STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

Appeal from Jasper County
The Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ROHAIME JAMAR HOPKINS,

APPELLANT

Appellate Case No. 2017-001224

FINAL BRIEF OF RESPONDENT

RECEIVED
NOV 20 2018
SC Court of Appeals

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DUFFIE STONE
Fourteenth Judicial Circuit Solicitor

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Rules

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the admission of testimony regarding the recipient cellphone tower locations listed in previously admitted and authenticated State's Exhibits 7 and 8 is procedurally barred for appeal, as defense counsel did not raise any objection and elicited additional testimony on the complained-of topic during cross examination?

II. Whether the court properly admitted State's Exhibit 9 containing text message evidence that was sent from Appellant's cell phone within minutes of the time of murder, and which the content of the text stating, "Dats done", can be reasonably

inferred as a statement that the murder for hire had been completed?

III. Whether the trial court acted within its broad discretion to admit the testimony of Michael Taylor regarding Appellant burning his clothes on the night of the murder, when such information was not made known to either party until the day of trial, where both parties had equal time to prepare for the new testimony before it was presented to the jury, and where Defense counsel was able to cross-examine and impeach the witness as to his new testimony?

STATEMENT OF THE CASE

Appellant was indicted for the murder of Terrence Johnson (hereinafter referred to as "victim") by Jasper County Grand Jury (2015-GI-2700144). (R. p. 3, lines 3-5; p. 6, line 20 through p. 7, line 4; p. 8, lines 2-4). Assistant Solicitors Mary Jones and Brian Hollen represented the State at trial, and Defendant Rohaime Hopkins (hereinafter "Appellant") was represented by attorney Scott Lee (hereinafter "Defense Counsel"). (R. p. 4, lines 12-24). The case was called to trial before the Honorable Perry M. Buckner, and a jury, on May 15, 2017. (R. p. 1). The jury returned a guilty verdict for murder against Appellant on May 17, 2017, and Judge Buckner sentenced Appellant to life imprisonment. (R. p. 521, 522). This appeal follows.

STANDARD OF REVIEW

"Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant." *State v. Garner*, 389 S.C. 61, 65, 697 S.E.2d 615, 617 (Ct. App. 2010). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law." *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). A trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Jeffcoat* 354, 279 S.C. 167, 303 S.E.2d 855 (1983). A trial court's rulings pursuant to a 403 balancing test are subject to an abuse of discretion standard and great deference is given to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate

court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing *United States v. Long*, 574 F.2d 761 (3d Cir.1978)). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances." *Hamilton,* at 593 (citing *United States v. Green*, 887 F.2d 25, 27 (1st Cir.1989)).

SUMMARY OF ARGUMENT

Appellant's conviction should be affirmed. Defense Counsel did not object to the introduction of the call log information contained in State's Exhibits 7 and 8. The objections raised by Defense Counsel addressed only the introduction of the text message and the sectional analysis testimony. Neither objection addressed the call log information, which merely listed the phone number in question and its corresponding outgoing and incoming calls and texts, the time and duration of those calls, whether the calls were forwarded, and the cellphone tower and sector that connected the communication. Appellant's claims under Issue 1, concerning cellphone tower testimony and the contents of State's Exhibits 7 & 8 are not preserved.

The text information introduced as State's Exhibit 9 was properly admitted by the trial court, as the timing and content of the message could be reasonably inferred as a confirmation that Appellant had carried out the hit against victim and desired to be paid. Such a communication constitutes an admission by party opponent, or at a minimum a statement against penal interest, as both were sustaining grounds set forth by the trial court for admission of the evidence. Finally, the text message fits precisely within the State's theory of the case, and by reasonable inference links the Appellant's communications to the crime committed. The trial

court was therefore correct in ruling that text message was admissible, and that its probative value was not substantially outweighed by the prejudice to Appellant.

The testimony of Michael Taylor was likewise properly admitted at trial. As discussed by the trial court, witnesses often change or elaborate upon their prior testimony, and such is not a basis for excluding the evidence from trial. Given that the Solicitor properly notified Defense Counsel immediately upon learning of the new testimony, that both parties had equal notice as to the change in testimony prior to the presentation of the testimony at trial, and that Defense Counsel was able to cross-examine and impeach the witness specifically on his failure to introduce his new testimony sooner, there was no error by the court, no prejudice against Appellant, and no basis to exclude Michael Taylor as a witness for the State.

STATEMENT OF FACTS

The Crime

On the night of November 12, 2014, the victim was murdered. The victim's body was found at the entrance of a dead end dirt road at 350 Knowles Island Road the next morning by Mr. Justin Kesselring. Mr. Kesselring called 911 to report the crime. (R. p. 28, lines 1-6; p. 35, line 19-23). The Knowles Island Road area is commonly referred to as the "Roseland" area. (R. p. 31).

Law enforcement arrived and found the deceased victim lying face down beside the passenger side of his vehicle, with the passenger door open. (R. p. 35-37). The autopsy report showed that the victim was shot five times, three of which struck the victim in the chest and abdomen area. (R. p. 451-453). Forensics concluded that the ammunition used to kill the victim were all .9 millimeter luger rounds, and that based on the casings recovered, appeared to have been fired from the same weapon. (R. p. 388, lines 11-21; p. 390, line 4-8). Forensics recovered

finger prints of both Appellant and witness Antoine Drake from the vehicle, and a DNA match for Appellant was recovered from cigarette butts in the victim's car ashtray. (R. p. 380, line 16 through p. 381, line 11).[1]

SLED Agent Richard Johnson headed up the investigation into victim's murder. (R. p. 223). The investigation led to the discovery that a "hit" had been placed on victim for snitching by a drug dealer named Trey Graves, and that multiple witnesses confirmed that Appellant was the individual who carried out the hit for the $15,000.00 reward. (R. p. 172-173; p. 324-329). The efforts of that investigation led to the following pertinent testimony and evidence presented at trial:

JUSTIN KESSELRING AND SHARDAJA SINGLETON

Witnesses Justin Kesselring and Shardaja Singleton, who both lived in close proximity to the murder scene, each testified that they heard multiple gunshots around 9:00pm or later on November 12, 2014. (R. p. 27, lines 6-18; p. 33, lines 3-16). However, no one witnessed the shooting occur. Ms. Shardaja Singleton also commented that she heard around six shots at that time, but did not hear any other gunshots that night. (R. p. 33, line 15-19).

ROBIN SIMMONS

Ms. Simmons testified that she knew the victim, as he was dating her sister, Angel Simmons. (R. p. 79). She recalled the events of November 12, 2014, as her family was holding a family gathering (hereinafter "wake") for her recently deceased grandmother. (R. p. 79, lines 24-25; p. 80, lines 1-7). This wake took place at a location referred to consistently as Simmons Hill, as all of the Simmons family lived there. (R. p. 79). At the wake, she saw both the victim and Appellant, and acknowledged that they were friends. (R. p. 80, lines 10-15; p. 84, lines 14-23).

