ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVANTE ANTONIO GRANT,

APPELLANT

APPELLATE CASE NO. 2017-002158

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred in admitting appellant's videotaped statement to Detective Jarrell where appellant did not say anything inculpatory, and where the court only found the statement admissible because it showed appellant was "playing games," since admitting a videotape because it makes the defendant look bad is an improper basis of admissibility?

2.

Whether the court erred in admitting jail phone calls from appellant where the state made no argument as to their relevance, defense counsel correctly argued they were irrelevant, the calls contained profanity, and the court found the calls admissible merely because appellant received a warning the calls were being recorded, which was error?

3.

Whether the court erred in admitting jail visitation videotapes of appellant and Michael Allen where the content of the conversations was largely incomprehensible, and where the videotapes contained profanity and racial slurs?

4.

Whether the court erred in admitting a letter the state claimed was "probably" written by appellant, which the state claimed showed witness intimidation, where the expert testimony was insufficient to be deemed reliable as to the actual author of the letter, and where the letter did not contain threats or incriminating statements, but did contain profane, racist, and misogynistic language, and the admission allowed the jury to hear other bad character evidence as well?

5.

Whether the court erred in sentencing appellant, a juvenile, to the maximum term of imprisonment for armed robbery where the court's purpose was to send a message "to the street" and make an "example" out of appellant, since the United States Supreme Court has held in *Roper*,[1] *Graham*,[2] and *Miller*[3] that deterrence is not a penological justification in juvenile sentencing?

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1 *Roper v. Simmons*, 543 U.S. 551 (2005).

2 *Graham v. Florida*, 560 U.S. 48 (2010).

3 *Miller v. Alabama*, 567 U.S. 460 (2012).

STATEMENT OF THE CASE

On April 11, 2016, appellant was indicted by a Charleston County Grand Jury for the offenses of armed robbery and possession of a weapon during the commission of a violent crime. R. 819 – 822. His case was called to trial before the Honorable R. Markley Dennis and a jury. R. 8. Megan Ehrlich represented appellant; T. Richard Waring and David Osborne represented the state. R. 8.

The jury returned verdicts of guilty, and Judge Dennis sentenced appellant to incarceration for terms of thirty years for armed robbery, and five years for possession of a weapon during the commission of a violent crime, with sentences to run concurrently. R. 823 – 824.

This appeal follows.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" *State v. Vick*, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" *Id.* (quoting *Wilson*, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *State v. Slocumb*, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015).

"A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher,* 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

ARGUMENT

1.

The court erred in admitting appellant's videotaped statement to Detective Jarrell where appellant did not say anything inculpatory, and where the court only found the statement admissible because it showed appellant was "playing games," since admitting a videotape because it makes the defendant look bad is an improper basis of admissibility.

Relevant facts

Appellant was served with arrest warrants for these offenses, and was taken into an interview room by Detective Jarrell. State's exhibit #63 is a video and audio recording of the interview, and is on file with this Court. Detective Jarrell began the interview by asking appellant for biographical information, and appellant answered the detective's questions. The detective seemed skeptical of appellant's answers. Detective Jarrell expressed surprise that appellant did not have a stable address, that he did not have a phone, and that he could not provide his aunt's phone number. Jarrell was surprised appellant was "sleepy" at that time of day.

When the detective began asking questions about the offense, appellant immediately said that he did not want to answer any questions without his mother present. "I don't really want to answer no questions without my mom being present." State's exhibit #63. Instead of discontinuing the interview, the detective read appellant his *Miranda*[4] rights, appellant verbally responded he understood the rights, and he signed the rights form with his right hand.

The detective expressed consternation that appellant did not seem to know why he was charged, and questioned appellant about his involvement in the offense, asking to hear "your side of the story." Appellant denied involvement in the offense, and when confronted with being

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4 *Miranda v. Arizona*, 384 U.S. 436 (1966).

identified by his codefendant, Saivon Chisholm, appellant said he had not been in contact with Chisholm for a long time. State's exhibit #63.

Jarrell pitted the victim's and Chisholm's statements against appellant's denials. Jarrell grilled appellant: "So you're just going to sit here and deny, deny, deny? Is that your game plan today?" The interview ended when appellant asked to be taken to the jail, said: "You're not supposed to be talking to me without my parent being here," and Jarrell replied: "You're a seventeen-year-old adult." Appellant responded: "I don't feel comfortable speaking to you guys without my parent or my lawyer." State's exhibit #63.

The state first sought only to introduce a muted portion of the video of Detective Jarrell's attempt to interview appellant to show that he signed a *Miranda* warning using his right hand. R. 30, ll. 20-23; R. 131, ll. 10-13. The court ruled that if a letter discussed in Issue 4, *infra*, came in, so could the muted portion of the video, because "it goes to prove [appellant] wrote the letter." R. 31, l. 23 – 32, l. 1. "Why else would somebody fake to be left handed and why else would he be angry about having to write something?" R. 32, ll. 1-4. The court said: "It wouldn't go further than that. And I am not going to allow the video because it would be I think bringing up indirectly that he invoked his right . . . to have counsel. And then [the jury] would infer why did you stop, as typically a lay person would do." R. 33, ll. 1-6.

