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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

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SC Court of Appeals

The State,

Respondent,

v.

Tommy Lee Benton,

Appellant.

Appellate Case No. 2017-002553

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

JIMMY RICHARDSON
Solicitor, Fifteenth Judicial Circuit
Post Office Drawer 1276
Conway, South Carolina 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

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(843) 915-5460

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial court violate Mr. Benton' protection against Double Jeopardy by retrying his case after granting a mistrial on the ground that Mr. Benton did not provide formal written notice of his alibi defense, where he was not required to disclose that information because the State did not first identify in writing the time he allegedly committed the offenses, the trial court inadequately considered whether alternatives to a mistrial existed, and the trial court failed to exercise sound discretion in finding manifest necessity for a mistrial?

II. Did the trial court abuse its discretion by admitting into evidence text and internet messages allegedly sent or received by Mr. Benton and Mr. Cheatham where there was no evidence these individuals actually sent or received them and where Mr. Benton did not have exclusive possession of his cell phone?

III. Did the trial court abuse its discretion by admitting into evidence unduly prejudicial and gruesome crime scene photographs that had no probative value where Mr. Benton only put forth an alibi defense, he did not challenge the facts or circumstances of the underlying crimes, and the photographs were not necessary to prove any fact in issue.

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

When a mistrial is declared without objection based on admitted defense non-disclosure, and the record supports the trial judge's finding of manifest necessity such that retrial is not barred by Double Jeopardy, is an appellant entitled to a reversal resulting in an acquittal?

Whether the trial judge abused his discretion in finding sufficient authentication of text messages and/or postings based upon testimony that the numbers matched a number known and associated with appellant, messages were matched with known users, and the information directly related to the crimes?

Whether the trial judge abused his discretion in admitting limited and probative crime scene photographs that corroborated the details of the crime as the co-defendants testified, and supported malice in the killing when malice is an essential element of murder?

RESPONDENT'S STATEMENT OF THE CASE

An Horry County grand jury indicted Tommy Lee Benton ("appellant") in April 2016 for the murder of Charles Bryant "C.B." Smith, and in October 2016 for two counts of burglary in the first degree, one count of arson first degree, and one count of arson third degree, all stemming from his crimes against Mr. Smith. (2016-GS-26-1719 and 5008, 5009, 5010, and 5011). (R. pp. 363-372). Thomas C. Brittain, Esq., and Case T. Brittain, Esq. represented appellant on the charges.

A jury was selected and sworn on July 17, 2017. The Honorable Steven H. John presided over the trial proceedings. Judge John heard motions the remainder of the day, and the trial began on the morning on July 18, 2017. During the defense's opening statement, the State asked to be heard on a legal matter. Based upon the failure to notice the prosecution of alibi pursuant to Rule 5(e), SCRCrimP, the trial judge, upon careful consideration, ultimately declared a mistrial and ordered compliance with Rule 5(e). (R. p. 41, line 12 – p. 45, line 14).

Appellant was thereafter tried by a jury December 4-8, 2018, and Judge John again presided. The jury found appellant guilty as charged. (R. p. 294, line 13 – p. 295, line 11). Judge John sentenced appellant to life without the possibility of parole for murder; life on each of the burglary convictions, consecutive the murder sentence; thirty years, concurrent to the murder sentence, for arson first degree; and fifteen years, concurrent to the murder charge, for arson third degree. (R. p. 296, line 18- p. 297, line 13).

Appellant timely appealed. This briefing follows.

RESPONDENT'S STATEMENT OF FACTS

The jury convicted appellant of multiple crimes against Charles Bryant Smith, including his murder. The evidence adduced at trial showed that in the span of a month, Smith suffered three separate robberies with the third robbery leading to his death by being burned alive in his home. All of the crimes were planned and executed by Appellant Benton and perpetrated with help from others. Two of his codefendants testified against him detailing their role in the various crimes. Officers recovered Benton's cellphone and co-defendant Cheatham's cellphone directly from Benton's and Cheatham's family members. Examination of those phones yielded information about their movements on the dates in question, and each phone was within approximately a mile of the murder location. In particular the jury heard the following specific evidence supporting guilt:

Smith owned a mobile home park and various rental properties, and also various other business properties. Rent for the trailers ranged from $300 to $1100 and was collected monthly, with most of his tenants paying in cash. (R. p. 95, line 23 - p. 96, line 15.). The victim carried case, did not believe in banks, and "had a bad habit of wanting to flash his money...." (R. p. 68, lines 22-25; p. 99, lines 13-15).

Lorraine Rose and her son, Garland Rose, worked for the victim. (R. p. 97, lines 1-5). Smith paid his employees daily, in cash, and would count out his money on a table. (R. p. 69, lines 17-25; p. 97, lines 6-11). Lorraine also rented from Smith and paid him in cash each month at Smith's produce stand. Whenever Lorraine paid her rent, Smith would show his cash, then put the rent money with the large sum of money he was already carrying. (R. p. 211, line 17 - p. 212, line 17). Both Lorraine and Garland knew Smith to have cash on his person. (R. p. 97, lines 12-14). Benton had seen Lorraine Rose pay her rent in cash to Smith and knew that Smith kept a

significant amount of cash on him at all times. (R. p. 212, lines 5-17).