[1] DNA analysis was not performed for Antoine Drake, as his alibi was corroborated by multiple witnesses. (R. p. 261-263).

She commented that she has known Appellant her entire life, as he is a family member, and that on November 12, 2014, she saw him in possession of a black pistol tucked into his military fatigue pants. (R. p. 80, line 16 through p. 81, line 19). Ms. Simmons was cross-examined on the fact that she did not originally mention the gun she saw that afternoon, when interviewed by police on November 17, 2014. (R. p. 85, line 10 through p. 87, line 19).

She testified that the victim and Appellant left together a couple of times during the day, but came back that evening. (R. p. 81, lines 20-24; p. 83, lines 24-25). When they returned that evening, Appellant had changed clothing and was wearing black jogging pants, a black t-shirt, black shoes, and a black hat. (R. p. 82 line 1 through p. 83, line 3). At approximately 8:00pm, she overheard Appellant ask the victim to take him to an area called Roseland to see a girl named Latanya (consistently referred to by witnesses as "Tutu", and so, hereinafter referred to as "Tutu") so that the victim could "make a play," which was explained to mean hustling or selling drugs. (R. p. 83, lines 4-25).

DAYTRON SIMMONS

Witness Daytron Simmons confirmed that he also witnessed the victim and Appellant leave together in victim's car that night, accompanied by no one else. (R. p. 113, lines 8-21). Daytron was questioned by the Solicitor as to his previous discussions with Agent Johnson, on March 24, 2014. However, Mr. Simmons claimed that, due to a head injury, he had no memory of the conversation occurring. He also denied having any recollection that he informed Agent Johnson that Appellant was waiting on Trey Graves to sign a contract for a hit to be put out on victim because he was snitching. (R. p. 114-116). However, he did remember that Appellant and victim left together from Simmons Hill on November 12th and agreed that Appellant and victim were friends. (R. p. 116, lines 10-12; p. 118, lines 1-6).

ANTOINE DRAKE

Antoine Drake (hereinafter "Drake") was familiar with both victim and Appellant. He testified to being friends with both victim and Appellant. (R. p. 122, lines 7-19; p. 122, line 22 through p. 123, line 7). However, Defense Counsel cross-examined Drake to show that he hates Appellant. (R. p. 168-169). Drake testified that he was with both victim and Appellant on the night of November 11, 2014, as they were on their way to Hardeeville to pick up some cocaine and marijuana. During this trip, while in the back seat of victim's car with Appellant, the boys got into a disagreement over gas money and he heard Appellant repeatedly say that he wanted to kill the victim. (R. p. 124, lines 2-9; p. 124, line 13 through p. 125, line 10).

On November 12, 2014, Drake testified that he was at the Simmons wake, and that he saw victim and Appellant at the wake together that day and evening. (R. p. 125-126). Drake testified that a man named A.J. Singleton tried to sell a black handgun to him at Simmons Hill, but that he ultimately turned it down. (R. p. 132, line 6 through 133, line 24). He commented that people commonly try to sell guns around Simmons Hill. (R. p. 132, 15-22). He also testified that he did some cocaine with the victim from the inside of victim's car door, but that Appellant came by at that time and told victim he had to go do something and needed to get some clothes. (R. p. 126, lines 9-13). Appellant stated that he wanted to go to his mother's house, at which point Drake asked if he could come along. (R. p. 126, lines 14-15). Appellant declined to let Drake come with him, claiming he had to go take care of some business, but would be right back with some coke and weed. (R. p. 126, lines 16-25). Drake testified that he did not own a car, but that he left the wake a while later when his cousin took him to the home of his girlfriend, Quan Chaneyfield's, which was about fifteen minutes away. (R. p. 127, lines 2-19). He testified that he stayed there until around midnight or 12:30, when his friends Javare Shuler and Brittany

Patterson came and picked him up. (R. p. 127, line 22 through p. 128, line 17). The three drove to a club called Pluto for a while and then back to Simmons Hill, to the home of Latran and Durrell. (R. p. 128, line 18 through 130, line 24). The testimony of Shaquandalynn "Quan" Chaneyfield, and Javare Shuler each corroborated Drake's testimony as to his whereabouts and actions on the night of November 12, 2014; this testimony also included the admission of a text message to Javare requesting they come get him. (R. p. 176-187). Both of these witnesses provided statements to investigator Richard Johnson which were equivalent to their testimony at trial. (R. p. 176, line 15 through p. 177, line 22; p. 185-187). Drake testified that victim's fiancé, Angel Simmons, woke him up the next morning and informed him that victim had been killed. (R. p. 131). Drake was already incarcerated by the time of trial, but Drake's testified that despite his outstanding warrant for arrest, he agreed to meet with Agent Johnson in a remote location to discuss victim's murder and what information he had about the crime. (R. p. 134, line 3 through p. 135, line 14). He stated that he desired to meet in a remote location because he did not want to be seen talking to police. (R. p. 135, lines 6-9).

On cross examination, Drake admitted that he was a scam artist and that he had a deceitful past, to both law enforcement and other citizens. (R. p. 137-138). He also admitted that he was not employed, and in large part relied on conning people for his income. (R. p. 143-144). On cross examination, Drake confirmed that he said Trey Graves put out a hit on victim (R. p. 139, lines 5-10). He also confirmed that he ran into Trey Graves at Club Pluto a week after the victim was killed, and tried to take credit for the victim's murder so that he could collect the bounty. (R. p. 139, line 5 through p. 249, line 12). Drake explained that he did so in order to see what really happened, and to see if it was true that Appellant had killed the victim. (R. p. 141, line 14-23).

On cross-examination, defense counsel attempted to contradict that Drake and the victim were friends by referencing a dispute over their girls that involved a knife; Drake denied the use of a knife and said it was merely a verbally dispute. (R. p. 157-159). Drake was successfully cross-examined as to his alleged friendship with Appellant via the use of prior recordings given to police which indicate that he did not like Appellant, wanted him gone, and would kill him if he could. (R. p. 167-169). On redirect, Drake confirms that he approached Trey Graves to try and take credit for the victim's murder, and receive the $15,000 bounty, but Graves turns him down and says "Hopkins told me he did it alone." (R. p. 172, lines 7 through p. 173, line 13).

LATANYA ("TUTU") SINGLETON

Tutu lived at 474 Knowles Island Rd, near the crime scene, and testified that she came out to the murder scene on the morning of November 13, 2014. (R. p. 189-190). She spoke briefly with SLED Agent Shaun Harley at the scene, but did not speak with him in depth, and did not want to speak with him that day. (R. p. 190, line 24 through p. 191, line 9). She testified that on February 1st, 2015, Agent Harley demanded to speak with her again under threat of escort by U.S. Marshalls, so she drove to meet him in Walterboro. (R. p. 192, lines 1-12). She testified that she was high at the time and could not remember much of what she told them, or whether she informed them that Appellant came to her home around 8:20 on November 12th. (R. p. 192, line 20 through p. 194, line 9). She did comment that Appellant and victim were common visitors at her home.