Later, the state asked to admit the entire video and audio recording up until appellant asked for an attorney. R. 131, ll. 4-6; R. 132, l. 24 – 133, l. 2. The solicitor told the judge that: "**He essentially denies but does give some things that turned out to be false. He says that he hadn't seen the co-defendant Saivon Chisholm in a few months. Mr. Chisholm's . . . mother is prepared to testify that they actually lived together at that time.** So there is some useful

information in there that we think should come in, Your Honor." R. 133, ll. 11-17 (emphasis added).

Defense counsel objected to the video's admission. R. 261, ll. 8-24. Counsel argued that appellant stated to Jarrell: "I really don't want to talk to you without my mother present or something along those lines. I'd argue that's an assertion of his right to remain silent." R. 261, ll. 15-18. "He doesn't have to assert his right to counsel; he just has to assert his right to remain silent." R. 261, ll. 19-20.

The court stated it was admitting all of the interview up until appellant invoked his right to an attorney. R. 263, ll. 4-5. The court opined that appellant knew how to ask for a lawyer, because he eventually did, and that he was "a savvy young man" who knew he was being videotaped. R. 261, l. 25 – 262, l. 21. "He's clearly demonstrated he understands what is going on and **he's playing games in those videos**. That's my opinion." R. 262, ll. 21-24 (emphasis added). "I'm developing my own picture of [appellant] **and that will be factored in if he is convicted**." R. 263, ll. 1-3 (emphasis added).

At trial, the state called Chandra White, codefendant Saivon Chisholm's mother. R. 313, ll. 16-18. White said she was best friends with appellant's mother and was married to his first cousin. R. 320, ll. 8-9. White testified that appellant and his mother had lived with them in the past, but that appellant was **not** living with them at the time of his arrest. R. 320, ll. 9-15; R. 321, l. 9-16.

> Q. **Okay. At the time that [appellant] was arrested was he still residing with you on Forsman** [phonetic]?
>
> A. **No.**
>
> Q. Okay. How long prior to his arrest did he not live on Forsman [phonetic]?
>
> A. I can't give you an exact timeframe.

Q. Was it days?

A. I can't give you an exact.

R. 321, ll. 9-16.

The solicitor had convinced the judge the statement was admissible because appellant said he had not seen Chisholm in a long time, while Chisholm's mother would testify the two were actually living together. However, Chisholm's mother testified they were not living together. When the solicitor introduced the interview, defense counsel renewed her objection. R. 421, ll. 5-6.

In closing, the solicitor argued appellant's interview was "important information." R. 495, l. 1. "**He says he lives with his mom on Napoleon Drive. Now the problem is Saivon Chisholm's mom testified that in actuality Chisholm and the defendant were living at her house.**" R. 495, ll. 4-7 (emphasis added). "**He mentions he hasn't seen Saivon Chisholm in a long time, but in reality they have been living together all along.**" R. 495, ll. 16-18 (emphasis added).

In addition to misquoting Chisholm's mother, the solicitor suggested appellant was a liar based on his statement to Jarrell that "he doesn't have a phone. A 17-year-old without a phone. At that day in age that doesn't make any sense. These days everybody has a cell phone." R. 495, ll. 8-11. "When asked what his aunt's cell phone number was he said he can't give that out either." R. 495, ll. 12-13. "All these things add up. It all connects, and they all have meaning. And the meaning is that he committed this crime." R. 495, l. 19-21.

Discussion

The trial court erred in admitting appellant's videotaped statement to Detective Jarrell because it did not contain any admissions by appellant, he had invoked his right to silence, and

the court stated it believed the video was admissible because it showed appellant "playing games."

A statement by a defendant may be "admissible as an admission against interest by a party opponent." *Bunch v. Cobb*, 273 S.C. 445, 257 S.E.2d 225 (1979); Rule 801(d)(2), SCRE. An inculpatory statement that relates directly to a defendant's guilt or innocence may be properly admitted. *State v. Good*, 308 S.C. 313, 316, 417 S.E.2d 643, 645 (Ct. App. 1992).

The use for impeachment purposes of an accused's post-arrest silence in the wake of *Miranda* warnings is a violation of the Due Process Clause. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right." *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987).

Doyle dealt with commenting on an accused's silence for impeachment purposes, but the state went farther than commenting here. The state introduced appellant's videotaped "statement" after he invoked his right to silence and was provided *Miranda* warnings, displaying his demeanor to the jury in an unfair effort to make appellant appear guilty simply because he invoked his rights. The jury heard appellant being read *Miranda*, and Detective Jarrell asking appellant for his "side of the story." The solicitor capitalized on the prejudice when he exhorted the jury in closing argument to believe that the contents of interview meant that appellant had "committed the crime."

The solicitor misled the court with his claim that he would show appellant lied about when he last saw his codefendant through Chisholm's mother's testimony, since it did not produce this evidence. Chisholm's mother only said the two had lived together in the past, and could not say how long ago. R. 321, ll. 9-16. The solicitor then erroneously misquoted

Chisholm's mother in closing, unfairly taking further advantage of the statement's admission—an admission that occurred in part because of the solicitor's misrepresentation to the court. R. 495, ll. 4-7; R. 495, ll. 16-18

Petitioner had invoked his right to remain silent, and was read *Miranda* warnings. He did not make any admissions before going on to invoke his right to counsel. The court abused its discretion because the entry of the statement lacked evidentiary support. The statement was not an admission against interest because appellant did not admit to engaging in any criminal acts and denied participating in the crime. He asserted his right to silence and asked for a lawyer. The court's decision to allow the statement in because it showed appellant was "a savvy young man" who was "playing games," was error. Nothing on the videotape related directly to appellant's guilt or innocence, and "playing games" would make appellant look bad, which was not an acceptable basis for admissibility. *Good*, 308 S.C. at 316, 417 S.E.2d at 645; *Johnson*, 293 S.C. at 323, 360 S.E.2d at 319 (1987).

