cusumano*, 83 F.3d 1247 (10th Cir. 1996); *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995); *United States v. Ishmael*, 48 F.3d 850 (5th Cir. 1995).

[1] See *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667, 682 (1978) (1) where defendant establishes deliberate falsehood or reckless disregard for the truth and those allegations are accompanied by offer of proof and 2) if these requirements are met, and if, when material that is subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required).

[2] In my opinion, respondent did not have standing to challenge the sufficiency of the search warrant as he had no expectation of privacy in his co-defendant's apartment. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

[3] I note Officer Cureton's testimony indicates the informant entered Hot Sauce's apartment twice on the afternoon of February 3, 1995, while the supporting affidavit states the informant entered the apartment only once. However, the important portion of the testimony and affidavit, that the informant last informed Officer Cureton the drugs were not in Hot Sauce's apartment, is contained in both.

[4] *Illinois v. Gates*, *supra* (probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place"); see *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995) ("observations of conduct consistent with drug trafficking, even though apparently innocuous, can give rise to probable cause"); *United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992) (warrant authorizing search for envelopes, pieces of cardboard, paperclips, and string was unobjectionable for alleged crimes involving homemade bombs).

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460 S.E.2d 573 (S.C. 1995)

319 S.C. 312

The STATE, Respondent,

v.

Kenneth SINGLETON, Appellant.

No. 24292.

Supreme Court of South Carolina.

August 7, 1995

Heard May 2, 1995.

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[319 S.C. 314] Fred Henderson Moore & Herman L. Moore, both of Moore & Moore, Charleston, and South Carolina Office of Appellate Defense, Columbia, for appellant.

- Atty.-Gen. T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka, Sr. Asst. Atty. Gen. Harold M. Coombs, Columbia, and Sol. David P. Schwacke, North Charleston, for respondent.

BURNETT, Justice:

Kenneth Singleton appeals his conviction for driving a moped while under the influence of alcohol and/or drugs (DUI). We affirm.

FACTS

Singleton was arrested and charged with driving a moped while under the influence of alcohol and/or drugs. While Singleton was being booked into the detention facility, the booking officer found cigarette rolling papers and green plant material in Singleton's pockets and gave them to the arresting officer who deposited the evidence in a heat-sealed bag and locked the bag in an evidence cabinet. An evidence custodian later removed the bag from the cabinet to analyze the

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substance. It tested positive for marijuana and was subsequently destroyed pursuant to Circuit Court Order.

In the course of Singleton's trial, the trial judge charged the jury that a moped is a vehicle as

contemplated by S.C.Code Ann. § 56-5-2930 (1991), thus making it illegal to drive a moped while under the influence of alcohol and/or drugs. After deliberating for thirty minutes, the jury advised the trial judge that they were unable to reach a verdict. The judge delivered an Allen [1] jury instruction and encouraged the jurors to take more time to deliberate, to re-examine their

[319 S.C. 315] views, and to avoid a mistrial by reaching a unanimous verdict. The jury deliberated further and convicted Singleton.

At the request of Singleton's counsel, the jury was polled. During polling, one of the jurors answered as follows:

[CLERK]: [Juror], was this your verdict?

[JUROR]: Yes.

[CLERK]: Is it still your verdict?

[JUROR]: No.

[THE COURT]: What did he say?

[CLERK]: He said no.

[THE COURT]: Go back in your jury room to continue your deliberations. I'm told this was a unanimous verdict. Is this your verdict?

[JUROR]: It is now.

[THE COURT]: And it's still your verdict?

[DEFENSE COUNSEL]: Your Honor, I think ...

[THE COURT]: Wait a minute now. I'm asking you--I think you misunderstood. The verdict of the jury as announced to me is guilty. Is that your verdict too?

[JUROR]: Yes.

[THE COURT]: And is it still your verdict?

[JUROR]: Yes.

[THE COURT]: Proceed to poll the jury. Go ahead.

The verdict stood after the polling.