During her testimony she denied the contents of her report provided to police, which included Appellant asking her for bleach on the night of the murder, telling agents that Appellant grabbed a soda while the victim tried to sell her marijuana, and that "about 20 minutes later, Hopkins walked back to your house, but Johnson was not with him." (R. p. 194, line 13 through

195, line 3; p. 195-196; p. 197, lines 10-19). Tutu confirmed that she went to Philadelphia in November, denied that Drake went with her, and testified that she did not purchase her .9 millimeter Hi-Point pistol until approximately March of 2015. (R. p. 199-200).

AGENT SHAUN HARLEY

Agent Harley testified that as SLED Lowcountry Region Supervisor, he assisted Agent Johnson in the victim's murder investigation. In doing so he spoke briefly with Tutu on November 13th, but noted that she acted like she did not want to talk with so many people in the parking lot around her. (R. p. 203). He also noticed that she was repeatedly looking at Appellant's mother, who also lived in the same area as the murder scene, and is also the home of Appellant. (R. p. 203; p. 227, lines 4-7). Agent Harley testified that Tutu specifically did not want to be interviewed in Jasper County because she was afraid, and agreed to drive to Walterboro to meet them at the SLED Lowcountry office. (R. 204, lines 13-24). Agent Harley testified that Tutu provided a statement to them on February 1, 2015, and testified that she informed him of the following:

> Between 8:20 and 8:30 the Defendant, Mr. Hopkins, had called her, stated that he was going to come over to her house, I guess to sell her some marijuana or say he had marijuana. He then showed up. The victim, Terrance Johnson, was also with him, the Defendant, Mr. Hopkins. The Defendant came in – from what she said, the Defendant came into her house, got a soda. She didn't know the victim, Terrance Johnson, was outside, so she went outside and talked to him for a minute, and bought some marijuana. Mr. Hopkins then left her house and they drove off together. Her, him, and the victim, Terrence Johnson.
>
> . . .
>
> I believe it was the victim's vehicle, Terrence Johnson.
>
> . . .
>
> After 20 minutes later, the Defendant, Hopkins, came back to her – walked back to her house. And she opened the door, she looked out, but she did not see the victim, Terrence Johnson, with him. So he stayed there approximately about five minutes and somebody came to pick her up – pick him up, I'm sorry.

(R. p. 205, line 3 through p. 206, line 2). Agent Harley also confirmed that Tutu informed him that when Appellant arrived alone the second time, he asked for bleach. (R. p. 206, lines 13-15).

ANGEL SIMMONS

Angel Simmons testified that she was the fiancé of victim and that her grandmother had passed away, so they were at Simmons Hill together on November 12, 2014. (R. pp. 211-213). Angel testified that she called the victim several times that night around 9:00pm, close to 10:00pm, and that he answered twice. (R. p. 215, lines 18-22). However, on her third call at close to 10:00pm, the phone picked up, she heard a scuffle and the phone hung up. She kept calling all through the night, but her calls were all going to voicemail. (R. p. 216, line 6 through p. 217, line 14). Angel confirmed that her phone number was xxx-xxx-5976, and that victim's number was xxx-xxx-3979. (R. p. 215, line 25; p. 216, line 3).

SLED AGENT RICHARD JOHNSON

SLED agent Richard Johnson was lead investigator in victim's murder. (R. p. 223, lines 14-15). During his testimony, Agent Johnson first discussed his unsigned memorandum interview with Daytron Simmons. (R. p. 228, line 18 through p. 229, line 13). Approximately two weeks prior to victim's murder, Daytron Simmons informed Agent Johnson as to a gathering of he, Drake, Appellant, and victim, at a home belonging to Michael Taylor (also referred to as Mike-Mike). (R. p. 229, lines 16-21). There, he heard Appellant state that he was waiting on "them boys," which was a reference to Trey Graves, to sign the contract, was looking at victim while saying this, and confirmed that Trey Graves had a hit out on victim for snitching. (R. p. 229, line 22 through p. 230, line 3).[2] Daytron was also at the November 12th wake and witnessed

[2] Agent Johnson testified that Trey Graves was a significant drug dealer in the Jasper County area, but is now serving a twenty year sentence in federal prison. (R. p. 230, lines 19-21).

Appellant ask the victim to drive him to the Roseland area. Daytron noted that victim did not want to drive him, but ultimately agreed to do so. (R. p. 230, lines 4-15).

Agent Johnson also had an opportunity to speak with Appellant prior to his indictment in the case at hand. On December 8th, 2014, Agent Johnson spoke with Appellant at the Chatham County Detention Center in Savanah, Georgia.[3] Following this discussion, Appellant provided a voluntary hand written statement to Agent Johnson, who read the statement into the record:

> Around 4:00pm on the day of Ms. Simmons' death, we were located in the yard with family members. T.J. arrived. We talked in the yard. T.J. is Terrance Johnson. He took me to get some clothes and took me back to Janeika DuPont house and dropped me off. I did not talk back with him or seen him anymore that night. T.J. took me to get clothes from Roseland around 6:00pm, and that took about 20 minutes. Then he dropped me off at Janeika DuPont's house when we was finished, which was around 6:30 to 7:00pm, and Janeika dropped me off around 11:30 to 11:45 in Baytree apartments. I did not go back to Simmons Hill anymore that day.

(R. p. 237, lines 10-21; State's Exhibit 13). Agent Johnson also testified that he brought up the 470 cell phone number that was provided to him through Angel Simmons, that she said belonged to Appellant. (R. p. 238, lines 1-3). Appellant confirmed that was an old number of his, but that he no longer used that number. (R. p 238, lines 1-21). Agent Johnson confirmed that this number was xxx-xxx-9329. (R. p. 238, lines 4-18).

Agent Johnson confirmed some of the other matters already addressed by certain witnesses at trial. He confirmed that Tutu asked whether finger prints could be lifted off of a soda bottle, and that she seemed to know more than someone could who was not at the scene of the crime. (R. p. 245, lines 13-18; p. 247, lines 12-22). Johnson also revealed that Tutu's phone

[3] A *Jackson v. Denno* hearing was conducted to determine the admissibility of statements given by Appellant to Richard Johnson. The trial court deemed the statements admissible, and Appellant has not raised any issues concerning this ruling. (R. p. 93-109).

records revealed that she and Appellant communicated all night on November 12, 2014. (R. p. 272, lines 17-25). He confirmed the meeting with Antoine Drake on Driggers Road, and commented that due to the corroboration of Drake's whereabouts and story, he was not pursued as suspect. (R. p. 249; p. 262 line 21 through p. 263, line 3; pp. 275-276). He also addressed the alleged dispute between Drake and victim, and noted that his understanding was that there was no physical confrontation between the two, and that the knife involved was never wielded in a violent manner. (R. p. 268, line 22 through p. 269, line 18).