2.

The court erred in admitting jail phone calls from appellant where the state made no argument as to their relevance, defense counsel correctly argued they were irrelevant, the calls contained profanity, and the court found the calls admissible merely because appellant received a warning the calls were being recorded, which was error.

Relevant facts

The state sought to enter jail phone call recordings[5] between appellant and his mother, and between appellant and Michael Allen, for unspecified reasons. R. 18, ll. 9-12. The state said the calls could be authenticated by Detective Jarrell, because he had interviewed appellant and could identify his voice. R. 19, ll. 6-10. The calls contained profanity, and were confusing and often unintelligible.

Defense counsel objected pre-trial to the calls being entered as evidence. R. 18, ll. 14-21. "For the jail calls themselves I object to relevance and also to whether or not they can authenticate that [appellant] is in fact the person making some of those calls." R. 18, ll. 14-17. Defense counsel argued that "each call" has to have relevance. R. 18, ll. 19-20.

The judge said that the calls were admissible because on a jail phone "unless they have changed it before he starts talking there is a warning, everything that you say in here can be used." R. 19, l. 25 – 20, l. 3.

Defense counsel stated the defense was not presenting an alibi defense, and argued that phone calls between appellant and his mother discussing "whether or not he was working that day and could they really prove that he wasn't at work," "shifts the burden" to the defense. R. 21, ll. 1-2; R. 20, ll. 13-17; R. 21, ll. 9-10. "I think the jury then is wonder[ing] why aren't they

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5 These calls are state's exhibit #27, which is on file with this Court.

presenting an alibi or why—" R. 21, ll. 18-19. The court said: "It doesn't shift the burden. He is making the conversation. He is the one that is—he is the one that is introducing that. Not some party out there in the world. It is him." R. 21, ll. 11-14. "He can testify all he wants." R. 21, l. 20. A defendant in a criminal case has the right to remain silent and does not have to testify at his trial. *State v. Cockerham*, 294 S.C. 380, 381, 365 S.E.2d 22, 22-23 (1988). The court's reasoning that appellant could testify in order to explain why he was not presenting an alibi was error, as it impermissibly shifted the burden of proof to appellant. *Lowry v. State*, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008).

Defense counsel also argued the inadmissibility of the jail call containing appellant's mother asking him if he wrote a letter to his codefendant, because appellant's answer is unintelligible. R. 23, ll. 12-17; R. 24, ll. 3-4. The court stated it would have to listen to the calls and would read the transcripts of the calls provided by the solicitor. R. 24, ll. 12-19.

During its case in chief, the state moved that the calls be admitted into evidence after Detective Jarrell identified appellant's and Michael Allen's voices.[6] R. 402, l. 22 – 403, l. 8. The court said it was admitting the calls "subject to objections previously argued on the record." The court did not provide its reasoning. R. 403, ll. 13-14. Defense counsel said: "Your Honor, I just renew previously argued—" and the court cut in: "—I'm going to do that." R. 404, ll. 3-5.

Discussion

The trial court erred in allowing the state to admit confusing, unintelligible, and profanity-laced jail phone calls against appellant by abdicating its discretion—concluding the

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6 Transcripts of the calls were also provided to the jury to read while they listened to the calls. R. 288, ll. 1-22; R. 573 – 576.

calls were admissible simply because appellant knew he was being recorded. *State v. King*, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29-30 (2017).

In, *King*, the South Carolina Supreme Court found the trial court abused its discretion when it admitted a jail phone call without listening to the call first, and the recording was "riddled with profanity, racial slurs, and impermissible references to [the defendant's] prior bad acts." *Id.* The failure to exercise discretion, is itself an abuse of discretion. *State v. Mansfield*, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000). "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

The trial court failed to make a finding that each call had relevance before allowing the evidence to be admitted. Instead, the court seemed to rely on the fact that jail telephones give the caller a "warning" that the calls are being recorded. The court's failure to determine each call was relevant before allowing its admission was a failure to exercise the court's discretionary authority. *Fontaine*, 291 S.C. at 538, 354 S.E.2d at 566.

Moreover, the state may not unconstitutionally shift the burden of proof to a defendant. *See State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000); *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 868 (1998). Defense counsel argued that admission of the calls with appellant's mother shifted the burden of proof to the defense to present an alibi, and the court responded by saying that appellant "can testify all he wants," agreeing that the appellant would in fact have to take the stand and present a defense in order to overcome the evidence. This ruling was error.

3.

The court erred in admitting jail visitation videotapes of Appellant and Michael Allen where the content of the conversations was largely incomprehensible, and where the videotapes contained profanity and racial slurs.

Relevant facts

Jail visitations between inmates and their family or friends are videotaped at the Charleston county jail. R. 272, ll. 1-12. The state wanted to admit two[7] jail visitation videotapes[8] of conversations between appellant and Michael Allen in its case in chief. R. 25, ll. 5-18. The solicitor argued the videos were admissible because in one of them "this defendant is telling [Michael Allen] by mouth not to say anything, to keep his mouth shut. And he is saying that they can come back and charge you as an accessory. And I think it is kind of probative because Michael Allen has never been charged and why would he be thinking that—" R. 25, l. 21 – 26, l. 2.

The defense argued the videos were not relevant, and she did not understand why the solicitor would seek to enter them. R. 25, ll. 5-18.

The state called Lisa Bloodworth, a detention center employee in the "security threat analysis division" to authenticate the videos. R. 271, ll. 17-21; R. 273, l. 20 – 274, l. 25. It then moved to introduce the videos through Detective Jarrell. R. 403, ll. 1-8. The videos were entered into evidence after the defense renewed its objection. R. 403, ll. 9-12. "I'll admit them subject to the objection previously argued on the record." R. 403, ll. 13-14.

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7 The state initially said it was moving in three videos, but ultimately chose only to introduce two. R. 535, l. 16 – 536, l. 14.

8 These videotapes are state's exhibit #32, which is on file with this Court. Transcripts of the videotapes were also provided to the jury to read while they observed the videos. R. 288, ll. 1-22; R. 577 – 578.

The jail visitation videotapes cast appellant in a negative light, as they were laced with profanity and racial slurs, including "shit," nigga," and "fuck." The jail video dated March 9, 2017, contained the word "shit" three times, "nigga" four times, and "fuck" four times. The subject-matter of the conversation is confusing and ambiguous. The jail video dated April 5, 2017, contained the word "nigga" ten times and "shit" nine times. The subject-matter of the conversation is confusing, ambiguous, and has no discernible connection to appellant's case at all. State's exhibit #32.

During deliberation, the jury asked to view the videotapes again. "We would like to see the jailhouse videos again please." R. 570. The videos were played again for the jury and it resumed deliberations. R. 538, ll. 6-13.

When the court was sentencing appellant, it said: "[A]fter viewing the videos—and frankly, I think it may have had some influence on some of the jurors as well. It sure had an influence on me. Because I saw an absolute disregard for anything that resembles law and order." R. 550, ll. 16-21. "And frankly, my assessment of him is he is a little thug." R. 550, l. 25 – 551, l.1.

Discussion

The trial court erred in admitting the videotapes as it is impossible to tell the meaning of the conversations, but they made appellant look bad.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. A requisite degree of relevance must exist to admit evidence of other crimes, wrongs, or acts because "the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). It is error for the state to invite the jury to speculate about a matter irrelevant to a defendant's guilt because it is an

"appeal for a verdict based on fear and speculation." *See State v. Sloan*, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982).

In *State v. King*, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29-30 (2017), the South Carolina Supreme Court found the trial judge abused his discretion by failing to exercise discretion when it admitted a jail call recording that was "riddled with profanity, racial slurs, and impermissible references to [the defendant's] prior bad acts." The failure to exercise discretion, is itself an abuse of discretion. *State v. Mansfield*, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000). "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

"[W]hen a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing 'critical attention' on the specific question asked." *Rutland v. State*, 415 S.C. 570, 579, 785 S.E.2d 350, 354 (2016) (citing *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978)).

The videotapes were not established to be relevant, and their introduction raised a spurious presumption of guilt in the minds of the jurors. The solicitor's argument for their admission was that "one of them" was "kind of probative." The court did not make a finding about their relevance or probative value. Defense counsel objected to the relevance of the videos. The videos were filled with profanity and racial slurs, and the meanings of the conversations were confusing and ambiguous. One video had no discernible connection to appellant's guilt at all. Following the jury charge, the jury asked to observe the "jailhouse videos" again during deliberation, demonstrating the jury was focusing its "critical attention" on these videos.

The judge stated the videos influenced him to think appellant was a "little thug" with an "absolute disregard for anything that resembles law and order," and said he thought the videos probably influenced the jury as well.

The court's failure to exercise its discretion in determining whether the videotapes were relevant to appellant's guilt or innocence before allowing their admission was error. *Fontaine*, 291 S.C. at 538, 354 S.E.2d at 566; *King*, 422 S.C. 68-69, 810 S.E.2d 29-30.

4.

The court erred in admitting a letter the state claimed was "probably" written by appellant, which the state claimed showed witness intimidation, where the expert testimony was insufficient to be deemed reliable as to the actual author of the letter, and where the letter did not contain threats or incriminating statements, but did contain profane, racist, and misogynistic language, and the admission allowed the jury to hear other bad character evidence as well.

Relevant facts

The defense moved to exclude the entry of a picture of a letter[9] the state purported appellant wrote to his codefendant, and that the state purported was evidence of witness intimidation. R. 13, ll. 7-18; R. 15, l. 22 – 16, l. 1. The defense argued the letter could not be authenticated and was not relevant. R. 13, ll. 11-14; R. 16, ll. 13-15; R. 319, ll. 3-4. Before the court read the letter, it said the letter was probative because it contained "potential threats." R. 15, ll. 7-14. Later, the court said: "[I]t may not be a threat. But it is up to the jury to make that determination." R. 17, ll. 16-19.

In one of the jail phone calls discussed in Issue 2, *supra*, appellant's mother asked him if he wrote the letter, and his response was unintelligible. R. 574 – 575; State's exhibit #27. After listening to the calls, the judge said of the letter: "But from the standpoint of the letter at least at this stage there is enough to begin. I think based on what I—the conversation with Mom gives some inference that there is a possibility of culpability there. And I don't know what other evidence is coming in but certainly there is enough there to at least give me some concern as to its admissibility being corroborated by the video [sic] from your client so." R. 264, ll. 14-21.

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9 This exhibit, state's exhibit #55, as well as the envelope, state's exhibit #56, are on file with this Court.

The solicitor argued in closing the letter was incriminating because it labeled Chisholm an "informant," contained the phrase: "this ain't 100," and because it had "threatening comments about Chisholm's mother." R. 494, ll. 1-9. The letter says: "And that bitch [illegible] mama tell her I say duck dick [illegible]." The letter was full of offensive terms: "shit," "nigga," "gangsta," "ass," "bitch," and "dick." State's exhibit #55.

Gaile Heath of SLED was admitted as an expert in handwriting analysis, and had compared appellant's handwriting standards to the letter. R. 353, l. 10 – 354, l. 1. She testified that when she received the first set of handwriting samples, she "detected that they were not freely and naturally prepared," and got the investigator to take standards using appellant's right hand. R. 354, l. 19 – 355, l. 1. She did not "issue an identification which would mean that the writer wrote the particular item in question," or even find there was a "strong probability which would mean there were one or two features missing . . ." R. 355, ll. 11-14. Instead, Heath "determined that [appellant] **probably** wrote the questioned document in question here." R. 355, l. 23 – 356, l. 1 (emphasis added). Heath said her efforts to identify the handwriting were hampered by the "standards not being freely and naturally given." R. 356, ll. 6-8.

The state moved to admit the letter and handwriting standards, and defense counsel renewed her objections. R. 358, ll. 1-12. The court admitted the items "subject to any previous arguments concerning those documents that are part of the record in this proceeding." R. 358, ll. 13-16.

Daniel Eckert, an investigator at the solicitor's office, testified he obtained appellant's handwriting samples. R. 373, ll. 15-19; R. 374, ll. 8-10. Eckert said when he obtained the first sample, appellant looked "uncomfortable," so he asked if appellant normally wrote with his left hand. R. 375, ll. 10-15. Eckert said that after he obtained the first sample, he learned appellant

was not left handed, so he took a right-handed sample from appellant the next day. R. 376, ll. 2-12. Eckert said: "It was clearly a tense environment. He clearly was unhappy that he was having to write again." R. 376, ll. 14-15. Defense counsel argued pretrial that evidence about these behaviors was "improper character evidence," and not relevant. R. 33, ll. 7-18. Counsel had also filed a motion to exclude this evidence as irrelevant, inadmissible bad character evidence, and because the danger of unfair prejudice outweighed any probative value. R. 599 – 600. Defense counsel objected to their admission, renewed "prior objections relating to this line of questioning," and the judge overruled the objection. R. 376, ll. 16-20.

Eckert continued: there was a point he slammed the pen on the floor and then I heard him mutter under his breath that it was—and I quote it was his statement he will fucking write it how he wants." R. 376, l. 23 – 377, l. 1. The court later said it found "everything that occurred at the exemplar meeting is admissible," due to the expert witness' "opinion concerning deceptive acts . . ." R. 386, ll. 1-5. The court said the evidence was probative because the jury could reasonably infer appellant was "angry" because he had been "found out." R. 386, ll. 9-22.

In sentencing, the judge said the letter illustrated for him that appellant was a "thug." "And he has embarked on being a thug. And when he wrote the letter that is exactly what and the jury found that he did." R. 551, ll. 1-3.

Discussion

The trial court erred in admitting the letter, envelope, and related evidence about appellant's angry behavior and efforts at deception while providing handwriting samples because the expert testified appellant only "probably" wrote the letter, and erred in determining the letter was probative before reading the letter, since it did not contain a threat, was confusing, and was filled with offensive language.

"[A] trial court may admit evidence of witness intimidation when the defendant is established as the source of the intimidation." *State v. Edwards*, 383 S.C. 66, 68, 678 S.E.2d 405, 406 (2009). The trial judge serves a "critical gatekeeping role" in determining the admissibility of witness intimidation evidence. *Id.* at 73, 678 S.E.2d at 408. The defendant in Edwards was tried for criminal sexual conduct with his minor stepdaughter. *Id.* at 68, 678 S.E.2d at 406. The minor's mother testified that Edwards told her to tell the minor not to show up because Edwards had a "hit out" on the minor and she would not make it through the courtroom doors; that he would have the minor killed or kill her when he got out of jail. *Id.* The South Carolina Supreme Court found this evidence was properly admitted as witness intimidation evidence to show consciousness of guilt, since the mother identified Edwards as the author of the intimidation. *Id.* at 72, 678 S.E.2d 408.

When it is alleged that a witness was threatened, it is proper for the trial judge to make a determination whether threats actually took place. *State v. Merriman*, 287 S.C. 74, 79, 337 S.E.2d 218, 222 (Ct. App. 1985). Although the court said the letter was probative at one point, it had not yet read the letter, and could not have determined that it contained a threat. The judge did not think that the court needed to find the letter contained a threat, but that the jury did. "[I]t may not be a threat. But it is up to the jury to make that determination." R. 17, ll. 16-19. This was error.

"[E]vidence of witness intimidation is admissible to prove consciousness of guilt if it is both related to the offense charged and reliable." *United States v. Young*, 248 F.3d 260, 272 (4th Cir. 2001) (citing *United States v. Hayden*, 85 F.3d 153 (4th Cir.1996)). In *Young*, the defendant was on trial for murder, knew the victim's mother was cooperating with authorities and was a potential witness against him, and the state introduced evidence of his prior convictions for

assault and reckless endangerment of the murder victim's mother. *Id.* at 271-72. The Fourth Circuit found the evidence of witness intimidation reliable because it was the subject of a conviction, and related to the offense because the defendant assaulted the victim's mother, a potential witness against him in a federal prosecution for murder. *Id.* at 272.

In *Hayden*, the Fourth Circuit found evidence of witness intimidation related to the offense where the defendant wrote a letter to a witness threatening to "pull your neck off of your fucking shoulders and shit down your punk ass neck," and telling the witness to "watch your back," and "get ready to join your nasty stinking dead ass wife." *Hayden*, 85 F.3d at 159, 162. The letter's content pointed to the defendant as the author because it referred to the recipient as "owing the writer money for drugs unpaid for," and the "recipient of the letter testified that [the defendant] was the only person to whom he had ever owed drug money and about whom he was planning to testify." *Id.* at 159.

Here, the letter was not sufficiently related to the offense. The solicitor argued in closing the letter was incriminating because it labeled Chisholm an "informant," and contained the phrase: "this ain't 100." The solicitor's argument that "this ain't 100" was a threat was disingenuous. "100" is common slang that means to be honest and tell the truth.[10] The solicitor also argued in closing the letter was incriminating because it had "threatening comments about Chisholm's mother." However, the letter says: "And that bitch [illegible] mama tell her I say duck dick [illegible]." These remarks are confusing, and are not the same as the defendant's threat in *Edwards* that he had a "hit out" on the witness and would kill her if she came to court,

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10 The popularity of the phrase "keep it 100" has spawned an emoji as well as a recurring segment on a late-night television show where guests were posed difficult questions they had to answer honestly. http://www.latimes.com/entertainment/tv/showtracker/la-et-st-keep-it-100-is-late-nights-new-truthiness-20150120-story.html#; https://emojipedia.org/hundred-points-symbol/.

or the defendant's threats in *Hayden* that the recipient should to get ready to join his dead wife, or the defendant's convictions in *Young* for assaulting a potential witness.

Rule 404(b), SCRE provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 403, SCRE provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

While the letter did not contain any threats, it was full of offensive terms that would predispose any normal juror to dislike its author: "shit," "nigga," "gangsta," "ass," "bitch," and "dick." Its composition and grammar would likewise prompt any normal juror to believe its author was of low intelligence and a criminal. The judge said the letter illustrated for him what a "thug" appellant was. The court should have found the letter was inadmissible under Rule 404(b), SCRE, and Rule 403, SCRE.

The letter was also not reliable, because it was not sufficiently connected to appellant. No one testified they were familiar with appellant's writing and recognized appellant's handwriting on the letter.

The trial court has a "gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). When exercising its gatekeeping duties in determining whether to admit expert testimony, the trial judge "must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." *Watson v. Ford Motor*

Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The court must determine (1) the subject-matter is beyond the ordinary knowledge of the jury; (2) the expert has acquired the requisite knowledge and skill to qualify as an expert in the subject matter; and (3) "the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id.* Here, the third prong was not met.

Although Gaile Heath was qualified as an expert in handwriting analysis, she merely testified the letter was "probably" written by appellant. She did not issue an "identification" which would mean that appellant in fact wrote the letter, or even find a "strong probability" that appellant wrote the letter. The trial court did not fulfill its gatekeeping function because the expert did not testify to a reasonable degree of professional certainty that appellant wrote the letter. *Means v. Gates*, 348 S.C. 161, 167, 558 S.E.2d 921, 924 (Ct. App. 2001).

The court's admission of the letter was error, and was explosively prejudicial because it led to the reason for the admission of testimony and evidence about appellant's angry behavior, cursing, and attempts at deception while providing the handwriting samples. *Edwards*, 383 S.C. at 68, 678 S.E.2d at 406; *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

5.

The court erred in sentencing Appellant, a juvenile, to the maximum term of imprisonment for armed robbery where the court's purpose was to send a message "to the street" and make an "example" out of Appellant, since the United States Supreme Court has held in *Roper*,[11] *Graham*,[12] and *Miller*[13] that deterrence is not a penological justification in juvenile sentencing.

Relevant facts

Appellant's father was murdered when he was one year old. R. 608. "With no positive father figure in his life, older male peers stepped into that role and were very influential in his young life." R. 608. The Department of Social Services (DSS) became involved with appellant's family when he was just four years old. R. 608. DSS found physical neglect, and placed appellant and his family in a shelter, where they resided before moving into public housing. R. 608.

On the night of the robbery, Appellant's codefendant, Saivon Chisholm, was twenty years old. Chisholm said that they were using drugs, and that he provided Appellant with the gun. R. 609.

When the court announced Appellant's sentence at the conclusion of his trial, it said that the videos of Appellant showed: "an absolute disregard for anything that resembles law and order." R. 550, ll. 16-21. "And frankly, my assessment of him is he is a little thug. That is what he is. And he has embarked on being a thug." R. 550, l. 25 – 551, l. 2. "[I]t is time to let the street

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11 *Roper v. Simmons*, 543 U.S. 551 (2005).

12 *Graham v. Florida*, 560 U.S. 48 (2010).

13 *Miller v. Alabama*, 567 U.S. 460 (2012).

know what happens when you do these things. And that is precisely—so this man is an example. And he is going to be." R. 552, ll. 23-25.

Appellant's counsel filed a motion to reconsider the sentence. R. 601 – 603. Counsel submitted a memorandum in support of her motion, and a hearing was held. R. 604 – 818; R. 555. The court confirmed it had reviewed counsel's memorandum. "I have received an extensive memorandum that has been prepared by your lawyer. It has been filed with all of the pleadings in this file. And, Ms. Ehrlich, you may rely on the submission fully. It is incorporated fully for purposes of review should that become necessary." R. 557, ll. 2-7.

Appellant turned seventeen years old twenty days prior to the offense. R. 562, ll. 13-14. Counsel argued at the motion to reconsider that appellant was still an adolescent, and "that adolescence is very relevant not only to the incident but his behavior afterwards." R. 562, ll. 14-17. Defense counsel explained that because appellant was a juvenile at the time of the offenses, *Roper*, *Graham*, and *Miller* informed the Eighth Amendment's application to juvenile sentencing. R. 605 – 606. "All four cases were grounded in one core Eighth Amendment principle: 'children are constitutionally different from adults for purposes of sentencing.'" R. 606.

Defense counsel addressed the court's concerns over appellant's "behavior during short clips of jail calls and video visits with a peer named Michael Allen," as well as his "behavior during the handwriting sessions." R. 610 – 611. Counsel explained that these behaviors by appellant were "reflective of his immaturity and youth." R. 611. Counsel argued: "[H]is behavior is reflective of an adolescent who does not think through consequences, makes poor decisions, and this behavior does not justify sentencing him to the maximum sentence of thirty years, nor does it fall in line with what the Courts have recognized about juvenile offenders." R. 612.

Counsel cited the *Roper-Graham-Miller* line of cases for the proposition that the penological justifications of deterrence and retribution are inapplicable to juvenile sentencing. R. 612. Counsel addressed the court's remarks "that sending a message to the streets was a motivating factor in sentencing," by pointing out that the "hallmark features of youth . . . weaken the deterrence rationale." R. 614 – 615. Counsel cited *Roper*'s recognition "that juveniles will be less susceptible to deterrence, and *Miller*'s explanation that inherent features of youth render juveniles "less likely to consider potential punishment." R. 615. "Sending a message to the streets that [appellant] received a thirty year sentence is not going to deter other youth from engaging in criminal activity or have any impact on what is commonly referred to as 'street code.'" R. 615. Counsel also provided the court with research documenting an absence of evidence that imposition of severe sentences actually has a deterrent effect. R. 654 – 665.

However appellant's thirty-year sentence remained in place: "I don't derive any great pleasure out of sentencing someone to the maximum sentence," but "at some point in time with all of the factors I had you have to just make a statement that this is not going to be accepted in our society." R. 565, ll. 21-23; R. 566, ll. 11-13. "I mean I understand he was a juvenile, but still it is not rocket science. You just know that you don't do that." R. 566, ll. 16-18.

Discussion

Appellant understands that *Roper*, *Miller*, *Graham*, and *Montgomery*[14] dealt with a juvenile offender's meaningful opportunity for release from prison before the end of his lifetime, but these cases also stand for the principle that deterrence is not a valid penological justification in the sentencing of juveniles. *Graham v. Florida*, 560 U.S. at 72. The trial court erred when it sentenced appellant, a juvenile, to the maximum period of imprisonment using a deterrence

14 *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

rationale, as demonstrated by its expressly stated intent to send a message "to the street," "make a statement" and make an "example" out of him. In doing so, the court failed to use its discretion to fashion a sentence that accounted for appellant's youth and immaturity.

The United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988), a plurality of the United States Supreme Court expressly rejected both the retribution and deterrence rationales when applied to capital punishment of offenders under the age of sixteen. The Court rejected a retribution rationale given the "lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children . . ." *Id.* at 836. "**For such a young offender, the deterrence rationale is equally unacceptable.**" *Id.* at 837 (emphasis added). The Court reasoned that the "potential deterrent value" of such a sentence was insignificant, as "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.*

In *Roper v. Simmons*, 543 U.S. 551, 571 (2005), the United States Supreme Court struck down the death penalty for juveniles under age eighteen, reasoning that "penological justifications for the death penalty apply to them with lesser force than to adults." "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . ." *Id.* "**[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than**

adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* (emphasis added).

In *Graham v. Florida*, 560 U.S. 48, 74-75 (2010), the United States Supreme Court held that the Eighth Amendment prohibited a juvenile non-homicide offender from being sentenced to imprisonment for life without the possibility of parole. "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 59 (internal quotations omitted) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

"The penological justifications for the sentencing practice are also relevant to the analysis." *Id.* at 71. "**Deterrence does not suffice to justify the sentence** . . . *Roper* noted that **the same characteristics that render juveniles less culpable than adults suggest that juveniles will be less susceptible to deterrence**." *Id.* at 72. (internal quotations and alterations omitted) (emphasis added) (quoting *Roper*, 543 U.S. at 571). "Because juveniles' lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions." *Id.* (internal quotations and alterations omitted) (quoting *Johnson v. Texas,* 509 U.S. 350, 367 (1993).

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court returned to juvenile sentencing in the Eighth Amendment context, striking down sentencing schemes that mandated life without parole for juvenile offenders. The Court found to be of "special pertinence" that "*Roper* and *Graham* emphasized that **the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile**

offenders, even when they commit terrible crimes." *Id.* at 472; 477 (emphasis added). The Court employed *Roper* and *Graham*'s rejection of the "deterrence" rationale in its reasoning, "because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.* at 472 (internal quotations omitted).

In *Aiken v. Byars*, 410 S.C. 534, 541-42, 765 S.E.2d 572, 576 (2014), the South Carolina Supreme Court explained that "*Miller* noted that *Roper* and *Graham* established that children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science." "[W]e must give effect to the proportionality rationale integral to *Miller's* holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing. *Id.* at 542-43, 765 S.E.2d at 576.

"[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion). "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (citing W. Blackstone, Commentaries on the Laws of England).

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). "It is a time of immaturity, irresponsibility, impetuousness, and recklessness." *Miller*, 567 U.S. at 476 (internal quotations and alterations omitted) (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

When the court announced appellant's sentence at the conclusion of his trial, it said that the videos of appellant showed: "**an absolute disregard for anything that resembles law and order**." R. 550, ll. 16-21 (emphasis added). "And frankly, my assessment of him is **he is a little thug**. That is what he is. And he has embarked on being a thug." R. 550, l. 25 – 551, l. 2 (emphasis added). "**[I]t is time to let the street know what happens when you do these things. And that is precisely—so this man is an example**. And he is going to be." R. 552, ll. 23-25 (emphasis added).

As part of the motion to reconsider, the court learned that appellant's father was murdered when he was one year old, and DSS became involved with appellant's family when he was just four years old. Older peers stepped in to fill the role of his father. On the night of the robbery, appellant's codefendant, Saivon Chisholm, was twenty years old, and he provided appellant with the gun.

Appellant turned seventeen years old twenty days prior to the offense. R. 562, ll. 13-14. Counsel correctly argued at the motion to reconsider that appellant was still an adolescent, and that his youth was relevant to both the robbery and his behaviors afterwards. Defense counsel rightly explained that appellant's behaviors during jail phone calls, video visitation clips, and the handwriting process reflected appellant's youth and immaturity.

Defense counsel correctly argued that because appellant was a juvenile at the time of the offenses, *Roper*, *Graham*, and *Miller* inform the Eighth Amendment's application to juvenile sentencing, and children are constitutionally different from adults for purposes of sentencing.

The *Roper-Graham-Miller* line of cases clarify that the penological justifications of deterrence and retribution are inapplicable to juvenile sentencing. Employing the motive of sending a message to the street when sentencing appellant was error, because the hallmark

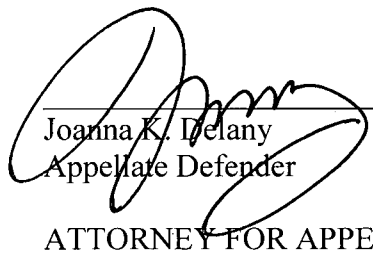
features of youth do not support a deterrence rationale. *Roper*, *Graham*, and *Miller* recognize that juveniles are less susceptible to deterrence, as the inherent features of youth render juveniles less likely than adults to consider potential punishment. Counsel provided the court with research documenting the dearth of evidence that severe sentences have a deterrent effect, and correctly argued that appellant receiving a thirty-year sentence is unlikely to deter other youth from committing crimes.

At appellant's motion to reconsider, the court said that while: "I don't derive any great pleasure out of sentencing someone to the maximum sentence," "at some point in time with all of the factors I had **you have to just make a statement** that this is not going to be accepted in our society." R. 565, ll. 21-23; R. 566, ll. 11-13 (emphasis added). "I mean I understand he was a juvenile, but still it is not rocket science. **You just know that you don't do that**." R. 566, ll. 16-18 (emphasis added). But *Miller*, *Roper*, and *Graham* explain that for minors, things are not so black and white.

The United States Supreme Court has expressly rejected deterrence as a penological rationale in the context of juvenile sentencing. The court erred when it sentenced appellant, a juvenile, to the maximum period of imprisonment under a deterrence rationale, as demonstrated by its expressly stated intent to make a "statement" and send a "message to the street" by making an "example" out of him. The court's justifications for appellant's sentencing that he was a "little thug," is at odds with the Eighth Amendment and the Supreme Court's jurisprudence on the constitutional significance of youth in juvenile sentencing. U.S. CONST. amend. VIII; *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

CONCLUSION

Based on the foregoing arguments, as to Issues 1 – 4, appellant's convictions should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial. As to Issue 5, appellant asks this case be remanded to the Charleston County Court of General Sessions for resentencing.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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