ISSUES

I. Did the trial judge err in charging that a moped is a vehicle under the DUI statute?

II. Did the trial judge abuse his discretion during the supplemental instruction and jury polling?

III. Was the chain-of-custody of the marijuana established?

DISCUSSION

I. Is a Moped a Vehicle?

Singleton was convicted under the DUI statute, which makes it unlawful for any person to drive any vehicle while under the influence of alcohol and/or drugs. ~~S.C.Code Ann. § 56-5-2930 (1991). The provisions of Chapter 5 of Title 56 govern the operation of mopeds on the public highways~~

[319 S.C. 316] and streets. S.C.Code Ann. § 56-5-50 (Supp.1994). Accordingly, we conclude the General Assembly intended the DUI statute to embrace the driving of a moped and the trial judge did not err in charging that a moped is a vehicle as contemplated by the DUI statute.

Singleton relies upon statutes involving vehicle registration, licensing of drivers, and liability insurance in contending that a moped is not a motor vehicle. We conclude that, although exempted from registration, licensing, and insurance requirements, mopeds are within the purview of the DUI statute.

II. Did the Trial Judge Abuse His Discretion?

Singleton contends the trial judge made inappropriate comments in the Allen instruction and intimidated a juror during polling. We disagree.

The trial judge has a duty to urge the jury to reach a verdict but he may not coerce them. *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981); *State v. Pulley*, 216 S.C. 552, 59 S.E.2d 155 (1950). It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a

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new trial at additional expense, [2] or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement. [3] Moreover, the trial judge must be satisfied that the verdict is unanimous. If it is made known to the court when it is time to render the verdict that any juror does not assent to it, the verdict cannot be received and the jury should retire to their room until they have agreed. *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

We conclude that Singleton failed to establish that the judge's comments during the supplemental instruction were coercive. Further, the manner of polling was appropriate to ensure that the juror did not misunderstand the verdict and to confirm that the verdict was unanimous. See *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979) (the manner of polling is within the court's discretion). Accordingly, since Singleton was not

prejudiced by either the supplemental instruction or the manner of polling, there was no abuse of discretion by the trial judge.

[319 S.C. 317] III. Was the Chain-of-Custody of the Marijuana Established?

~~The party offering evidence must trace possession of the substance and what was done with it from the time it was taken until final analysis.~~ *State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992); accord, *Raino v. Goodyear Tire and Rubber*, 309 S.C. 255, 422 S.E.2d 98 (1992); *State v. Sarvis*, 265 S.C. 144, 217 S.E.2d 38 (1975). In addition, if the evidence possesses exculpatory value that is apparent before its destruction, its disposal constitutes a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Jackson*, 302 S.C. 313, 396 S.E.2d 101 (1990).

Here, the record establishes the chain-of-custody of the marijuana from the time it was taken from Singleton until its final analysis, and Singleton failed to establish that the destroyed evidence was exculpatory. We further conclude that the officers were acting in good faith and in accord with normal procedures when destroying the marijuana after analysis. See *Arizona v. Youngblood*, supra (bad faith on part of police must be established in order for the destruction of potentially useful evidence to constitute a denial of due process); *California v. Trombetta*, supra (no due process violation when normal practice is to discard evidence after analysis). Accordingly, Singleton was not prejudiced by the destruction of the evidence.

AFFIRMED.

FINNEY, C.J., and TOAL, MOORE and WALLER, JJ., concur.

Notes:

[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

[2] *State v. Ayers*, 284 S.C. 266, 325 S.E.2d 579 (Ct.App.1985).

[3] *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct.App.1985).

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702 S.E.2d 395 (S.C.App. 2010)

390 S.C. 502

The STATE, Respondent,

v.

Waltroric U. MOSES, Appellant.

No. 4758.

Court of Appeals of South Carolina.

November 5, 2010

Heard Sept. 15, 2010.

Rehearing Denied Dec. 20, 2010.

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[Copyrighted Material Omitted]

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[Copyrighted Material Omitted]

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Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all of Columbia; Robert Mills Ariail, of Greenville, for Respondent.

PIEPER, J.