MICHAEL TAYLOR

Michael Taylor testified that he recalls the events of November 12, 2014. He got off work at about 9:00pm and came home, but only his son and daughter in law were home so he went next door to his wife's family's home. (R. pp. 284-285). He returned home around 10:15 or 10:30 and found Appellant in his home. (R. p. 285, line 7-18). Mr. Taylor commented that it was strange to find Appellant at his home and was not happy about it, given that Appellant did not have a key, that he was not home to allow Appellant in, and that they were not friends. (R. p. 285, line 17 through p. 287, line 1). The victim and Mr. Taylor were very close friends, but he only knew Appellant through his friendship with victim. (R. p. 299, lines 12-15; p. 291, lines 1-2).

Mr. Taylor needed to pick up his step-son and, at Appellant's request, agreed to give him a ride. (R. p. 288, lines 17-22). According to Mr. Taylor, Appellant was wearing all black clothing and asked Mr. Taylor if he could change clothing before leaving. (R. p. 286, lines 13-14; p. 289, lines 2-11). Mr. Taylor did not think much of the request, and then witnessed

Appellant burning his clothes in his outside burn barrel. (R. p. 289, lines 8-17).[4] Mr. Taylor moved to Florida shortly after victim's death and acknowledged that he had never mentioned this detail to police in his prior testimony, and testified that at the time "it never really crossed my mind that it was him" and that he did not really think Appellant could have killed his own friend. (R. p. 290, lines 14-19; p. 296, p. 299). However, he had been contemplating things since receiving his subpoena, realized the importance of that detail, and made it known to Solicitor on the day of his testimony. (R. p. 299, line 18 through p. 300, line 7). Mr. Taylor was also questioned regarding the altercation between Drake and victim, and was adamant that it was not a violent altercation, and that both individuals shook hands and were fine soon after. (R. p. 291).

JANEIKA DUPONT

Ms. DuPont is the former wife of Michael Taylor. (R. p. 302). She corroborated the testimony of her husband coming home and then going over to her family's house next door. (R. pp. 302-312). She has known Appellant for a long time, from school and family. (R. p. 303). In direct contradiction to Appellant's voluntary statement, she testified that there was no one home when she arrived home after 9:00pm and that Appellant did not arrive at their home until after 10:30. (R. p. 311, lines 6-18). She did take Appellant to the Baytree apartment complex when she went to pick up her son from work at about 11:30pm.[5] (R. pp. 311-312).

BYRON SINGLETON

Byron Singleton was an inmate charged with murder. He confirmed that he had not been promised anything by law enforcement or the Solicitor, but was hoping for leniency in return for his cooperation. Singleton was housed with Appellant in Charleston County and they developed

[4] This testimony was objected to by Defense counsel, a bench conference was held off the record and the Court noted he would put his ruling on the record at a later time. (R. pp. 289-290).

[5] Given their respective testimonies, Ms. DuPont and Mr. Taylor seem to have gone together to pick up their son. The issue was not delved into further by either party.

a friendship of sorts as both individuals were from Jasper County. (R. pp. 322-323). He testified that while incarcerated together, they were almost like roommates. (R. p. 338).

Singleton testified that Appellant somehow already knew about his criminal charges and began talking to Singleton about his charges. (R. 232). Appellant then began to talk about his own charges, and originally said he was in jail for federal gun charges. (R. p. 324). However, he later tells Singleton about his murder of victim. (R. p. 324). Singleton testified that Appellant informed him about Agent Johnson's repeated efforts to talk to him; at the time Singleton had never heard of Agent Richard Johnson. (R. p. 324). Appellant then tells Singleton that he and victim were riding around together selling marijuana, and that he tried to kill him before November 12, but Angel called the victim and placed Appellant at the scene, so he had to wait for another time. (R. p. 325).

Singleton then testified: "He said they was ride – said they was riding together in the car and he had the gun right here and he said he saw him with the gun. He said he shot him two times. He said, 'no, man, we are cool. I [F] with you. I [F] with you' and he shot him two times." (R. p. 326, lines 18-22). He then testified that after the first two shots the victim fought to get the weapon and Appellant then shot him again. (R. p. 327 line 18 through p. 328, line 3).

After the shooting, Singleton testified that Appellant told him he went to his mother's house. Singleton was permitted to demonstrate how he was told the murder was carried out, and noted that the victim was driving while Appellant was in the passenger seat. (R. p. 326; p. 327, lines 8-11). He testified that Appellant told him that it was a murder for hire that came from "somebody named Trey", and that Appellant received $15,000 for the murder. (R. p. 328, lines 9-21). He also recalled Appellant informing him that someone at the scene asked about fingerprints off a bottle. (R. p. 329, lines 1-6). Lastly, Singleton testified that while Appellant did

not tell him precisely where the murder occurred, he was able to testify that it occurred at a stop sign close to his mom's house. (R. p. 329, line 23 through p. 330, line 2).

KAREN MILBRODT

Ms. Milbrodt was a senior analyst in executive relations, including responsibilities as a records custodian for Verizon Wireless. (R. p. 398). She was not qualified as an expert witness to offer opinion testimony as to the how cell phone towers work. (R. p. 429). She did however provide and describe Verizon Wireless records pursuant to the State's subpoena, which included cell phone log data for cell phone number xxx-xxx-3979,[6] (State's Exhibit 7), cell phone log data for cell phone number xxx-xxx-9329,[7] (State's Exhibit 8), and a text message sent from xxx-xxx-9329. (State's Exhibit 9). (R. p. 400; p. 436, lines 7-15; R. p. 439, line 17 through p. 440, line 7; p. 441, line 21 through p. 442, line 24).

Consistent with the testimony of Angel Simmons, the call logs from victim's phone showed that that there were two answered phone calls at 9:33 and 9:34pm, on November 12th, then a third call from xxx-xxx-5967[8] which lasted only twenty seconds. (R. p. 437, line 9 through p. 438, line 3). Ms. Milbrodt noted that from the information in Exhibit 7, these calls utilized cell tower number 216, and were from sector (clarified to mean "antenna") one alpha. (R. p. 438, lines 4-12). Ms. Milbrodt then confirmed that there were multiple additional calls to that cell phone after 9:37, but all appeared to be forwarded to voicemail. (R. p. 438, line 13 through p. 439, line 16; pp. 443-445). The same November 12th information was recited from State's Exhibit 8, confirmed to be an old cell phone number of Appellant. *That call log demonstrated a*

[6] Previous testimony showed this to be the cell phone of victim. (R. p. 266).
[7] Previous testimony, including confirmation from Appellant, established this number to be an old telephone number of Appellant. (R. p. 238).
[8] Previous testimony demonstrated that this was the telephone number of Angel Simmons. (R. p. 215). However, it appears that the Solicitor may have misspoken when confirming Ms. Simmons phone number, as the last two numbers are reversed. (R. p. 215; pp. 437-438).

call at 9:37pm to Tutu's old number, xxx-xxx-9189, which also utilized cell tower 216, sector one alpha. (R. p. 441, lines 3-11; p. 191, lines 15-19; p. 204, lines 5-12).