Lisa Rose had been married to Garland Rose. They were married for one (1) year and Garland died on November 8, 2014. (R. p. 209, line 22 - p. 210, line 5). Lisa Rose had been friends with Benton since the fifth grade. (R. p. 210, lines 7-12). Lisa Rose introduced Garland to Benton and they became friends. (R. p. 213, line 21 - p. 214, line 8). Garland Rose told Benton and co-defendant Mitchell Cheatham about Smith having a lot of cash. They began planning to rob him. (R. p. 222, line 5 - p. 223, line 22). Cheatham testified Benton and Garland Rose planned the first burglary. (R. p. 228, lines 15-16).

On April 18, 2014, Benton, Cheatham, and Garland Rose met at Garland Rose's house where they started discussing the robbery. Benton and Cheatham stole a shotgun beforehand and brought it with them. The men got in Benton's girlfriend's Black Ford Focus and drove to a road near Smith's trailer. Benton and Garland went into the house through the window on the side of the home. A few minutes later, Benton and Garland came out of the back door, jumped in the back seat of the car and they drove off. When the men entered the house, one of them had a shotgun with them. When they exited the home, they had a gun, a crowbar, and a grocery bag with around $27,000 in cash in it. (R. p. 224, line 2 - p. 228, line 7; p. 229, lines 7-19).

Sammy Charles Smith, the victim's son, was living with his father in 2014 but was not home at the time of the April 18th burglary. (R. p. 95, lines 12-15; p. 98, line 15). Over Sammy's objections, the victim did not call the police after the incident because he did not believe in getting the police involved, or that it would even do any good. (R. p. 99, lines 1-25).

In the early morning hours of April 26th, Smith's store was set on fire. Earlier on the 25th, a man named J.T. introduced Benton and Cheatham to Douglas Thomas. The group met in a Walmart parking lot for the sole purpose of planning additional crimes. Benton, Cheatham,

Thomas, and J.T. went to a Holiday Inn motel in Whiteville, North Carolina and discussed their plans to rob the victim's outlet store. (R. p. 230, line 10 - p. 232, line 15; p. 220, line 18 - p. 221, line 8). Benton told them Smith had $100,000 in the store ripe for the taking. (R. p. 73, lines 18-25). That night, the four men drove to Mullins in the black Ford to steal a truck from someone Benton's stepfather knew. (R. p. 233, line 16 - p. 234, line 15; p. 70, line 1 - p. 71, line 1). Later, around 3:00 in the morning, Benton, J.T. and Thomas drove to Smith's store in the stolen truck. The plan was to go to the store and stay there until Smith arrived for work, because they believed he kept more money in the store than he did at his house. (R. p. 235, line 13- p. 238, line 21). Benton and Thomas went through the side bathroom into the back area of the store and started looking for money, but having found none, went to the front of the store to wait for Smith's arrival. (R. p.73, lines 9-14). They eventually realized no one would be working because it was a Saturday morning (the 26th). They had a "spontaneous idea to burn ...the place" and set it on fire before exiting the building the same way the broke in. The group eventually parted ways and return to North Carolina. (R. pp. 74, line 20- p. 76, line 4). The fire department was dispatched on the morning of April 26, 2014, at 6:17a.m., arriving minutes later. (R. p. 100, line 16 - p. 102, line 23). However, at the request of the victim, the Horry County Police Department did not investigate the fire. (R. p. 103, line 25 - p. 104, line 12).

On the night of April 28th, Benton, Thomas, and Cheatham met at the motel where Benton and Cheatham were staying to plan their final crime against Smith. They planned to go to his home and take the $100, 000.00 they did not find at the outlet store.[1] (R. p. 76, lines 15-25; p. 239, lines 10-17). Benton drove Thomas and Cheatham to the stolen truck in the same black Ford he was

[1] Investigators found a safe with $120,000.00 in cash in the debris. (R. p. 134, line 1 – p. 135, line 12).

driving previously.[2] Cheatham put a can of gasoline in the middle of the seat and then he and Thomas got into the truck. Cheatham and Thomas followed Benton from North Carolina to Aynor, South Carolina. The men arrived at the same dirt road they had stashed the car before they broke into the store, then they all got in the truck and went to Smith's trailer. Benton popped the back door with a crowbar and went in first. All of the men were armed when they entered the home, Benton had a Ruger 9mm pistol, Thomas had a sawed off shotgun, and Cheatham had a High Point 9mm pistol. Benton jumped on Smith who was sleeping on the couch, and handcuffed him. The men took turns watching and interrogating him while the others looked for money. While Benton was watching Smith, he beat him with a crowbar and threw vodka on his bleeding face. Eventually, they found a few thousand dollars. Benton went to the truck and returned with a can of gasoline. He poured gas on the victim, who made a noise, then poured gas about the trailer. Cheatham lit a shirt on fire and dropped it on the floor, but it did not catch the trailer on fire so Benton poured gas on the flaming shirt. Benton, Chatham, and Thomas drove away, burning the truck before they returned to the motel to count their money. The men left the victim bound on the floor, alive, in a trailer they set on fire. (R. p. 77, line 4 - p. 91, line 19; p. 239, line 10- p. 267, line 13). Benton and Cheatham had brought a bad to the home. Cheatham described it as a "crime bag" with gloves, mask, extra ammunition, handcuffs and rope. (R. p. 253, lines 5-15). The bag was found at the burned home during the investigation. (R. p. 112, line 10 – p. 115, line 1).

When the first responders found Smith, his body was badly burned and he had a pair of handcuffs still attached to his left hand. (R. p. 103, line 13 - p. 106, line 15). They could smell gasoline when they removed the victim's remains form his trailer. (R. p 116, lines 20-22). There

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[2] The owner of the stolen truck testified he knew Benton as his sister was once married to Benton's stepfather. (Tr. p. 181, lines 1-9).

were extensive burns to the victim's body, so much so that the victim's abdominal organs were exposed. There were also fractured ribs on the right side his body with significant hemorrhaging surrounding the remaining soft tissue that indicated blunt force trauma. (R. p. 160, lines 2-21). The black particulate matter and toxicology report showed carbon monoxide indicated the victim was still breathing at the time of the fire. (R. p. 161, lines 4-15). He died as a result of carbon monoxide inhalation and burning. (R. p. 162, lines 3-5).

On May 2nd, a few days after the incident, Law Enforcement got a call from Benton's stepfather, Gregory Hudson, because Mr. Hudson found Benton's black Motorola ZTE cell phone and wanted to turn the phone over to police. (R. p. 188, line 2 - p. 189, line 5). Officers also received a Moto G Motorola cell phone from Cheatham's family on the same day. (R. p. 189, line 10 - p. 190, line 9). Law enforcement was able to use a program called Cellebrite that extracts forensic data maintained on mobile devices and puts it into a readable format on both phones in this case. (R. p. 151, line 17- p. 152, line 3). They then used a program called CellHawk that takes cell tower information and combines it with the phone records information to make a visual representation of what the phone records show. (R. p. 208, lines 1-8). Law enforcement was able to plot cell phone locations on the dates in question and identified that both phones were connected to the tower closest to where the victim lived on the day of his murder and the first robbery. (R. p. 194, line 21 - p. 195, line 17; p. 196, line 22 - p. 200, line 16; p. 200, line 18 - p. 204, line 8; p. 206, lines 7-23) Specifically, the phones were connected to Charleston Switch Tower 1531 which is located off of Pine Oaks Road in the Conway area and is 1.33 miles from the incident location. (R. p. 191, lines 4-8; p. 194, line 21 - p. 201, line 8).

As indicated above, the jury returned a verdict of guilty of all charges including the murder of Mr. Smith.

ARGUMENT

I.

Appellant did not object to the declaration of the mistrial, but acquiesced based upon the defense's own admitted failure to comply with the alibi notice requirements. Further, the record supports a finding of manifest necessity where appellant admittedly failed to provide the required notice, but the trial judge was unwilling to suppress alibi testimony, and was equally unwilling to force the State to go forward without time for investigation and preparation. Notably, the trial judge took steps to expedite the curing of the defense's failures, and to quickly hold a trial within six months.

Standard of Review:

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "A trial judge's decision to grant a mistrial will not be overturned absent an abuse of discretion amounting to an error of law." *State v. Baum,* 355 S.C. 209, 215, 584 S.E.2d 419, 422 (Ct. App. 2003) (citing *State v. Rowlands,* 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct.App. 2000). *See also Gilliam v. Foster,* 75 F.3d 881, 903 (4th Cir. 1996) ("the Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial.").

"The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is 'whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.'" *Id.,* 355 S.C. at 214, 584 S.E.2d at 422 (quoting *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)). Though the standard is abuse of discretion, "reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.* (*quoting United States v. Perez*, 22 U.S. 579 (1824)).

Relevant Facts:

On July 18, 2017, the first trial began with opening statements. During the defense's

opening statement, defense counsel began to reference alibi and specific alibi witnesses and alibi specifics. (R. p. 30, line 21 – p. 31, line 1; p. 35, line 7 – p. 37, line 6). The State asked to speak on a legal matter outside the presence of the jury. (R. p. 37, lines 9-17). The State argued: "It's becoming clear through this opening ... that the defense is going to rely essentially on alibi witnesses ... We have been provided no notice of alibi and ... don't believe that defense is proper at this point...." (R. p. 37, line 22 – p. 38, line 1). The defense contended alibi was always the defense, but the State contended some names they knew from discovery, but some they had not heard, and that there was no notice given pursuant to Rule 5. (R. p. 38, line 20 – p. 39, line 1). The Court reviewed the Rule 5 provisions, including the provision that a failure to disclose could result in exclusion. (R. p. 39, line 13 – p. 40, line 13). The Court asked defense counsel if written notice had been served upon the State. Defense counsel responded: "... we can't find a written notice ... So, we must not have done it." (R. p. 40, lines 16-19). Defense counsel asserted he believed the defense was alibi, and thought notice had previously been given, though he conceded he did not send any addresses, and further believed the defense did not "completely compl[y] with the rule." (R. p. 40, line 21 – p. 41, line 2). After a break and an off the record discussion in chambers, (R. p. 41, lines 3-5),[3] Judge John announced he would grant a mistrial rather than exclude the defense evidence, or require the prosecution to continue without proper notice and time to investigate, and set out strict requirements on disclosure while giving a warning that failure to disclose would result in exclusion of testimony. (R. p. 41, line 12 – p. 45, line 14). At the conclusion of the ruling, Judge John asked for "comments or further statements from the defense," and defense counsel replied, "Nothing, Your Honor." (R. p. 45, lines 19-21). The following day, defense counsel asked the

[3] After the break, the court reporter as noted "July 19, 2017," however, the transcript shows the "end of day two," after the jury is dismissed. (R. p. 41, line 8 and p. 48, line 24). It would appear the reference to the 19th after the break was a mere scrivener's error.

Judge to direct the State to give more specific information on time of the crimes; however, Judge John found that the State had given notice of the specific times through discovery and had specifically requested notice of alibi. (R. p. 49, line 13 – p. 55, line 11). The trial judge also affirmed his prior finding that the defense did not comply with the notice requirements after having received sufficient notice of the time, date and place as required by the rule. (R. p. 55, line 11 – p. 56, line18). Judge John also issued a written order on July 26, 2017. (R. pp. 4-5).

Additional trial proceedings began on December 4, 2017. After selection of a jury and presentation of various pretrial matters, defense counsel sought to place on the record that the State failed "to make a specific request of the particulars" such that the defense duty was triggered. (R. p. 62, line 18 – p. 63, line 1). The defense noted within the presentation that it was "not trying to reprove anything today," but argued "there was no justification for the mistrial" so the "trial shouldn't proceed and the charges ... should be dismissed." (R. p. 63, lines 6-24). The State responded the request it gave sufficient notice and made sufficient request. (R. p. 64, lines 1-7). Judge John affirmed his prior reasoning and rulings, noting the basis for his findings as found throughout the State's discovery properly given to the defense, and also "noted the defense counsel conceded failure to comply with notice requirements of Rule 5, that they did not inform the state where the defendant claims to have been at the time of the offenses, nor the names and addresses of the witnesses upon whom he would rely to establish such claim." He also affirmed again that he did not choose the remedy of exclusion that was available to him, or forced trial by surprise on the state, which was also available to him, but opted to set the trial for December 4, 2017. (R. p. 64, line 8 – p. 65, line 23).

Even while knowing the date that trial was to begin, Benton did not seek any intervention from the Supreme Court of South Carolina or the federal courts. *See State v. Rearick*, 417 S.C.

391, 405, 790 S.E.2d 192, 199 (2016) (though a mistrial ruling is not immediately appealable, "A defendant may still challenge the denial of a motion to dismiss on double jeopardy grounds *via* (1) a petition for federal habeas corpus relief, or (2) a petition for this Court to issue an extraordinary writ.").

Discussion:

The Fifth Amendment contains the Double Jeopardy Clause. U.S. Const. Amend. V. Among other provisions in the amendment, the relevant clause declares: "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Id. "[J]eopardy attaches when the jury is empaneled and sworn...." *Crist v. Bretz,* 437 U.S. 28, 38 (1978). "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States,* 468 U.S. 317, 325 (1984). The Supreme Court has never adopted the view that "every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade v. Hunter,* 336 U.S. 684, 688 (1949). Rather, the Court has cautioned "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id,.* at 689.

The Court requires "in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar." *Arizona v. Washington,* 434 U.S. 497, 505 (1978). It is the prosecutor's burden to show '"manifest necessity' for any mistrial declared over the objection of the defendant." *Id.* "[T]hose words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge" and "the key word 'necessity' cannot be interpreted literally," but only to "require a 'high degree' before concluding

that a mistrial is appropriate." *Id.,* at 506. It "is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *State v. Baum*, 355 S.C.209, 584 S.E.2d 419, 422 (Ct.App. 2003). "Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, 434 U.S. at 505.

There is a "spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny" with the highest degree of deference allowed mistrial due to a deadlocked jury, and the strictest scrutiny applied where there is an "unavailability of critical prosecution evidence...." *Id.,* at 508-510.

The facts here do not warrant the rather undefined, but stringent "strict scrutiny," because it was the defense counsel's failings that brought about the mistrial. *See Arizona v. Washington*, 434 U.S. at 508 ("the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused"). In fact, defense counsel did not object to the mistrial. His interaction with the trial court appeared to convey consent or acquiescence by the lack of objection or alternatives offered to cure the error caused by his own failure to abide by notice rules. *See United States v. Dinitz,* 424 U.S. 600, 608 (1976) ("The distinction between mistrials declared by the court Sua sponte and mistrials granted at the defendant's request *or with his consent* is wholly consistent with the protections of the Double Jeopardy Clause.") (emphasis added).

Moreover, the trial judge did not act rashly, but considered two alternatives though he resolved neither would produce a reliable proceeding or fair result.

A precipitous grant of a mistrial likely will not support a sound exercise of discretion:

> It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial. United States v. Perez, 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.

United States v. Jorn, 400 U.S. 470, 487 (1971); *see also Gilliam v. Foster,* 75 F.3d 881, 903 (4th Cir. 1996) ("the Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial."). The Fourth Circuit has considered the failure to carefully consider the matter before granting a mistrial as critical in its evaluation:

> ... as the district court found, the state trial judge acted precipitately: He refused defense counsel's request to determine whether the jury had actually seen the photographs in question; he refused to determine whether Officer Counts had in fact authenticated the photographs during his testimony; he refused simply to look at the photographs and rule on their admissibility; and he refused to allow defense counsel's request to recall Officer Counts and formally move the admission of the photographs into evidence. The manner in which the state trial judge examined the appropriateness of the grant of a mistrial furnishes no indication of the exercise of sound discretion.

Gilliam v. Foster, 75 F.3d at 901. In *Gilliam*, another critical point was the error was technical only:

> The State conceded in argument before this court that there was nothing to prevent the state trial judge from simply allowing Officer Counts (who was under subpoena and available) to be recalled to the witness stand to have the photographs formally introduced, as defense counsel offered to do prior to the state trial judge's ruling on the prosecution's motion for a mistrial. Without question, this would have cured the technical, and only, error that had occurred. Thus, in the absence of any prejudicial error, the state trial judge refused to consider or implement an obvious and completely adequate course of action to correct any possible error in the jury's having viewed cumulative photographs that had not been formally moved and received into evidence. This factor, then, also weighs in favor of a conclusion that the state trial court acted irresponsibly in granting the mistrial.

Id., at 901–02.

Here, there was no such mere technical error, but a notice deficiency – a deficiency solely in control of the defendant, about which defense counsel confessed error. Moreover, the choice dealt with probable investigation of witnesses and/or facts that clearly were not known to the prosecution at the time of the mistrial. The choices for alternatives to mistrials were slim. The first was to disallow the alibi evidence; the second was to force the prosecution forward without adequate time to prepare. The judge found neither a palatable and viable alternative for a fair resolution of the charges. *Accord State v. Pierce,* 263 S.C. 23, 28, 207 S.E.2d 414, 416 (1974) (if amendment to the indictment should change the date alleged in the indictment, "it is proper for the trial judge, after allowing amendment of the indictment, to declare a mistrial and allow defendant time to attempt to establish an alibi defense for the different date."). *See also Wade v. Hunter,* 336 U.S. at 689 ("a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."). "[G] iving the jury the benefit of the fully developed facts when deciding the matter" is a sound reason to weigh in considering whether a mistrial should be granted. *Baum*, 355 S.C. at

215, 584 S.E.2d at 422. This is the path carefully chosen by the trial judge in a reasonable and logical exercise of discretion based on the facts presented. Of note, the judge carefully directed full disclosure and avoided undue delay in ordering a date certain. *See generally* Rule 5(e) (1) and (2), SCRCrimP (requiring reciprocal discovery of alibi witness information including names and addresses); *see also Williams v. Fla.,* 399 U.S. 78, 81-82 (1970) (finding no cause to strike state "notice-of-alibi rule" noting "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate" and finding the notice rule at issue was "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.").

Appellant argues that the trial judge misinterpreted Rule 5 in finding notice was necessary. (BOA, p. 23). However, the record shows defense counsel conceded that he had names of alibi witnesses and failed to give addresses of those witnesses to the State. While he later – after the grant of the mistrial – quibbled over the notice he had of the exact time and sought clarification, he did not seek clarification prior to trial so that he could sufficiently prepare an alibi defense. It is inconsistent to argue the defense was prepared to present a complete alibi, yet did not have sufficient notice of the time date and place to disclose his alibi. (See BOA, p. 26). Further, there is inconsistency in appellant's argument that arrest warrants and other discovery reflected narrow time frames, but that was not enough because there is "no source" cited, or dispatch time was not close enough. (See BOA p. 25, n. 8). Again, this is not a matter where the defense claims it could not develop an alibi defense, but a matter where the defense, having admitted non-compliance, (R. p. 40, line 21 – p. 41, line 2), seeks to present remedial arguments as to their own non-compliance. It is a fatal variance in position. Moreover, there is no argument as to why the defense did not give

notice of their known alibi witness and their addresses as required by the plain language of the rule.

Appellant further argues that the trial judge erred in not considering alternatives to the two suggested courses of action – suppression or surprise. (BOA, pp. 27-28). He appears to argue on appeal that suppression was not available, so the trial judge should not have considered suppression. (See BOA, p. 28). Yet exclusion of testimony is expressly provided for in the rule. Rule 5 (e)(4). At the heart of his argument is the premise that his alibi witnesses were critical. Rather than detract from the reasoned decision of the trial judge, this position supports the decision. His argument the trial judge noted he would have declared a mistrial if the provision were to be waived fares little better as it embraces that which the Supreme Court has stated: "... a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter,* 336 U.S. at 689. *See also Baum,* 355 S.C. at 214, 584 S.E.2d at 419 ("The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is 'whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.'") (quoting *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)).

Lastly, appellant suggests that there was no discussion of a possible "brief" continuance. (BOA, p. 30). As a first point, it would be difficult to discuss that which was not known to the State. The State would have little input as to what time would be necessary for investigation. Secondly, the suggestion the mistrial trial was made without input from defense counsel is contradicted by the record. The judge did not assume a notice failure, but discussed the failure with the parties. Further, before ruling, the record reflects a conference was held with the parties off the record. (R. p. 41, lines 3-5). But, and as a third point, the absence of manifest necessity is

not shown by creativity of possible other scenarios. The Supreme Court has clearly stated that while it is not to be strictly interpreted by definition, but denotes a "high a 'high degree' before concluding that a mistrial is appropriate." *Arizona v. Washington,* 434 U.S. at 506. At bottom, the decision to grant a mistrial is still a discretion decision which implicitly indicates that judges may differ in their treatment of the facts and circumstances before them. *Id.,* at 511. The record here, though, shows a thoughtful consideration of the clearly available alternatives, and a deliberate thoughtful decision on the rights of the defendant and the duty to ensure fair proceedings. Again, appellant does not show an abuse of discretion. This record supports the trial judge's decision. Moreover, the judge took specific steps to order disclosures and set a date certain so that the matter could be fairly concluded quickly. This again shows deliberate and thoughtful consideration of the rights of the parties and fairness in resolution, particularly in ensuring that appellant would not have a long delay in resolving the charges, even though the delay was attributed to his non-disclosure.

In sum, not only did the defense acquiesce to the mistrial based on its own failure to disclose names and addressed of its alibi witnesses, but there was also manifest necessity in this specific circumstance such that retrial was not barred. The deliberate consideration of the necessity of the mistrial, available alternatives, and duty to ensure fair proceedings are more than adequately reflected. Appellant is not entitled to any relief.

II.

The trial judge did not abuse his discretion in finding sufficient authentication of text messages and/or postings for admissibility of those relevant messages based upon testimony that the numbers matched a number known and associated with appellant, messages were matched with known users, and information directly related to the crimes was contained in the messages.

Standard of Review:

"In criminal cases, the appellate court sits to review errors of law only." *State v. Washington*, 379 S.C. 120, 123, 665 S.E.2d 602, 604 (2008). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *Id.* at 123–24, 665 S.E.2d at 604.

Discussion:

"As a general rule, statements or declarations made by one accused of a crime are admissible against him." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (quoting *State v. Plyler*, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980)). The texts were admissible under Rule 801(d)(2)(A) because the communication reflected statements by appellant offered in his trial. Appellant contends that the error in admission rests with a lack of authentication – specifically without evidence he and Cheatham "actually sent or received them." (BOA, p. 31).[4]

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[4] The issue of authentication is not clearly raised in the discussions before the trial judge, and there is some question as to waiver of the issue as defense counsel argued that some of the messages were clearly admissible when parties identified the message. (R. p. 341, lines 1-16). Further, defense counsel conceded that at some point Benton had the phone identified as Benton's phone. (R. p. 342, lines 18-20). However, the Court continued with individual analysis as offered by the defense and the prosecution and found that the messages were probative especially in light of the suggestion by some of the defense testimony that the phone was not with (or shown to be with) Benton. Though not exceedingly clear, by the time of argument on the record, the basic objection appeared to rest more on more prejudicial than probative rather than lack of authentication. (R. p. 343, line 1 – p. 356, line 15). Thus, is questionable that the argument on authentication is properly before the Court. *See, e.g, State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have

However, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The party offering the evidence at issue is tasked with showing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. '"[T]he burden to authenticate ... is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015) (alternations in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

Appellant's argument fails to consider the totality of the evidence. Appellant concedes that the State presented evidence authenticating three specific text threads – two before the murder and one after. (BOA, p. 33; see also R. p. 256, line 25- p. 262, line 12). This shows a line of communication between two co-conspirators at the relevant time of their concerted action against the victim. *See United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) (finding authentication sufficient where witness testified she recognized account and manner of speaking noting "Although she was not certain that Hall authored the messages, conclusive proof of authenticity is not required for the admission of disputed evidence.") (citing *United States v. Jimenez Lopez,* 873 F.2d 769, 772 (5th Cir.1989)).

Further, appellant's argument that evidence suggested that "others" had control and use of "Benton's phone on various other occasions," (BOA pp. 33-34), an argument that appears at one point to be conceded away in a statement that admitted his possession of the phone, (R. p. 342,

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been raised to and ruled upon...").

lines 18-20, simply misconstrues the testimony. For example, he cites to testimony from Lisa Rose, but her testimony was that she may have sent a message using Benton's phone, but did not take the phone out of his presence. (R. p. 219, lines 5-19). He also cites to testimony from Cheatham, but again, there is a brief handling of a phone, not a taking of a phone. (R. p. 273, lines 9-20). Moreover, there is no mention of the fact that investigators gained possession of the phone from Benton's family, specifically his stepfather Gregory Hudson, who contacted police to turn the phone over. (R. p. 188, line 2 through p. 189, line 5). This is yet another portion of evidence that indicates authentication.

Of particular note is that Cheatham his cellphone, Benton's cellphone, and identified the conversations as conversations he had with Benton. (R. p. 257, line 4 – p. 262, line 6). The cellphone he identified as Benton's was the one Hudson gave to investigators. (R. p. 257, lines 16-18; p. 188, lines 11-19). Further still, the testimony at trial was the Benton used his cellphone for its light function during the crime. (R. p. 249, lines 13-25). Additionally, there were extracted messages from the phone which contained information connecting Benton and Cheatham to the messages, (R. p. 167, line 6 – p. 171, line 11), and specifics of planning and the crime including references to meetings, a 9mm and ammunition, (R. p. 171, line 16 – p. 176, line 17). There were similarly connected information and identifications in regard to messages posted through the phone, (R. p. 177, line 19 – p. 187, line 3), and also testimony clearly establishing the Facebook account name "Tommy Lee Kruspe" was "Tommy Benton," (R. p. 215, lines 21-24). There was sufficient evidence to meet the low authentication standard apart from Cheatham's basic testimony. *See generally Com. v. Koch,* 39 A.3d 996, 1005 (Pa. 2011) (rejecting "mere confirmation of number or address" finding "[c]ircumstantial evidence, which tends to corroborate

the identity of the sender, is required" suggesting error where "No testimony was presented from persons who sent or received the text messages.").

At any rate, it is without question that Cheatham testified that he was participating in conversations with Benton outside of specific text messages – he testified Benton was part of the murder. (R. p. 239, lines 10- p. 267, line 13; see also p. 77, line 4 – p. 91, line 19). Text exchanges, if entered in error, could only be cumulative and harmless in light of these remaining testimony and that of co-defendant Thomas. *State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless).

Appellant's argument for relief should be rejected.

III.

The trial judge did not abuse his discretion in admitting limited and probative crime scene photographs that corroborated the details of the crime as the co-defendants testified, and supported malice in the killing, an essential element of the crime of murder.

Standard of Review:

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *Id.* "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Lyles,* 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct.App.2008) (internal quotation marks omitted).

Discussion:

Appellant contests three particular photographs, all three showing Mr. Smith as he was left with one particularly showing the handcuff still remaining on his arm. (BOA, p. 14, see also State Exhibits 54, 55 and 56; R. p. 107, line 1 – p. 111, line 11). Appellant essentially argues the photographs were not necessary to prove any fact in contest because the facts of the death were not contested, (BOA, p. 14), though the record supports he did not confess malice on his part, or agree that he was guilty of murder, or agree he participated in any portion of the crimes. Appellant argues that because of his concession the crime occurred as the crime occurred, the photographs were of no probative value. (BOA, p. 38). However, the State was still tasked with carrying its burden proof.

The murder was gruesome. But within that gruesomeness is evidence of the very element of malice the State must prove. "[T]he more essential the evidence, the greater its probative value."

State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (quoting *United States v. Stout,* 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted)).

"To constitute *unfair* prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 377, 401 S.E.2d 146, 149 (1991))(emphasis added)."The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case." *State v. Gray*, 408 S.C. at 610, 795 S.E.2d at 165. Here, the photographs were used to specifically demonstrate, explain, and corroborate the evidence of how the victim was murdered which, in turn, gave evidence of malice. In discussing similar evidentiary rulings in their cases, the Pennsylvania courts have oft quoted:

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Com. v. Robinson, 864 A.2d 460, 502 (Pa. 2004) (quoting *Com. v. Rush*, 646 A.2d 557, 560 (Pa. 1994)).

The Georgia courts have concisely rejected an argument on unfair prejudice on the basis of its own paradox: "...a defendant cannot complain about photographs that simply 'portray the havoc wreaked by [his] own hand.'" *McKibbins v. State*, 750 S.E.2d 314, 322 (Ga. 2013) (quoting

Null v. State, 402 S.E.2d 721 (Ga. 1991)). Appellant's malice in the killing is aptly demonstrated by the work of appellant's hands.

Further, the trial judge's charge instructed the level of brutality could be considered in the jury's consideration of the element of malice aforethought: "Malice, that's hatred, ill will, hostility towards another person... an intent to inflict an injury or under circumstances that the law will infer an evil intent ... Malice can be inferred from conduct showing a total disregard for human life." (R. p. 283, line 9 – p. 284, line 3). *See State v. Jones*, 86 S.C. 17, 19-20, 67 S.E. 160, 162 (1910) (approving charge that "[m]alice ... may be implied from brutal conduct on the part of the person committing the crime...."). See also 40 C.J.S. Homicide § 46 (April 2016 Update) ("The fact that cruelty or brutality was manifested in the killing will raise an inference of malice....").

Further still, the photographs corroborated witness testimony on how the scene presented, including handcuffing the victim and the fact he was alive when they set him on fire, and the autopsy findings. (See, for example, R. p. 161, lines 4-15; p. 103, line 13 – p. 106, line 15; p. 247, line 7 – p. 249, line 9; see also R. p. 13, line 5 – p. 22, line 6). Appellant appears to concede the photographs corroborated certain details in witness testimony. (See BOA, p. 15). Consequently, there were discrete and necessary reasons to submit the photographs, namely the corroborative value. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) ("'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'") (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008) ("Admitting photographs which serve to corroborate testimony is not an abuse of discretion."). *See also State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim's body as first discovered by

police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *State v. Edwards*, 10 S.E.2d 587, 588 (1940) ("In our opinion the trial Judge did not abuse his discretion in admitting the photograph [depicting head, torso, neck wound, decomposition and maggots] as being relevant, nor can we attach any importance, in view of the facts of this case, to the contention that the photograph prejudiced the jury against the defendant. Everything depicted by the photograph was, subsequent to its introduction, testified to in detail by the witnesses."). Though this Court does not make credibility rulings, *see generally State v. Wilson*, 345 S.C. 1, 6–7, 545 S.E.2d 827, 829–30 (2001) (error for appellate court to re-determine credibility which was an issue for the jury), appellant urges that the co-defendant testimony from Thomas and Cheatham was not worthy of belief. (See generally BOA pp. 5 and 39). The fact that he argues credibility concerns, however, simply underscores the value, indeed heightens the value of definitive evidence supporting the details of the testimony.[5] At any rate, the proper question for determining relevance was whether the photographs had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "[A] defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense" and "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *State v. Martucci*, 380 S.C. at 249, 669 S.E.2d at 607 (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523

[5] Appellant makes an unclear assertion the photographs of the body were not merely used to corroborate evidence because the state showed the photograph and asked Cheatham whether the murder was "worth $1500." (BOA, p. 16). That goes to the shared malice (he responded "Me and Tommy did" killed Smith for money). Id. Again, malice is a necessary element of murder that the State had to prove beyond a reasonable doubt.

(2000)) ("The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.").

Respondent submits the argument the photographs were too gruesome to allow, (see BOA, p. 37), does not rely on the proper test for admissibility. It has long been established that "[a] trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive." *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607. *See also Farris v. State*, 328 So.2d 640, 641 (Ala.Crim.App. 1976) ("The colored photograph in question is clearly ghastly; but, gruesomeness is not grounds for excluding this type of evidence, if relevant. ... This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot, and should not, gloss over the fact that violent death is itself loathsome."). Simply, gruesomeness alone does not render the photograph inadmissible. *State v. Collins,* 409 S.C. 524, 535–36, 763 S.E.2d 22, 28 (2014).

Appellant's argument that questioning Cheatham on the evidence of their malice only shows the State sought to "inflame the passions of the jury," (BOA, p. 38), omits the critical consideration of the proof of malice – not simply that the murder occurred, but over a small sum of money which the co-defendant admitted. (See BOA, p. 38; Tr. p. 676, lines 17-21).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result").

At worst, the photographs were cumulative to the other evidence, *i.e.* the testimony on the condition of the body and the crime scene, and, specifically, other photographs of the crime scene showing different portions of the crime scene which were admitted without objection. (R. p.115, lines 6-22). *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587, 588 -589 (1942) ("The photographs, it is true, were only corroborative of the spoken word, and proved to be unnecessary in this particular case, but they were no more than harmless surplusage. They showed material conditions which existed, and were not inflammable fuel to be consumed by the minds of the jurors, nor do we think that they were calculated to arouse the prejudices of the jury."). *See also State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless). However, the record supports the basis for the trial judge's ruling admitting the photographs over objection. His ruling should not be disturbed on appeal.

Appellant's argument to the contrary should be rejected.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

BY:_____
MELODY J. BROWN
SC Bar No. 14244

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

June 12, 2019.
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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

RECEIVED
JUN 12 2019
SC Court of Appeals

The State,

Respondent,

v.

Tommy Lee Benton,

Appellant.

Appellate Case No. 2017-002553

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

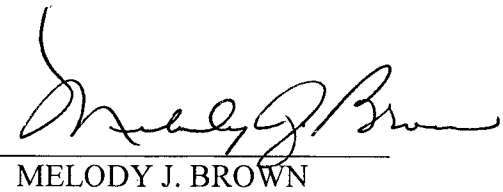
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

BY: 

MELODY J. BROWN
SC Bar No. 14244

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

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