[390 S.C. 508] Waltronic U. Moses appeals his conviction for assault and battery of a high and aggravated nature (ABHAN) and sentence pursuant to the Youthful Offender Act. On appeal, Moses argues the trial court erred in: (1) ruling his statement was voluntarily made; (2) refusing to dismiss the charges due to the State's destruction of and failure to disclose videotaped evidence; (3) refusing to grant the motion to quash the indictments; and (4) admitting statements by a witness under Rule 613, SCRE, as prior inconsistent statements. We affirm.

FACTS/PROCEDURAL HISTORY

On September 28, 2006, Moses, a special education student at Hillcrest High School, was involved in a physical altercation with a school police officer. The altercation took place during a lunch period when Moses went to the cafeteria to wish a cafeteria worker happy birthday. Moses walked towards a lunch line being monitored by a biology teacher, Brian Carl. As Moses approached, Carl told him not to cut in line. Moses did not respond and Carl followed him, indicating that Moses had to go to the end of the line. Moses continued to ignore Carl and proceeded through the lunch line. After tugging on Moses' backpack, Carl repeated for a third time that Moses could not cut in line. Refusing to cooperate, Moses told Carl not to touch him and that he better get away from him. Consequently, in accordance with school procedure, Carl took Moses' identification badge from his backpack and asked Officer Morris Madden, the school resource officer, to handle the situation with Moses.

Thereafter, Moses walked behind Carl to the administrator's table to retrieve his badge. When Moses walked back [390 S.C. 509] toward the lunch line, Carl turned around and put his hand on Moses' shoulder. Moses responded by raising his hand up and stating, "don't f__ing touch me." When Madden saw Moses raise his hand, Madden stood up, grabbed Moses by the hand, and told him to sit down at the administrator's table. Instead of sitting down, Moses "pushed" his chair toward Madden and told Madden to get off of him. Moses then pushed Madden. Moses started to walk away and Madden caught up with him and attempted to place him under arrest. When Madden attempted to grab Moses and arrest him, Moses turned around, shoved Madden with both hands, and told him, "get the f--k away."

After Moses pushed Madden a second time, Madden attempted to push Moses to the ground in order to gain control of him. However, Madden was unable to keep Moses

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down. Once Moses was able to stand up, he grabbed Madden around his waist and pushed him backwards. Madden used his arms to come underneath Moses' grip and then punched him. Moses then punched Madden in the left temple area of his head, knocking off his glasses. As a result, Madden suffered multiple facial fractures.

Moses immediately ran out of the cafeteria and exited the building while Madden and Officer Matthew Smith followed him. Smith asked Moses to stop. Moses finally stopped and told Smith to keep Madden away from him. Smith placed Moses into custody and transported him to the Simpsonville Police Department. At the police department, Smith

took Moses into the squad room where he removed Moses' handcuffs. Smith read Moses his rights verbatim from the "Waiver of Rights" form and asked Moses if he understood his *Miranda* ⁽¹⁾ rights. Moses replied that he understood his rights and signed the waiver. Smith then took Moses' written statement by writing down everything Moses said.

Moses was indicted for ABHAN, malicious injury to personal property, and disturbing schools. The case proceeded to trial in Greenville County on October 29, 2007. Following jury selection, the court denied the defense's pretrial motions [390 S.C. 510] relating to a *Brady* ⁽²⁾ violation involving production of the school's surveillance tapes, the voluntariness of Moses' statement, and the alleged irregularity of grand jury proceedings. At trial, the court also overruled two evidentiary objections by defense counsel on the basis of hearsay and relevance.

The trial court granted a directed verdict on the indictment for malicious injury to personal property, finding no evidence of intent. The jury found Moses guilty of ABHAN, but not guilty of disturbing schools. The court sentenced Moses to incarceration for a period not to exceed six years, which is the maximum sentence for ABHAN under the Youthful Offender Act. This appeal followed.