Lastly, Ms. Milbrodt testified as to State's Exhibit 9, which was a November 12th text message sent at 9:56pm from Appellant's old cell phone number to an unknown recipient. (R. p. 441-442; p. 445, line 10 through p. 446, line 12). The content of the text message stated: "Dats done, need to Holla at u". (R. p. 443, lines 2-11).

ARGUMENT

IV. Appellant's failure to object to the introduction of information from State's Exhibits 7 and 8 renders the issue unpreserved for appellate review, and is otherwise meritless, or at most constitutes harmless error.

In Issue 1, Appellant raised a broad claim concerning the improper introduction of evidence through States Exhibits 7-9, part of which argued that the cell phone tower evidence was improper for lack of necessary expertise of the witness. The cell phone tower evidence complained of was not properly objected to by Defense Counsel, and was contributively elicited by Defense Counsel, such that the issue has not been preserved for appellate review. Moreover, the limited testimony introduced by the State concerning cells phones towers was within the scope of the record custodian's responsibilities, and therefore properly admitted. Appellant's conviction should be affirmed as to the introduction of cell phone tower testimony.

This issue originates from objections raised by Defense Counsel concerning the State's intended introduction of Exhibits 7, 8, and 9, as well as testimony and visual aids concerning "sectional analysis" via witness Dylan Hightower. However, the purposes of those objections by Defense counsel do not coincide with the cell phone tower testimony introduced at trial. Defense counsel's objections to the introduction of State's Exhibits 7-9 *concerned only the admissibility*

of text message data from Appellant's old cell phone. (R. p. 404-413).[9] The matter was initially discussed by the parties in chambers, and Judge Buckner put the matter on the record and recited that the Defense Counsel's objection argued that admission of the text constituted inadmissible hearsay, would violate the Confrontation Clause, and was otherwise not relevant under a Rule 403 analysis. The Court ultimately held that the text message evidence was admissible.[10] (R. p. 404-412). The trial court learned the following day that there were three separately numbered Exhibits, States Exhibits 7, 8, and 9, which were presented for the purposes of determining admissibility. (R. p. 416, line 20 through p. 417, line 17). The trial court's ruling as to the admissibility of the Exhibits 7-9 was not altered, no further objections to these documents were raised, and the trial court collectively entered them into evidence over objection based on his ruling from previous evening. (R. p. 417, line 13-17). [11]

---

[9] The text message evidence was only present in State's Exhibit 9.

[10] The merits of the Court's admission of this evidence argument is also part of Appellant's Issue 1, but is addressed separately in Section II of this Brief.

[11] The trial court's discussion as to admissibility of State's Exhibits 7-9 was limited strictly to the text message information contained in State's Exhibit 9. (R. p. 401; p. 404-413). It is unclear from the trial proceedings, or from Appellant's Brief, what objections were raised as to the admission of the *call log information*, set forth in State's Exhibits 7 and 8. Appellant argued generally in his brief that information in Exhibits 7 and 8 would be confusing to the jury, but then ultimately narrowed his discussion to specifically address text message in State's Exhibit 9. He then concludes that Exhibits 7 and 8 are "almost incomprehensible", and invite speculation without the requisite expert witness analysis, which would again seem to only correlate to the tower and sector information.

The cell tower information has been specifically addressed in Respondent's Issue I, the remaining information in Exhibits 7 and 8 is strictly incoming and outgoing phone call data from select phone numbers at the time of the murder was argued to occur. The trial court confirmed that Ms. Milbrodt could serve as record custodian, and she recited that information from the call log exhibits, and explained that duplicate call entries indicated that the call was forwarded to voicemail. This was well within her province as records custodian and was absolutely relevant, as Exhibit 7 corroborated the timing of Angel Simmons last communications with victim and Exhibit 8 confirmed that Appellant's phone number was active following the time of the murder, that that phone call log indicated that Appellant called Tutu after victim's death. Respondent can find no objection or argument for the exclusion of call log data, which would be necessary for

Following his ruling as to the introduction of the text message, the Court next addressed Defense Counsel's objection concerning the introduction of testimony and visual aids from witness Dylan Hightower. (R. p. 413, lines 9-19). In addressing this matter of law the trial court discussed the introduction of testimony referred to at trial as "sectional analysis". (R. p. 418, lines 4-12). Sectional analysis, which appears be an equivalent term to refer to "historical cell-site analysis," refers to the use of cell phone tower usage to triangulate the location of a certain cell phone at a certain time.

In the trial stage of *U.S. v. Natal*, the records custodian, *in addition to giving a recitation of the call log information admitted at trial*, was permitted to offer lay opinion testimony as to the manner in which cell phone towers work, and specifically analyzed the facts presented in the case to say whether or not there was possible movement by an alleged suspect to the crime. *United States v. Natal,* 849 F.3d 530, 535 (2d Cir.), cert. denied, 138 S. Ct. 276, 199 L. Ed. 2d 177 (2017). He also offered an opinion as to other factors that could dictate which tower is used by a given cell phone. *Id.* at 535. The State in turn used this testimony at closing to conclude that the alleged suspect was not anywhere near the crime, thereby leaving the defendant as the only possible culprit. The decision reached by the Second Circuit ultimately reversed the conviction, as it was concluded that the testimony offered by the records custodian could only be properly offered by an expert in cell phone tower operations. *Id.* at 537.

As a predicate matter, Judge Buckner, citing *U.S. v. Natal*, ruled that the sectional analysis information intended to be offered by the State required an expert in cell phone tower operation. In response, the State attempted to qualify the record custodian, Karen Milbrodt, as an expert in "the use of cell phone towers". (R. p. 429, lines 20-22). After proffering testimony as to

---

preservation of the issue for appeal. Nevertheless, Respondent has responded to and disproven the merits of such an argument, if such an argument was intended by Appellant.

Ms. Milbrodt's qualifications, education, and experience in the field, Judge Buckner ruled that she was not qualified to serve as an expert for purposes of sectional analysis, and sustained Defense Counsel's objection. The trial court's specific ruling stated: "The issue before me is whether or not this witness in a proffer is qualified in the use of cell phone towers. And while I certainly find that she's qualified as a records custodian, I sustain the objection that she is not qualified in giving opinion testimony on the use of cell phone towers." (R. p. 429, line 20 through p. 430, line 1).

Following this ruling, the Solicitor endeavored to make clarifications as to what could and could not be addressed at trial, and the Solicitor specifically noted to the court that the admitted call log exhibits (States Exhibits 7 and 8) reference the tower and sector numbers that each cell phone used to connect each listed call. The Solicitor asked the court if Ms. Milbrodt could recite that information from the records, and the court acknowledged the issue and instructed the Solicitor to discuss the issue with Defense Counsel. (R. p. 4320, lines 1-9). The Solicitor presumably did so, as further off the record discussions were held, and further questioning of the witness was permitted. At the conclusion of these efforts the Solicitor proactively informed the trial court that given the ruling, *she would not introduce any visual aids and would not be calling Dylan Hightower to testify.* (R. p. 432, line 10 through p. 433, line 21). Defense Counsel did not put any discussion on the record regarding the cell phone tower data in Exhibits 7 and 8.

Following the ruling of these legal matters, Ms. Karen Milbrodt testified. As part of her testimony concerning State's Exhibits 7 and 8, she recited from the documents the tower and sector number that certain communications utilized. (R. p. 438; p. 441). However, at no time did Defense Counsel raise an objection to this testimony or the exhibits being in conflict with the

sustained objection reached by the trial court concerning sectional analysis. Furthermore, no new objections were raised to any portion of State's Exhibits 7-9, and the prior objections cited by the court in admitting the evidence concerned only the text message data. In the record, there is absolutely no objection to Ms. Milbrodt's testimony wherein she recited the tower and sector numbers listed in the records for which she served as custodian.

The law in South Carolina concerning issue preservation is well settled. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." *Id.* (citing *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001)). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Id.* at 59 (citing *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996)).

There is no objection within the record to address any testimony offered by Ms. Milbrodt concerning State's Exhibit's 7 and 8. Respondent argues that in order to preserve the issue for appeal, Defense Counsel was required to object specifically to Ms. Milbrodt's testimony, as it was distinguishable from "sectional analysis" testimony. Nevertheless, for purposes of preservation, Defense Counsel should have *at least* objected to this testimony on the grounds that her testimony was within the confines of the previously sustained objection. This is especially so, given that this specific issue was discussed before it was presented to the jury. (R. p. 432, line 1 through p. 433, line 21). It is clear from the record that Defense Counsel did not find Ms. Milbrodt's testimony objectionable, as he made efforts during cross examination to elicit additional information from Ms. Milbrodt regarding the effect of a malfunctioning or overloaded

cell phone tower which drew a sustained objection from the Solicitor. (R. p. 446, lines 13-25). Defense Counsel then abruptly ended his cross examination.

Defense Counsel had notice of the complained of issue beforehand, and while outside the presence of the jury. However, Defense Counsel did not raise an objection to the introduction of the call log data, or the tower and sector numbers. As this information constitutes the entire content of State's Exhibits 7 and 8, there is nothing within the record to argue that their admission at trial was an issue preserved for appeal.

a. The recitation of cell phone tower data by Ms. Milbrodt was properly admitted.

In the alternative to Respondent's preservation argument, Appellant's argument simply lacks merit. The trial court's admission of the cell phone tower data was proper.

The crux of the *U.S. v. Natal* decision is that a qualified expert is needed *to provide opinion testimony* regarding the operation of cell phone towers in order for a party to discuss sectional analysis. *Id.* at 537. Ms. Milbrodt provided absolutely no opinion testimony as to how these cell phone towers work, or what relationship those listed towers would have concerning the ability to pinpoint the location of a connected cell phone. Her testimony was limited to a recitation of the tower and sector identification numbers listed in the exhibits. The Solicitor likewise did not misrepresent the testimony of Ms. Milbrodt by arguing that the identical cell phone tower and sector data for victim and Appellant's cell phone records definitively placed Appellant at the scene of the crime. (R. p. 475; p. 476, lines 4-12). Ms. Milbrodt's testimony did not rise to a level that would necessitate the use of an expert witness as discussed by the Judge Buckner, in reliance upon *U.S. v. Natal*. Moreover, Appellant should be barred from raising an unpreserved issue of appeal on the basis of Ms. Milbrodt's testimony, given that Defense Counsel's own cross examination of Ms. Milbrodt drew closer to the inadmissible area of

opinion testimony than any testimony elicited by the Solicitor. (R. p. 446, lines 13-24); See *State v. Goodwin*, 250 S.C. 403, 406, 158 S.E.2d 195, 197 (1967) (holding that the admission of an oral confession was proper when the witness's testimony was responsive to the question asked by counsel who later sought to contest its admission on appeal. Such response should have been expected by experienced counsel and defendant is in no position to complain now of the admission of testimony he elicited).

As Ms. Milbrodt was confirmed as the records custodian for Verizon Wireless, the court did not err in permitting Ms. Milbrodt to recite the various call log data set forth in State's Exhibits 7 and 8. Appellant's claim lacks merit and his conviction should be affirmed.

b. If error can be found in admitting Ms. Milbrodt's recitation of cell phone tower data, such would merely constitute harmless error.

In the alternative to the Respondent's previous arguments, if the admission of the tower and sector numbers is found to be in error, the admission would constitute harmless error. In light of the remaining evidence presented, there is substantial evidence of guilt admitted against Appellant in this matter, and the circumstances of the case in particular minimize the importance of the tower and sector data admitted.

The trial record provided considerable evidence of guilt against Appellant, including but not limited to testimony that he was last seen leaving the company of the victim less than two hours before the murder, was seen in possession of a black pistol just hours before the murder occurred, confessed to the crime to his cellmate, and burned his clothes on the night of the murder. Reference to tower and sector similarities was harmless in light of the other evidence of guilt. Moreover, tower and sector information is of minimal influence for the jury given that Appellant, his mother, and Tutu all lived near the scene of the crime, and that Simmons Hill was only a few minutes' drive apart. (R. p. 131, lines 11-16); *State v. Pagan*, 369 S.C. 201, 212, 631

S.E.2d 262, 267 (2006) (noting that when "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," a minor error that does not influence the result of the trial is considered harmless).[12]

The admission of the cell tower data is of little importance given the remaining evidence. It is, at a minimum, harmless error by the court and Appellant's conviction should be affirmed.

V. The trial court acted within its discretion when he admitted the text message evidence contained in State's Exhibit 9.

Appellant's Issue 1 also asserts that the trial court erred by admitting the text message evidence contained in State's Exhibit 9, as such evidence was inadmissible hearsay and substantially more prejudicial that probative under Rule 403.[13] The trial court ruled specifically on this matter and correctly found that the evidence was not hearsay, but instead constituted an admission by party opponent. The trial court was likewise within its discretion in finding that the probative value of the text message was not substantially outweighed by its prejudice to Appellant under a Rule 403 analysis.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, and the trial judge's ruling will not be reversed on appeal absent an abuse of discretion or the commission of prejudicial legal error. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002); *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct.App.2001). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to

---

[12] By Appellant's own statements to law enforcement (State's Exhibit 13), he was in the general area on the night of the murder. As the evidence does not distinguish precise location, it ultimately cannot be viewed as proof that Appellant was at the scene of the crime committing the murder. It does however provide to the jury an additional piece to the puzzle, however small, that is consistent with and bolstering to the evidence already presented.

[13] At trial, Defense counsel also argued that the evidence was in violation of the confrontation clause. However, this argument was not raised or addressed in any way by Appellant.

error of law." *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). In the given case, Judge Buckner was within his discretion and committed no error of law when he admitted the text message evidence from Appellant's phone.

a. Text message evidence constituted an admission of a party opponent.