ISSUES ON APPEAL

- (1) Did the trial court err in ruling that Moses' custodial statement was admissible as voluntarily made?
- (2) Did the trial court err in refusing to dismiss the charges against Moses as the result of the State's alleged destruction of and failure to preserve or disclose videotaped evidence?
- (3) Did the trial court err in refusing to grant the motion to quash the indictments?
- (4) Did the trial court err in admitting as substantive evidence prior statements made by a defense witness under the theory that the statements were admissible as prior inconsistent statements under Rule 613, SCRE, and did the court err in denying the motion to strike when the State's witness referenced Moses' prior bad act of assaulting a teacher?

STANDARD OF REVIEW

In criminal cases, the appellate court only reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of [390 S.C. 511] discretion." *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Likewise, rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. *State v. Stokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

LAW/ANALYSIS

Moses first argues the trial court erred in failing to suppress Moses' custodial statement on the ground the statement was not knowingly or voluntarily given. Moses argues that under the totality of the circumstances, the statement, taken from a learning-disabled student, unaccompanied by his

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parents, was improperly admitted into evidence. However, because defense counsel failed to make a contemporaneous objection, this issue is not preserved for our review. " [M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840(2001). Notwithstanding, if the court makes a ruling on the admission of evidence *immediately prior* to the evidence at issue being introduced at trial, then the aggrieved party need not renew the original objection. *Id.* (emphasis added). Here, Moses does not meet the exception to the rule because the evidence was not immediately introduced following the court's ruling at the pretrial hearing. Thus, it was necessary for defense counsel to renew her objection to the introduction of Moses' custodial statement in order to preserve the issue for appellate review.

Moreover, the record supports the trial court's ruling that Moses' statement was freely, knowingly, and voluntarily made. In *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court indicated " that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." 378 U.S. at 376, 84 S.Ct. 1774. Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable [390 S.C. 512] determination on the issue of voluntariness. *Id.* at 376-77, 84 S.Ct. 1774. In order to introduce into evidence a confession arising from custodial interrogation,^[3] the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct.App.2009); *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct.App.2007).^[4]

" The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis v. Thompson*, ___ U.S. ___, ___, 130 S.Ct. 2250, 2261, 176 L.Ed.2d 1098 (2010). Both of these *Miranda* rights protect the privilege against compulsory self-incrimination. *Id.* at 2260. The United States Supreme Court has now recognized there is no principled reason to adopt differing standards for determining when an accused has " invoked" the right to remain silent or " invoked" the right to counsel. *See id.* As such, a suspect must " invoke" these rights " unambiguously." *See id.* " A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoid[s] difficulties of proof and ... provide[s] guidance to officers on how to proceed in the face of ambiguity." *Id.* (internal quotation marks and citation omitted). Otherwise, " [i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression ' if they guess wrong.' " *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 461, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)). Suppression under these circumstances would place a " significant burden on society's interest in prosecuting criminal activity." *Id.*

Here, Moses did not unambiguously " invoke" his right to remain silent or his right to counsel. Additionally, Moses [390 S.C. 513] has not challenged on appeal his right to counsel; thus, we need only consider whether Moses " waived" his right to remain silent due to his assertion that his statement was not freely and voluntarily given. *See Berghuis*, 130 S.Ct. at 2260 (" Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation

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is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily

waived [*Miranda*] rights when making the statement.") (internal quotation marks and citation omitted). The Supreme Court has indicated two dimensions to this waiver inquiry: (1) the waiver must be " voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and (2) the waiver must be " made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). As both the United States Supreme Court and our state supreme court have indicated, the prosecution need not show that a waiver of *Miranda* was express. *Berghuis*, 130 S.Ct. at 2261; *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) (" An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by *Miranda*. " (citing *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979))). An implicit waiver is sufficient. *Id.* Regardless of whether the waiver is express or implied, the waiver must be given freely, knowingly, and voluntarily. Accordingly, we must assess Moses' waiver under this standard.

In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overcome by the totality of the circumstances surrounding the confession. See *Goodwin*, 384 S.C. at 601, 683 S.E.2d at 507 (citing *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)). Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations [390 S.C. 514] ; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (length of interrogation, location, continuity, and defendant's maturity, physical condition, education, and mental health); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (noting the following factors as relevant: age, education, advice of constitutional rights, length of detention, repeated and prolonged nature of questioning, and use of physical punishment such as deprivation of food or sleep); *Goodwin*, 384 S.C. at 601, 683 S.E.2d at 507 (police coercion, length of interrogation, its location, continuity, and defendant's maturity, education, physical condition, and mental health); *Simmons*, 384 S.C. at 163-64, 682 S.E.2d at 28-29 (awareness of constitutional rights, coercion, hunger, promise of leniency); *State v. Dye*, 384 S.C. 42, 47-48, 681 S.E.2d 23, 26-27 (Ct.App.2009) (defendant's awareness of rights, coercion, environment, education); *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619, 627-32 (Ct.App.2008) (age, education, physical and mental state of defendant, misrepresentations of evidence by police, coercion, effect of juvenile's request for parent and advice of parent); *Miller*, 375 S.C. at 384-86, 652 S.E.2d at 451-52 (direct or implied promise of leniency). This list of factors is not an exclusive list. See *Withrow*, 507 U.S. at 693-94, 113 S.Ct. 1745. Moreover, no single factor is dispositive and each case requires careful scrutiny of all surrounding circumstances. *Schneckloth*, 412 U.S. at 226-27, 93 S.Ct. 2041; *State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007).

Here, Smith testified during the hearing that only he and Moses were present during his interview, although he acknowledged that several officers walked in and out of the room. The record does not indicate Moses was threatened by Smith. Rather, Smith, aware that Moses was seventeen years old and enrolled in special education classes, took the time to write Moses' statement himself after reading each line of the " Waiver of

Rights" form to Moses, who then signed the form. [390 S.C. 515] Additionally, Moses testified on two separate occasions that he understood his *Miranda* rights. He further testified that Smith did not tell him what to say during his

statement. The record does not indicate that Moses was detained for an extended period of time. Finally, although Moses could only read and write at a third grade level, he was able to earn an occupational diploma. Although the trial court failed to specifically mention his mother's alleged request to be present during questioning, we find that factor standing alone is not dispositive. Ultimately, upon review of the totality of the circumstances in this case, the record supports the trial court's conclusion that Moses' statement was freely, knowingly, and voluntarily made, regardless of his age, learning disability, and separation from his mother. Thus, we find no abuse of discretion by the trial court.

Next, Moses argues the trial court erred in refusing to dismiss the charges due to the failure of the State to preserve or disclose videotaped evidence from the incident in the cafeteria which would have been helpful to Moses in identifying student witnesses. Because of his expulsion, Moses was not allowed to go back to the school to look for student witnesses who were in the cafeteria at the time of the incident. If he had been presented with the entire surveillance recording, defense counsel asserts he may have been able to locate, interview, and present favorable testimony from student witnesses.

The State's duty to disclose evidence favorable to the defendant is addressed by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In South Carolina, an individual asserting a *Brady* violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching.^[5] *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006); [390 S.C. 516] *State v. Carlson*, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct.App.2005). The court in *Riddle* recognized the United States Supreme Court's emphasis on the prosecutor's responsibility for fair play. *Riddle*, 369 S.C. at 46, 631 S.E.2d at 74. In describing this responsibility, the court stated:

The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. (internal quotation marks and citation omitted). As such, it is imperative for prosecutors to abide by this rule as " [o]ur judicial system relies upon the integrity of the participants." *Id.* Whether the prosecutor's failure to reveal evidence pursuant to *Brady* is due to negligence or an intentional act is irrelevant because a court may find a *Brady* violation regardless of the good or bad faith of the prosecutor. *Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999). Because *Brady* is founded upon a sense of fairness and justice, the focus in a *Brady* analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure. *Id.* As noted in *Brady*, "[t]he principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.

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Society wins not only when the guilty are convicted but when criminal trials are fair[.]" *Id.* (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

Generally, "[t]here are three categories of *Brady* violations: (1) cases involving nondisclosed evidence or perjured [390 S.C. 517] testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for *Brady* material." *Carlson*, 363 S.C. at 609, 611 S.E.2d at 295. Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. *Kennerly*, 331 S.C. at 452-53, 503 S.E.2d at 220. Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); accord *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see also *Riddle*, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555)); *State v. Hill*, 368 S.C. 649, 661, 630 S.E.2d 274, 280-81 (2006) (stating evidence is material if the cumulative effect of the suppressed evidence results in a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different); *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct.App.1997) ("A defendant shows a *Brady* violation by demonstrating that 'favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict.'"). Evidence is not considered "material" if the defense discovers the information in time to adequately use it at trial. *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220; *Sheppard v. State*, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004) (finding no *Brady* violation when defense counsel was given witness's statements in time for cross-examination, and, thus, there was not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial).^[6]

[390 S.C. 518] While *Brady* imposes a duty on the State to disclose material evidence favorable to the defendant, the State has the additional duty, albeit not an absolute duty, to preserve evidence that is favorable to the defendant. Although under *Brady* the good or bad faith of the State is irrelevant when the State fails to disclose material, exculpatory evidence, the United States Supreme Court has clarified that a different analysis is required when the State fails to preserve evidence that *might* have exonerated the defendant. In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the Court explained the reason for this difference:

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful

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evidence does not constitute a denial of due process of law.

488 U.S. at 58, 109 S.Ct. 333.

South Carolina has adopted the duty to preserve analysis of *Arizona v. Youngblood* in its jurisprudence. While recognizing that the State does not possess an absolute duty to preserve potentially useful evidence, our state supreme

court has held that a defendant must demonstrate either that the State destroyed evidence in bad faith, or the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. *State v. Mabe*, 306 S.C. 355, 358-59, 412 S.E.2d 386, 388 (1991); see also *State v. Cheeseboro*, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (finding "[t]he State does not have an absolute duty to preserve potentially useful evidence that [390 S.C. 519] might exonerate a defendant.") (emphasis added); *State v. Singleton*, 319 S.C. 312, 317, 460 S.E.2d 573, 576 (1995) (" [I]f the evidence possesses exculpatory value that is apparent before its destruction, its disposal constitutes a denial of due process." (citing *Youngblood*, 488 U.S. at 56 n. 3, 109 S.Ct. 333)).

In this case, defense counsel failed to establish a due process violation resulting from the intentional destruction of, or failure to preserve, relevant evidence. The record fails to establish bad faith on Smith's part. The State argued to the trial court during pretrial motions that the surveillance system in place at Hillcrest High School was very antiquated and only captured still images, not live video. As the State further explained, a live video could not be obtained from the surveillance system because it is a delayed still image process. Instead, if not yet automatically deleted, delayed pictures could be obtained, such as the one produced by Smith to defense counsel. Further, the solicitor indicated to the trial court that she had given a hard copy of the picture and a copy of the disk to defense counsel; this statement was not contested at the time made. The State also invited the defense expert to Hillcrest High School to examine the surveillance system. Thus, based on the information provided, the record supports the trial court's finding that the State did not destroy any evidence in bad faith.^[7]

Furthermore, the testimony of record fails to establish the exculpatory value of this evidence. The defense asserts the tape " would most likely" have allowed it to identify witnesses who *may reasonably* have presented favorable evidence or evidence which could have lead the defense to impeachment evidence. Standing alone, this assertion is insufficient. Moreover, Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria. See, e.g., *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir.1990) (finding no *Brady* violation when exculpatory [390 S.C. 520] information was not only available to the defendant, but also available in a source where a reasonable defendant would have looked); see also *Cheeseboro*, 346 S.C. at 538-39, 552 S.E.2d at 307 (" To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."); *Mabe*, 306 S.C. at 358-59, 412 S.E.2d at 388 (" A defendant must demonstrate either that the state destroyed evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."). Accordingly, we find no reversible error in the trial court's denial of Moses' motion to dismiss the case based on the alleged destruction of relevant evidence.

Moses next asserts on appeal that the trial court erred in refusing to grant the

motion to quash the indictments on the ground the grand jury process followed in this case violated due process and constitutional guarantees. Moses asserts that the Greenville County Grand Jury returned over four hundred indictments on the day the indictments against him were returned; thus, he argues that the devotion of only two minutes per indictment constituted evidence that the grand jury proceedings were not regular. We disagree.

"A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." *State v. Capps*, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981). Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise. *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct.App.1991). Any speculation regarding "potential" abuse of grand jury proceedings cannot suffice as evidence of "actual" abuse in order to quash an indictment. *Id.* at 502, 409 S.E.2d at 424.

In *State v. Duncan*, 274 S.C. 379, 264 S.E.2d 421 (1980), the court dealt with a strikingly similar issue. The defendant appealed his conviction for murder and argued, among several other grounds, that the trial court erred in failing to quash his [390 S.C. 521] indictment. 274 S.C. at 380, 264 S.E.2d at 422. At trial, Duncan's motion to quash the indictment was based entirely on the number of indictments returned by the grand jury on the day his indictment was returned, arguing it was impossible for the grand jury to have had enough time to weigh the evidence presented against him. *Id.* at 380-81, 264 S.E.2d at 422. The supreme court affirmed the trial court's decision to deny the motion, holding that the Fifth Amendment only requires the indictment to be returned by an unbiased jury and to be valid on its face. *Id.* at 381, 264 S.E.2d at 422. Moreover, the court stated the time spent deliberating a matter does not control the effectiveness of the indictment. *Id.*

Similar to the argument made in *Duncan*, Moses' argument is based on the number of indictments returned on a single day. Here, Moses asserts that all three indictments should be quashed because the grand jury processed 418 indictments on the day it returned his indictments. At trial, Moses argued that based on the number of indictments returned that day, the grand jury would have processed one indictment every 2.3 minutes, not allowing much time and consideration for the volume of evidence presented in this case. Although the court in *Duncan* never mentioned the number of indictments returned that day, the court stated, "[t]he length of time spent deliberating a matter, even if it could be established, does not control the effectiveness of the deliberation." *Id.* at 381, 264 S.E.2d at 422. Furthermore, this evidence is not clear evidence of any *actual* abuse justifying the quashing of the indictments but rather, it is tantamount to mere speculation regarding *potential* abuse. See *Thompson*, 305 S.C. at 502, 409 S.E.2d at 424. In addition, the average time suggested herein by Moses discounts the equal possibility that the grand jury spent more time on some cases and less on others. Accordingly, without direct evidence, which we acknowledge is difficult to provide due to the secretive nature of the grand jury proceedings, Moses failed to demonstrate irregular grand juror proceedings. Thus, we find no reversible error in the trial court's denial of the motion to quash the indictments.

Turning to the next issue on appeal, Moses argues the trial court erred in admitting statements made by Amy Gahagan, Moses' teacher, as prior inconsistent statements under [390 S.C. 522] Rule 613, SCRE. He argues that no foundation was made for the introduction of the statements and, further, that the court erred in denying the defense motion to strike when the State's witness referenced Moses' assault of a teacher. We disagree.

According to Rule 613, SCRE:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made

the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 613(b), SCRE. "A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." *State v. Stokes*, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009). Unlike the federal rule, the South Carolina rule requires that a proper foundation must be laid before admitting a prior inconsistent statement. *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct.App.2004). Thus, "[i]t is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement." *Id.*

The trial court did not err in allowing Coach Robert Searfoss to testify regarding Gahagan's prior inconsistent statement. "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." *State v. Blalock*, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct.App.2003); see also *State v. Carmack*, 388 S.C. 190, 201-02, 694 S.E.2d 224, 230 (Ct.App.2010) (holding witness did not unequivocally admit making a prior inconsistent statement; therefore, the trial court did not abuse its discretion in allowing extrinsic evidence of the statement). This wide latitude extends to a witness indicating an inability to recall or to remember a previous statement:

If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not [390 S.C. 523] recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (quoting *State v. Sullivan*, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)). Here, the proper foundation was laid for the admission of Gahagan's inconsistent statement. Gahagan's testimony was not an unequivocal admission. She merely stated she could not remember having asked Searfoss in the fall of 2006 to take Moses into his classroom. Gahagan was advised by the State of the substance of the statement she made to Searfoss, the time and place it was allegedly made, the person to whom it was made, and she was given the opportunity to explain or deny the statement. See Rule 613(b), SCRE. Moreover, the State even rephrased the question to Gahagan to allow her a sufficient opportunity to explain or deny the statement. We find no abuse of discretion by the trial court.

Moses also argues the trial court improperly denied the defense motion to strike Searfoss's testimony regarding Moses' prior assault in Laurens County. During his testimony, Searfoss stated, "Mrs. Gahagan told me that Walt could be confrontational at times. And one of the reasons he was at Hillcrest now is because he assaulted a teacher at Laurens High School...." Defense counsel objected to the statement on the ground of relevance and moved to strike the statement. The trial court instructed the jury as follows: "[t]he comment about Laurens [referring to the assault on a teacher] is not admissible. You should disregard that." The court further instructed the jury that the previous statement regarding what Gahagan told Searfoss should only be used to evaluate the credibility of Gahagan. According to the court's statement to the jury to disregard the testimony regarding the Laurens County incident, the trial court in effect granted the motion to strike. We do not think the semantics of the court's ruling prejudiced Moses or affected the outcome of the trial. Instead, the defendant's procedural objective of the motion to strike achieved the remedy of the court directing the jury to disregard the testimony:

The general rule is indisputably established that, when in the course of a trial incompetent statements of witnesses [390 S.C. 524] are brought in either from accident, or when they might be reasonably, though erroneously,

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thought by counsel to be competent, the only remedy that the court can afford is to grant a motion to strike out and instruct the jury to disregard the testimony. The injury resulting from the jury having heard the incompetent statement is regrettable, but the trial cannot be stopped because of such accidents and mistakes liable to occur in every trial.

Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 399, 171 S.E.2d 352, 354 (1969). Thus, we find no prejudicial, reversible error as to this issue. ^[8]

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

Notes:

^[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

^[2] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

^[3] Custodial interrogation is not in dispute herein.

^[4] Once introduced, the State must prove to the jury (or fact finder) beyond a reasonable doubt that the statement was freely, knowingly, and voluntarily made. *State v. Simmons*, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct.App.2009); *Goodwin*, 384 S.C. at 602, 683 S.E.2d at 507.

^[5] Likewise, under Rule 5, SCRCrimP, defendants, upon request, are entitled to disclosure of their statements, criminal records, and any documents or tangible objects material to the preparation of their defense or intended for use by the prosecution. Rule 5(a)(1), SCRCrimP. For purposes of Rule 5, "material" is used in the same context as it is in a *Brady* analysis. *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998). Once there is a Rule 5 violation, a court will only reverse "where the defendant suffered prejudice as a result of the violation." *Id.* 331 S.C. at 453-54, 503 S.E.2d at 220.

^[6] Although this case involved a trial, the *Brady* standard is also applicable to guilty plea cases. See *Gibson*, 334 S.C. at 525, 514 S.E.2d at 325 (adopting essentially the same standard that is applied in the context of a trial: "A *Brady* violation is material when there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial.").

^[7] Although defense counsel suggested that others had mentioned the "alleged" video, the defense never proffered that testimony for the

record.

[8] Moses further asserts the trial court erred in allowing the State to offer general evidence of Moses' bad character on the ground the defense opened the door to the evidence by presenting positive evidence of Moses' work habits, his disability, and the fact he had passed a drug test. While this argument appears in Moses' brief, we note it is not mentioned in the issues on appeal. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Moreover, the argument advanced in the brief makes no reference to any supporting authority. See *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct.App.2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Accordingly, we need not reach the merits of this argument.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 29th, 2013



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