The trial court did not err in admitting the text message evidence introduced through Verizon Wireless records in State's Exhibits 9. Appellant's text message was sent from Appellant's phone, was sent mere minutes after the murder was argued to have occurred, and the content of the text could reasonably be interpreted to mean that the hit against the victim had been carried out. The text message could be reasonably inferred as an admission by party opponent and was therefore not inadmissible hearsay evidence.

The trial court denied Defense counsel's objection to exclude the text message "Dats done, need to Holla at u" as inadmissible hearsay, and found that it was an admission by party opponent under Rule 801. South Carolina Rule of Evidence 801(d)(2) dictates that an admission by party-opponent does not constitute hearsay. Specifically, Rule 801(d)(2) states in pertinent part that an admission of a party opponent occurs if "the statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity. . ." Rule 801(d)(2), SCRE. It does not articulate that such a statement by the party opponent be so clear and specific as to not require any degree of inference by the jury to be considered an admission. Such is the distinction between circumstantial evidence and direct evidence, *but both forms of evidence are admissible.*

This issue is most closely addressed by the South Carolina Court of Appeals analysis in *State v. Rogers*. Therein, and notwithstanding the using of "slang" terminology, the Court addressed a practically identical statement to the one at issue in this case. The Court addressed

the statement, "It's done," made by the defendant during a phone call to a witness and co-conspirator named Sherry. *State v. Rogers*, 405 S.C. 554, 564, 748 S.E.2d 265, 270 (Ct. App. 2013). The Court of Appeals scrutinized the issue of guilt based entirely on circumstantial evidence in relation to the trial court's denial of directed verdict. In consideration of Sherry's testimony, the appellate court had to determine whether a jury could properly convict the defendant based solely on whether they believed Sherry's testimony, as opposed to the need for the jury to make an additional inference from the evidence. *Id.* The court ruled that the testimony was circumstantial evidence, which with an additional inference, certainly tended to prove guilt, but could not be independently relied upon to prove murder. *Id.* Therefore the "substantial circumstantial evidence" standard applied. *Id.*

Moreover, the Court of Appeals' continued discussion showed that it found the statement "It's done." to be a strong inculpatory statement, as it "did not merely reveal Engels' death, but tied itself to Roger's elaborate scheme of murder because it informed his co-conspirator that he had executed their plan to kill Engel." *Id.* at 571. The Court of Appeals also noted that the statement was corroborated by other details of that conversation, particularly Rogers being out of breath and in the woods, and was consistent with the State's theory that Rogers killed Engel and then dragged his body into the woods." *Id.*

Admittedly, the Court of Appeals in *Rogers* did not directly address the admissibility of the admission, but it did explicitly acknowledge the inculpatory nature of the statement. *Id.* Its analysis and ruling are tantamount to a confirmation that such a statement is admissible as circumstantial evidence of an admission by party opponent. The fact that an additional inference is needed from the jury did not render the evidence inadmissible, it merely influences the potential weight that the jury might attribute to that evidence given that it was not direct proof of

murder. See *Id.* at 564.

The trial court came to the same conclusion when ruling on Defense counsel's objection that the text message constituted hearsay. In response to follow up arguments of Defense Counsel, the court found that the use of "Dat's done" as an indication by Appellant that he had completed the murder for hire was an "inference argument from the evidence" that would be up to the jury to determine. (R. p. 410, lines 17-21). The court concluded that such an argument goes to the weight of the evidence, not its admissibility.[14] (R. p. 410, lines 20-21).

Given the analysis set forth in *State v. Rogers*, the Solicitor was entitled to present that text message evidence to the jury, and if convincing, argue to the jury that it is reasonable to infer that this text represents Appellant's effort to inform Trey Graves that the murder for hire had been completed. The reasonableness of that inference is bolstered by the fact that Appellant confirmed that the number from which this text originated was his old cell phone number, and that the text was sent at 9:56pm; the time of this text was a mere nineteen minutes after victim's last phone call with his fiancé was cut short, and is consistent with the time frame that witnesses heard gunshots coming from the vicinity of the crime scene. The remaining portion of the text stating, "need to Holla at u" is also bolstering, as it fits into the State's theory of the case that Appellant wanted to be paid for completing the hit.

The trial court did not err in admitting the test message evidence contained in State's Exhibit 9. South Carolina law supports the trial court's conclusion that this text message could be inferred as an admission by Appellant that he had completed the murder for hire, and the surrounding circumstances bolster the reasonableness of that inference. Appellant's conviction

[14] The same analysis is equally applicable to the trial court's alternative sustaining ground under 804(b)(3), that the text message, if deemed hearsay, would constitute a statement against penal interest. (R. pp. 407-408).

should be affirmed.

b. The court properly conducted a 403 balancing test and was within his discretion to admit the text message evidence.

In addition to defense counsel's argument that the text message evidence was inadmissible hearsay, Defense counsel also argued that it was not relevant under SCRE 403, and that the prejudice to defendant would substantially outweigh the probative value for the State. The trial court disagreed and admitted the text message evidence. Appellant argues that the trial court erred in finding the text message relevant and admissible under Rule 403.

"Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the opposing party. *Id.*; Rule 403, SCRE. The trial court's judgment in performing a Rule 403 balancing test must be given great deference and should only be reversed in exceptional circumstances. *Id.* "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing *United States v. Long*, 574 F.2d 761 (3d Cir.1978)). In light of this deferential standard, and in consideration of the evidence in question, the trial court properly concluded under Rule 403 that the text message evidence was relevant and not substantially outweighed by unfair prejudice to Appellant.

State v. Rogers demonstrates that under the right circumstances, statements nearly identical to "Dats done," even when additional inference is needed, can constitute inculpatory

statements tending to show that the speaker has committed a murder. *Id.* That is precisely the purpose for which the State sought to introduce the text message evidence, and the State likewise provided supporting circumstances to link the text message to the crime charged. The State confirmed that the number from which the text originated was Appellant's old number, and the timing of the text would place the communication occurring just minutes after the murder. The State also presented argument that the text message fits within the *res gestae* of its case. The Solicitor argued that State's theory of the case is that Appellant killed the victim in an effort to satisfy a murder for hire worth $15,000. The Solicitor commented that the text message tells the whole complete story because it is a reference to the completion of the murder and Appellant's effort to be paid for killing the victim. All of which is supported by the testimony of other witnesses at trial.

Unlike common circumstances where the disputed Rule 403 evidence is a separate prior bad act, the text message in question directly relates to the crime for which Appellant is charged. Rule 403 balancing is a protection against *unfair prejudice*, not inherent prejudice that simply damages the strength of a defendant's case. *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014). The trial court acknowledged that the recipient of the text could not be identified, and that the text is not so explicit as to clearly reference victim's murder. However, he noted that inference and argument from admitted evidence is permitted, and while that may dictate the weight of the evidence given by the jury, it does not address its admissibility. (R. p. 410). After hearing the arguments of Defense Counsel and the Solicitor, the trial court specifically ruled that he found the evidence relevant, and that its prejudice did not substantially outweigh the probative value. (R. p. 412, lines 18-21).

There is nothing within the record which demonstrates that the trial court abused its discretion or committed legal error in finding the text message relevant and admissible after performing a Rule 403 balancing test. The State's argument that the evidence fit precisely within its theory of the case was compelling, and the evidence itself is directly related to the charges against Appellant. Given the deference granted to a trial court's Rule 403 analysis, and the exceptional circumstances needed to reverse the decision of the trial court, there is no merit to Appellant's claim. The ruling of the trial court was proper and the Appellant's conviction should be affirmed.

VI. The trial court acted within its discretion when it permitted Michael Taylor to testify, regardless of the witness's change in his testimony not made known to the parties until the day of trial.

Appellant argues that the trial court erred in permitting Michael Taylor to testify that he saw Appellant burn his clothes on the night of the murder. As this was new testimony, not previously made known to the parties until the day of trial, Appellant argues that the introduction of his testimony constituted a "trial by ambush" and should have been excluded so as to guarantee a fair trial to Appellant. There is no merit to Appellant's claim, as there is neither applicable legal support for such an argument, nor a demonstration of prejudice by Appellant concerning the State's disclosure of this evidence or the circumstances in which he was able to examine and impeach the witness.

On the second day of trial, the State called witness Michael Taylor to testify. Mr. Taylor was the best friend of the victim and had met Appellant on prior occasions through his relationship with victim. Michael Taylor testified that he had encountered Appellant in his home on the night of November 12, 2014, around 10:30pm, but had not previously seen him at his home in the hours beforehand. Appellant was not a close friend or familiar acquaintance of Mr.

Taylor, which made his presence peculiar. All of which was expected testimony from Mr. Taylor. However, in discussing the later events of the night, Mr. Taylor testified that Appellant requested an opportunity to change his clothes before leaving. (R. pp. 288-289). He then witnessed Appellant burning his clothes in the burn barrel he had outside his home. (R. p. 289, lines 13-17).

Mr. Taylor's testimony raised a speaking objection from Defense counsel as to not having been provided this testimony in advance of trial. (R. p. 289, lines 19-21). The Court held an off the record discussion with counsel and stated for the record that his ruling in the matter would be placed on the record at a later time. (R. p. 289, line 22 through p. 290, line 8). Following the conclusion of the Michael Taylor's testimony, Judge Buckner went on the record outside the presence of the jury to provide his ruling concerning Defense counsel's objection. The Court stated for the record that the Solicitor learned of this new testimony at the beginning of the day of trial and immediately informed Defense counsel, and that the parties then jointly informed the Court. (R. p. 360). The trial court then stated:

> Because witnesses often change their testimony and often give surprise testimony, there was absolutely no reason for Mr. Lee to stand up other than to evoke sympathy for his client in front of the jury and talk about the notice he got, because he got the exact same notice that the solicitor got as to the content of Mr. Taylor's testimony. And the solicitor, just as Mr. Lee rightfully went to her with the juror problem, the solicitor rightfully went to Mr. Lee to give him the same notice she received about the content of that testimony. For that reason, I did not sustain Mr. Lee's objection.

(R. p. 360, lines 3-14). No further objections or arguments of any kind were placed on the record regarding this matter.

As was correctly noted by the Court, there are no legal grounds to *exclude* a witness's change in testimony simply because it differs from his prior testimony. This is precisely why our

procedural rules allow for cross-examination, impeachment, the use of prior inconsistent statements, and the ability to declare a witness hostile. The system also provides rules to ensure the proper disclosure of exculpatory evidence under *Brady* and the Rule 5 of the South Carolina Rules of Criminal Procedure. Aside from tangentially related maxims of fairness, Appellant has not offered any direct legal authority which would support the exclusion Mr. Taylor's new testimony. Appellant has also failed to demonstrate why, under such maxims of fairness, the trial court abused his discretion in permitting the testimony when Defense Counsel had an opportunity to cross-examine and impeach the witness as to his new testimony. Lastly, Appellant has failed to demonstrate that the Solicitor failed to properly or timely disclose this new evidence.

To the extent Appellant argues that the Solicitor committed some form of *Brady* violation or Rule 5 violation, the facts do not support such an allegation. Moreover, the fact that Defense Counsel had *equal notice* of the new testimony before it was presented to the jury and was able to effectively cross-examined and impeach Mr. Taylor as to his inconsistent testimony is especially detrimental to any claim asserting improper disclosure.

A *Brady* claim is based upon due process requirements, and "such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995); *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996) . This rule applies to both

exculpatory evidence and impeachment evidence. *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985)).

Mr. Taylor's testimony is certainly not exculpatory, but could arguably constitute impeachment evidence. However, the facts presented at trial clearly do not support the conclusion that the Solicitor had advanced notice of this new testimony and failed to properly disclose it. Quite the opposite, as the Court commended Solicitor for bringing this new information to light as soon as he discovered it so as to give the defense equal notice and time to prepare. These circumstances demonstrate that the elements necessary to constitute a *Brady* violation are completely unsupported by the record.

Additionally, a *Brady* violation requires a showing of prejudice by the accused. In *State v. Gather*, our Supreme Court ruled that a failure to disclose information only warrants a reversal is the omission deprived the defendant of a fair trial. *State v. Gathers*, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988), aff'd, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989) (citing *State v. Osborn*, 291 S.C. 265, 353 S.E.2d 276 (1987)). The Court in *Gathers* concluded that since Appellant was able to successfully cross-examine the witness at trial, that no prejudice arose from the nondisclosure. *Id.* The same conclusion was reached in *State v. Jones*, wherein defense counsel was able to impeach a witness with a prior statement who provided surprising testimony not previously provided by the prosecution. *State v. Jones*, 325 S.C. 310, 319, 479 S.E.2d 517, 521 (Ct. App. 1996).

The record shows that Defense counsel had ample time to prepare a cross-examination concerning the new testimony that Appellant burned his clothing. Defense counsel was likewise able to impeach Mr. Taylor as to why such an important fact was left out of his prior statement to

police and never mentioned in the interim before trial. As such, Appellant can show no prejudice in the fact that the new and damaging testimony was only made known to him on the day of trial.

Appellant has failed to demonstrate that the introduction of Michael Taylor's testimony was in any way in error by the trial court. There is no basis to exclude relevant and highly probative testimony, absent a *Brady* violation. The facts convincingly show that the Solicitor was timely in disclosing the new testimony and that Appellant was not prejudiced by the testimony as Defense Counsel had a full and fair opportunity to cross-examine and impeach the witness. Appellant's conviction should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General

DUFFIE STONE
Fourteenth Judicial Circuit Solicitor

BY: _____
W. Joseph Maye

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

ATTORNEYS FOR RESPONDENT

November 20, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
NOV 20 2018
SC Court of Appeals

Appeal from Jasper County
The Honorable Perry M. Buckner, III, Circuit Court Judge
Appeal Case No. 2017-001224

THE STATE

RESPONDENT,

V.

ROHAIME JAMAR HOPKINS,

APPELLANT.

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).

This 20th day of November 2018.

W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT