ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN CHRISTOPHER HART,

Appellant

Appellate Case No. 2017-001291.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the court erred in allowing the solicitor to argue in closing that appellant was "pure evil," and that "evil walks the streets, evil lives in Lexington County, evil is in this courtroom," since solicitors must tailor their remarks so as not to arouse the jurors' passions or prejudices?

II. Whether the court erred in admitting incriminating statements by appellant that were given in response to questions by Sergeant Mefford where appellant was in custody and had not been provided *Miranda* warnings, since statements stemming from custodial interrogation of a defendant are inadmissible absent *Miranda* warnings?

III. Whether the court erred in denying defense counsel's motion for a continuance where counsel continuously received discovery in the month leading up to trial, and the solicitor said the state "had been careful what it turned over," since fundamental fairness dictates counsel be given additional time to prepare, particularly where counsel did not have time to investigate Jeremy Washington's new statement since it was undisputed Washington said others made threats to kill the decedent?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court abuse its discretion when it permitted the State to argue at closing that malice may be equated with evil?

II. Did the trial court abuse its discretion when it admitted Appellant's response made while in custody in New York but not subject to custodial interrogation?

III. Did the trial court abuse its discretion when it denied Appellant's motion for continuance when the discovery at issue was disclosed over a month prior to trial and where Appellant has failed to demonstrate how he was prejudiced by the manner of the disclosure?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Appellant John Christopher Hart for the 2013 murder of Paula Justice. (R. pp. 1207-08). Dayne C. Phillips, Esquire, represented Appellant at his trial on the charge. Eleventh Circuit Deputy Solicitor D. Shawn Graham and Assistant Solicitor Robert McNair, III, prosecuted the case. (R. p. 58).

The Honorable Eugene C. Griffith, Jr., presided over Appellant's case. After a series of pretrial hearings, trial began on May 22, 2017, and lasted through the week. (R. p. 58). The jury convicted Appellant of murder and Judge Griffith sentenced Appellant to 50 with credit for time served. (R. p. 1154, lines 4-6). By and through trial counsel, Petitioner served a notice of appeal on June 2, 2017. (R. pp. 1205-06).

STATEMENT OF FACTS

The investigation into the murder of Paula Justice began when men working for a repossession agency were out looking for equipment just after 11 p.m. in early April 2013. One heard "something that resembled a gunshot" and traveled towards the noise, ultimately locating a jacket on the ground in a secluded area in West Columbia. Drawing closer to the area from which he heard the noise, he recognized that there was in fact a person lying on the ground. Shining a flashlight and seeing blood, the repossession workers called 911. (R. p. 284, line 20 – p. 286, line 24). Prior to law enforcement's arrival, the men observed a small shell casing on the ground nearby and marked its location with a twig. (R. p. 287, lines 10-22).

The victim had suffered one gunshot wound to the head which entered above and slightly behind the left ear and traveled downward towards the right jaw. The wound was delivered at or near contact with the decedent's head. (R. p. 648, line 15 – p. 651, line 19). According to the first responding officers, the body was located on a dirt road running parallel to a railroad track. Ultimately, two shell casings were recovered from the scene. (R. p. 291, line 5 – p. 292, line 25).

Once transported to the hospital, medical personnel identified the victim via the cell phone found in the c-collar placed around her neck at the time of transport. Law enforcement verified that identity through Department of Motor Vehicle records. (R. p. 318, line 18 – p. 320, line 12). Law enforcement then began looking in to the phone calls placed from the victim's phone. Retracing her phone calls, they were able to determine that night that the decedent often stayed at the America's Value Inn. The victim also placed calls to a number identified in her phone contacts as "KG." (R. p. 320, line 15 – p. 321, line 21; R. p. 368, lines 13-25). "KG" did not answer when a call was placed to his phone number, an 803 number with the prefix 348. (R. p. 321, lines 2-11).

Law enforcement immediately went to the America's Value Inn and spoke to other patrons of the Inn who easily identified the victim. (R. p. 369, lines 2-25; R. p. 456, lines 2-25). Law enforcement also obtained a search warrant for the victim's room at the America's Value Inn. (R. p. 322, lines 13-25). Patrons of the Inn named "KG" as the last person seen with her that day. (R. p. 362, lines 6-24). One patron who testified at trial last saw the victim when she asked to borrow money to pay for her hotel room. The victim told the patron that two guys were coming to pick her up and that she was going with a "guy named KG" who had lined up some men so she could get paid. (R. p. 456, line 4 – p. 459, line 4). Law enforcement learned that the victim was supposed to be meeting with "KG" at the Delta Hotel that night. (R. p. 370, lines 1-6).

Following up on this lead, law enforcement arrived at the Delta, where a parked Lincoln Town Car with a missing license plate and registered to one Robert Wesley Justice caught their eye. People at the America's Value Inn and the Delta Motel had associated the identity of "KG" with that Lincoln Town Car. (R. p. 312, line 15 – p. 324, line 17; R. p. 329, lines 2-8; R. p. 371, lines 3-5). "KG" had been described to law enforcement by "transient" patrons of the Value Inn and the Delta Motel as a black male, aged 18 to 30, approximately six feet tall, and weighing approximately 180 pounds. Law enforcement also recovered a room card for Room 3 at the Delta Motel, a room registered to Appellant John Christopher Hart. (R. p. 325, lines 8-24; R. p. 330, lines 8-21).

Appellant's then-girlfriend, Jessica Ussery, was also identified by hotel patrons. When law enforcement located and interviewed Ussery, they learned that she gave birth to Appellant's child days before the decedent was killed. She testified that on April 10, 2013, she was discharged from the maternity ward of the hospital and Appellant was supposed to take her

home. However, he left the hospital room at some point that day and never returned. (R. p. 334, line 12 – p. 337, line 25). A friend of hers picked her up at midnight in Appellant's stead, and she next saw Appellant on April 11 at 8:00 a.m. when he arrived at her side accompanied by Tevin Deloach. (R. p. 338, line 3 – p. 341, line 18). Appellant was at that time grabbing his belongings: "they were leaving." (R. p. 341, lines 23-25). By that time, detectives had already been to Ussery's home to question her. (R. p. 342, lines 18-20).

Ussery identified Appellant Hart's aliases as KG and Bhris. (R. p. 335, lines 2-4; R. p. 356, lines 8-9). Ussery also explained that Appellant was a drug dealer regularly dealing with prostitutes. He used one "work phone" and another separate phone for more personal calls such as those with Ussery. (R. p. 344, lines 2-14; R. p. 351, lines 16-23). Though Ussery was aware that Appellant frequently changed phone numbers, she testified that in April 2013 she knew that one of his phones had the 348 prefix. (R. p. 347, lines 21-23; R. p. 358, lines 7-10). In a jail phone call between Appellant and Ussery which was published at trial, Appellant denied having the phone with the 348 prefix.[1] (R. p. 347, line 9 – p. 348, line 25). However, Ussery's phone contacts listed a 803-348 number as "Hart" and another 603-498-**18 number as "My Baby." (R. p. 364, lines 8-15). Ussery also acknowledged that Appellant drove a Lincoln Town Car and was often seen with Tevin Deloach whom he referred to as the "dude boy." (R. p. 345, line 8 – p. 346, line 9).

After speaking with Ussery, Spivey, who was working the investigation, called Appellant at his 603-498 number. Spivey placed his call just after 3:00 a.m. the night of the victim's murder. (R. p. 372, lines 3-23). Appellant answered but hung up the phone not long into the

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[1] A person who regularly bought drugs from Appellant testified at trial that she knew him as "KG," she contacted him at an 803-348 number, and she saw him driving a Lincoln Town Car. (R. p. 492, line 23 – p. 494, line 25).

call—the Sergeant was asking if Appellant would speak with them in regards to an investigation. (R. p. 373, line 1 – p. 374, line 10).

In turn, Spivey began investigating the Lincoln Town Car associated with Appellant. (R. p. 375, lines 6-15). He also began looking for security camera footage of the Town Car at various places Appellant had been seen that day such as Lexington Medical Center where Appellant and Tevin Deloach had visited Ussery in the maternity ward of the hospital. (R. p. 379, line 12 – p. 382, line 16). Spivey located surveillance camera footage from the Holiday Inn next door to the American's Value Inn which contained footage depicting the victim on the night of her murder. That footage led Spivey to locate additional footage of the victim at the Waffle House located a "short walk" from the America's Value and the Holiday Inns. (R. p. 379, line 12 – p. 380, line 2). Based on the video timestamps, the victim appeared in this surveillance footage between 10:30 and 10:50 p.m. and was picked up by a Lincoln Town Car. (R. p. 381, line 1 – p. 382, line 8).

Appellant Found in Custody in New York

Appellant was located by the fugitive task force in New York about a week after the murder, on April 18, 2013. Appellant had been taken into custody there. (R. p. 653, lines 12-14). Law enforcement in South Carolina contacted the detention center in New York that housed Appellant and the detention center responded by putting Appellant on the phone with the local Sergeant in South Carolina. (R. p. 653, line 12 – p. 654, line 11). The Sergeant was trying to determine whether to initiate extradition proceedings or whether Appellant would resign to contact with and transport by local law enforcement if they arrived in New York; Appellant in turn questioned the Sergeant about whether they had found a gun with his fingerprints on it. (R. p. 654, lines 12-25).

Spivey drove about fifteen hours to Utica, New York along with another detective for the

purpose of interviewing Appellant. (R. p. 657, lines 1-14). When the detectives arrived, Appellant was advised of his *Miranda* rights and knowingly and intelligently waived those rights, electing to engage in an interview with the detectives. Appellant refused to provide a written statement. (R. p. 658, line 2 – p. 663, line 12; R. p. 1168). When the interview began, Appellant initially acknowledged himself and Tevin Deloach appearing in photographs from a visit they made to Lexington Medical Center. (R. p. 665, lines 16-25). Then, Appellant denied knowing the victim, denied the existence of any phone records or photographs connecting Appellant to the victim, separated himself from any tie to Tevin Deloach, and continued asking the detectives what evidence existed against him. (R. p. 666, line 15 – p. 672, line 25). Appellant did not mention anyone by the name of Alex or AJ Wallace. (R. p. 669, lines 3-5).

Early the next morning, the detectives transported Appellant to South Carolina in a fifteen-hour car ride. He had waived extradition prior to their arrival in Utica, New York. (R. p. 663, line 24 – p. 664, line 5; R. p. 673, lines 10-14). Knowing a long car ride awaited, law enforcement re-advised him of his *Miranda* rights as soon as they picked him up for transport. (R. p. 673, line 17 – p. 674, line 4). Appellant engaged the detectives in conversation at various points throughout the car ride, volunteering statements indicating that he did not like snitches and that he knew talking was not going to help him. (R. p. 674, line 18 – p. 677, line 17). Appellant also volunteered that he did not need to be separated from Tevin Deloach at the detention center law enforcement (R. p. 677, lines 18-21). At one point, Appellant commented that if the charge had been something like petit larceny, he would have already confessed over the phone. (R. p. 676, lines 16-18).

A Sunken Handgun

Also about a week after the murder, on April 17, 2013, a dive team investigating leads in

the case recovered a handgun from the pond near the tennis courts at Chestnut Hill Plantation in Richland County. (R. p. 509, line 23 – p. 512, line 25). It was a semiautomatic pistol with ammunition loaded in the clip. (R. p. 514, line 24 – p. 518, line 22). The firearm and toolmark examiner who analyzed the handgun testified that the gun was in working order. The ammunition found with it was manufactured by Remington. The bullets were .45 caliber hollow-point with a brass jacket and a nickel cartridge case. (R. p. 594, lines 6-19). The .45 caliber handgun was manufactured by Karr. (R. p. 593, lines 15-18). The examiner was able to conclude that the unfired cartridges collected with the handgun were consistent with what would be fired from that weapon. (R. p. 593, lines 19-21). After conducting his analysis, the examiner conclude that the empty cartridge case found at the scene "was fired by the [ ] pistol." (R. p. 595, lines 2-4). A fired bullet provided for examination had characteristics "consistent with the bullets loaded into Remington Golden Saber brand cartridges." Though the test was "inconclusive" by the applicable testing standards, the examiner could not exclude the fired bullet from having been fired from the handgun collected from the pond because the fired bullet showed the same rifling characteristics as the bullets produced by test firing that weapon. (R. p. 595, lines 5-25).

As for DNA evidence from the handgun, an analyst could only develop a partial DNA profile showing a mixture of at least two individuals' DNA. (R. p. 603, lines 11-17). The profile did not meet the criteria required for comparison. (R. p. 604, lines 13-22). However, the victim could be and was excluded as a contributor. (R. p. 607, line 12 – p. 608, line 15).

Phone Call Connections

Law enforcement also extracted data from the victim's cell phone, logging a number of outgoing, incoming, and missed calls with KG at an 803-348 number. (R. p. 520, line 23– p. 523, line 14). An employee of AT&T who maintained the records for that 803-348 number explained

at trial that the phone was a pre-paid go-phone with no owner name attached to the sale or account of the device. (R. p. 528, lines 13-24). At trial, A Verizon custodian established a trio of phone numbers registered to subscriber Tevin Deloach and another registered to Cynthia Johnson. (R. p. 806, line 1 – p. 810, line 15). One number registered to Deloach matched the "personal" phone number utilized by Appellant: 603-498-**18. (R. p. 364, lines 8-15; R. p. 808, line 6 – p. 809, line 4). This same number was changed on April 12, 2013, to a 414-216 number. (R. p. 809, lines 9-12).

The law enforcement official who examined cell phone records for these numbers on dates surrounding the murder identified thirteen communications from Deloach to Appellant; zero communication from Deloach to either the victim, Ussery (Appellant's then-girlfriend), or one Jeremy Washington.[2] (R. p. 825, line 7 – p. 829, line 24). The same conglomerate of records demonstrated 162 contacts from Appellant to Deloach, zero to the victim, zero to Appellant's other phone numbers, 185 to Ussery, and 44 to Washington. (R. p. 830, line 5 – p. 831, line 5). Then, once Appellant changed his one phone number to 414-216, records showed zero contacts with Appellant's other phone numbers, zero calls to the victim, zero calls to Washington, but 330 calls to Ussery and 67 calls to Deloach. (R. p. 831, line 6 – p. 834, line 11). The victim's phone records showed contacts with both Appellant and Deloach. (R. p. 832, lines 19 – p. 833, line 1; R. p. 835, lines 2-25). These records also showed that on night she was killed, the victim texted Appellant at 10:27 p.m. with messages indicating she was waiting for him to arrive. (R. p. 836, line 14 – p. 837, line 10).

When common calls were mapped for cell tower connections from 3:17 to 11:22 p.m. on April 10, 2013, law enforcement identified that Appellant's and the victim's phones were in

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2 Later identified as Munchkin, *infra* n.3.

close proximity both to each other and to: the Waffle House on Sunset Boulevard near the Holiday and America's Value Inns, at a time that corresponded with video surveillance of the victim getting into the Lincoln Town Car; and at the location at or near where the victim's body was discovered shortly before midnight that night. (R. p. 381, line 1 – p. 382, line 8; R. p. 839, line 3 – p. 847, line 17). Appellant called Washington at 11:14 p.m. (R. p. 837, line 25 – p. 838, line 19; R. p. 847, lines 22-24). After 11:50 p.m., mapping analysis showed phones linked to Appellant and Deloach traveling on I-20 and arriving within cell tower range of the Delta Motel. (R. p. 849, line 15 – p. 850, line 15). One of Appellant's phones, the 348 number, was disconnected from cell tower connections after 11:17 p.m. (R. p. 849, lines 3-14). Then, Appellant's phone was mapped in New York. (R. p. 851, lines 3-14).

An Admitted Accomplice – Tevin Deloach

Deloach met with law enforcement, implicated himself as the driver at the time of the murder, and was arrested. (R. p. 391, line 20 – p. 392, line 2). Deloach was "forthcoming" with Spivey, initially minimizing his role but increasing his cooperation with law enforcement each time they spoke about the case. Spivey believed Deloach was consistent throughout their interactions. (R. p. 393, lines 2-12).

Deloach testified at Appellant's trial, admitting his guilt under the theory of hand of one hand of all. (R. p. 406, line 21 – p. 407, line 7). Deloach explained that he first met Appellant when they were four or five years old and they had recently taken a GED program together. (R. p. 407, line 9 – p. 408, line 1). Deloach testified that in 2013 he was assisting Appellant in his drug trade, driving Appellant around to buy and sell. They rode around in both Deloach's gold Marquis and Appellant's Lincoln Town Car. (R. p. 408, lines 16-24). Deloach testified that he called Appellant Bhris, reaching him by phone at a 603-498 number, although he knew that

Appellant used multiple phones. (R. p. 410, lines 1-24). Deloach also knew that Appellant's drug name was "KG." (R. p. 425, lines 3-7). Deloach's number at the time was an 803-465 number. (R. p. 410, lines 9-12).

Deloach testified that on April 10, 2013, he worked part of a shift at Wal-Mart then left to pick up Appellant at the hospital in Lexington to drive him around "to make some more serves." According to Deloach, they were riding in the gold Marquis that day until it began to act up, causing them to switch to the Town Car to complete their business. (R. p. 411, line 2 – p. 413, line 21). At some point, Appellant asked Deloach to take him to meet a woman for prostitution. (R. p. 414, lines 10-15). When Deloach pulled the car into the parking lot of a Waffle House near Sunset Boulevard in West Columbia, Appellant told Deloach "he was gonna set her up to kill her." (R. p. 415, lines 1-7). The woman got in the backseat of the Town Car at the Waffle House, and Deloach recalled her saying something about "Munchkin" or "Fat Boy" telling on her: that "Munchkin" had set her up and ratted her out to law enforcement and got her locked up.[3] (R. p. 416, lines 2-17). Deloach recalled Appellant telling the woman that he did not like snitches. (R. p. 417, line 1).

Next, Deloach took Appellant and the woman to a dirt road and parked the car. He also

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[3] Also at trial, a narcotics detective with the Richland County Sheriff's Department testified that, on May 30, 2012, they conducted a buy/bust where the victim acted as a middleman in the transaction. Law enforcement knew the victim as a confidential informant, but she was not working in that capacity during this particular deal. (R. p. 531, line 16 – p. 534, line 6). Jeremy Washington drove the victim to the drop point. Law enforcement moved in and located over 80 grams of crack cocaine in the vehicle. The victim and Washington were charged with trafficking. (R. p. 534, line 8 – p. 535, line 6). Washington bonded out that same day, but the victim did not bond out until March 15, 2013. (R. p. 569, lines 14-21). As part of Washington's cooperation on the charge, he identified his phone number as an 803-239 number. (R. p. 537, lines 1-16). Washington went by "Fat Boy" or "Munchkin" or "Munchie." (R. p. 540, lines 1-6). According to the attorney who prosecuted these charges, the victim was ready and willing to cooperate at Washington's trial but was killed before it began. (R. p. 572, line 1 – p. 573, line 5).

recalled Appellant receiving a phone call from someone who instructed Appellant to "hurry up" and stated they were "restless." (R. p. 418, lines 11-18). Within three minutes of Deloach parking the car, Appellant and the woman "got out of the car and walked up the road and [Deloach] heard the gunshot and [Appellant] ran back to the car with the gun in his hand." (R. p. 420, lines 3-11). Appellant directed Deloach to take off, saying "go go go." (R. p. 420, lines 21-22). Deloach testified he had not seen Appellant with a gun before, including the gun in Appellant's hand. (R. p. 417, lines 13-14; R. p. 420, line 23 – p. 421, line 1). He testified he never saw any blood on Appellant. (R. p. 449, lines 3-4).

Appellant dialed a number from a black flip phone as Deloach drove him back to Columbia. Appellant told the person on the other end of the phone that "it was done." (R. p. 422, lines 10-21; R. p. 426, lines 4-8). In the car, Appellant told Deloach that he killed the woman because she was a confidential informant "and Munchkin hired him to kill her so he wouldn't have to go to jail." (R. p. 422, lines 24-25). Appellant offered Deloach $5000 of the $10,000 he was supposed to make on the hit. (R. p. 423, lines 3-11). At some point during the drive, Appellant took the battery out of the black flip phone and threw it out of the car. (R. p. 426, lines 10-15).

Also during the drive, Deloach was pulled over for an improperly displayed license plate. (R. p. 421, lines 10-16; R. p. 461, lines 15-25). Appellant directed Deloach to stay calm and to "take the charge for him" if the officer searched the car and found the gun under Appellant's seat. (R. p. 421, lines 17-23). The traffic stop occurred a few minutes past midnight. (R. p. 461, lines 21-22). When Appellant and Deloach were questioned by the officer conducting the stop, they provided inconsistent answers about where they were headed. (R. p. 462, line 17 – p. 463, line 10). The officer did search the car, but did not find the gun during the traffic stop. (R. p. 425,

lines 12-18; R. p. 467, lines 12-19).

After the traffic stop, Deloach took Appellant to a truck stop on I-20 where Appellant found a third party to drive him to the Delta Motel.[4] (R. p. 427, lines 4-17; R. p. 486, lines 4-19). Appellant told the third party driver that he was coming from either Aiken or Augusta and offered no explanation for why only one of the two people in the Town Car needed a ride to the Delta. (R. p. 487, line 7 – p. 488, line 7). Later, according to Deloach, another person came and picked up Deloach and Appellant and took them to someone else's house. Appellant was silent in the car. (R. p. 431, line 24 – p. 432, line 20).

The following day, once Appellant and Deloach had separated, Appellant called Deloach who met up with Appellant and help him throw away the gun in the pond by the tennis courts at Chestnut Hill Plantation in Richland County. (R. p. 433, lines 2-25). Deloach testified that Appellant was acting like nothing happened. (R. p. 436, lines 19-20). Appellant asked for Delaoch's help again, and Deloach helped him secure a hotel room in someone else's name. (R. p. 436, line 22 – p. 437, line 18; R. p. 452, lines 2-21). Deloach also purchased Appellant a bus ticket at Appellant's request. Appellant left that night for New York. (R. p. 438, lines 17-24; R. p. 454, lines 14-19). He left after law enforcement first contacted him. (R. p. 439, lines 1-16).

A Jailhouse Snitch – Deandre Staley

Staley was housed as the Lexington County Detention Center during the same time period as Appellant, whom he called Bhris or Brisko. (R. p. 621, line 17 – p. 623, line 10). Staley testified that one day in the rec yard, Appellant told him that he "bodied the bitch," meaning the

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[4] When they arrived, Deloach and Appellant visited a woman at the Delta Motel who testified that Appellant told her he had lost his cell phone. She said, "Well, I just talked to you a little earlier and he said I know, I lost it," and he did not give her a new number. (R. p. 499, lines 20-25).

victim, because "she was a CI" who was getting others in the "neighborhood and the community" in trouble. (R. p. 623, line 17 – p. 624, line 7; *see also* R. p. 874, lines 10-21). Appellant told him the victim had set up Munchkin, a West Columbia drug dealer whose real name was Jeremey Washington. (R. p. 625, lines 8-16). Appellant said he was given five circles of crack cocaine in exchange for killing the victim. (R. p. 625, lines 2-8). Appellant wrote Staley a letter in jail indicating that Appellant had not yet seen the discovery in his case and believed Staley would not snitch on him. (R. p. 627, line 4 – p. 628, line 22). Staley also contacted someone in Munchkin's family on behalf of Appellant to tell them that Appellant was owed $1000 and "needed some money." (R. p. 630, lines 3-8). Staley received threats and a stab wound after cooperating in Appellant's case. (R. p. 638, lines 22-25).

An Alleged Admitted Accomplice – Alex/AJ Wallace

Spivey also spoke with Alex/ AJ Wallace who, in June 2016, three years after the murder, provided a written statement confessing to being the triggerman. At that time, Wallace was in custody at the Lexington County Detention Center and charged with (and confessed to) another murder. (R. p. 877, line 10 – p. 885, line 13; R. p. 1169-77). Wallace was fifteen at that time. (R. p. 918, line 20). He maintained that appellant stood next to him during the shooting. (R. p. 938, lines 13-20).

Notably, Wallace initially stated he was five or six feet away from the victim when he pulled the trigger, but changed that distance when given information concerning the evidence that the victim sustained a contact wound. (R. p. 690, line 3 – p. 692, line 9; R. p. 954, line 4 – p. 955, line 15). The phone number he provided for himself at that time was an 803-822 number, and he said he had contacted Appellant by phone that night. (R. p. 691, line 22 – p. 692, line 4). In a letter dated a day or two prior to his written statement, Wallace also offered a confession to

the murder, stating that Appellant "had no idea at all" the murder was to occur, that Appellant "thought it was a money meeting," and that Wallace got Appellant involved because the victim would not have shown up if she knew she was supposed to meet Wallace. (R. p. 713, line 13 – p. 716, line 7). Wallace maintained that he both arrived to and fled from the scene on foot. (R. p. 714, lines 9-25).

Wallace also said that he used a chrome-colored Glock to shoot the victim as she walked away from him. (R. p. 690, lines 20-21; R. p. 691, lines 12-17). However, when asked to describe the size of the gun, the gun Wallace described was markedly different in size and metal than the small Karr .45 semiautomatic handgun recovered from the pond. (R. p. 696, line 2 – p. 698, line 25). Wallace described the gun in his statement as "all black with a chrome cartridge and black grips." (R. p. 917, line 25). Wallace testified at trial that he knew the difference between chrome and stainless steel, that the steel "was a little lighter." (R. p. 882, lines 11-17). The gun was stainless steel at the top. (R. p. 918, lines 10-17). He recognized during cross-examination that he "was mistaken" when he described the small firearm as "full size." (R. p. 928, lines 4-7).

Wallace also did not mention Tevin Deloach or that anyone was driving the Lincoln Town Car. (R. p. 700, lines 3-25). In yet another inconsistency with the remainder of the evidence, Wallace said in his statement that he got rid of the gun himself in a pond in Irmo "near a railroad track" and "a relatively close housing or apartment complex." He made no mention of Chestnut Hill Plantation, its location in relation to Irmo, or the tennis courts or other country club accoutrement near the pond. (R. p. 701, line 4 – p. 650, line 22; R. p. 1176).

Wallace included in his statement that he believed the victim as wearing a gray or white shirt and sweatpants. (R. p. 1172). The clothing recovered from the victim was instead comprised

of a black t-shirt with sparkly writing and a pair of women's jeans. (R. p. 853, line 3 – p. 854, line 7).

Finding no corroboration to Wallace's statements, Spivey excluded Wallace as having the potential to be "KG." (R. p. 389, line 24 – p. 390, line 4; R. p. 743, line 2 – p. 744, line 5).

Debunking the Wallace Confession

At trial, Wallace denied telling a friend and co-defendant in an unrelated charge that he was going to "take" Appellant's murder charge and that he was studying the discovery in Appellant's case in preparation for doing so. (R. p. 956, line 10 – p. 957, line 24). That co-defendant, Terrance Flagler, testified in the State's case-in-reply. (R. p. 1033, lines 14-24). Flagler testified that Wallace confided in him that Appellant "brainwashed" him into "taking" his murder charge. (R. p. 1035, line 11 – p. 1036, line 6).

Appellant's Admitted Presence at Scene and Time of Murder

Appellant Hart testified at trial, denying any role in the shooting, and rebuking any assertion that he had any knowledge that the shooting was going to occur. (R. p. 972, lines 19-24; R. p. 1021, lines 20-25). He testified he was "completely responsible for" picking up and "disposing of the weapon." (R. p. 973, lines 2-8). Appellant testified that Deloach drove him to the dirt road where the shooting occurred: "When we pulled up, the lights were on, but when [he and the victim] got out of the car Tevin [Deloach] turned the lights off. When I saw Wallace come out of the cut as he calls it, me and him were talking side by side and he told her to walk ahead because me and her – she looked shocked at first when she saw him, I guess because they had a situation, and in the midst of that conversation he shot her in the head." (R. p. 1014, lines 16-23). Then Appellant picked up the gun and ran back to the car. (R. p. 1015, lines 10-18).

Appellant did not deny being a drug dealer, and testified that he was aware that he was

the last person with the victim, others knew he was going to pick her up that night, and that he was aware he would be suspected of the murder. (R. p. 973, line 22 – p. 974, line 23; R. p. 976, lines 3-8). He denied confessing to others and denied threatening others as well. (R. p. 974, lines 13-25; R. p. 1011, line 22 – p. 1012, line 8). He denied having any conversation with Washington, his supplier, about somebody needing to "take out" the victim and agreeing to take care of that for him in exchange for crack. (R. p. 981, line 3 – p. 983, line 9). He denied calling Washington after the shooting to report that it was done. (R. p. 983, lines 12-15). He testified he ran to his family in New York instead of reporting to law enforcement because he was nervous and did not want to snitch on Wallace. (R. p. 996, line 11 – p. 998, line 16). He testified that he was high and drunk when the detectives interviewed him in New York and remained that way fifteen hours later during and after his transport back to South Carolina. (R. p. 999, lines 2-7; R> p. 1004, line 10 – p. 1005, line 14).

ARGUMENT

I. The trial court did not abuse its discretion when it allowed the State to equate malice with evil during its closing argument.

A. Standard of Review

"A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). A prosecutor's statement during closing argument is impermissible if determined to have "by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). "The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial." *State v. Northcutt*, *supra.* "An appellant must prove both an abuse of discretion and resulting prejudice to warrant reversal." *State v. Navy*, 370 S.C. 398, 412, 635 S.E.2d 549, 556 (Ct. App. 2006), *aff'd in part, rev'd in part on other grounds*, 386 S.C. 294, 688 S.E.2d 838 (2010).

Moreover, any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an "examination of the entire proceedings" in context. *Id.* at 643, 94 S.Ct. at 1871; *State v. Northcutt*, *supra* ("We must review the [closing] argument in the context of the entire record.").

B. The State's Definition of Malice as Evil is Supported in Law and Fact

The State introduced the elements of the offense of murder early on in its closing argument. (R. p. 1073, line 5 – p. 1074, line 1). In describing malice, the State argued it was "a dark word," "an evil word." (R. p. 1074, line 10). "It's a word that talks about, in this case, an

execution. Not just ill will between two people, not an argument between somebody that went bad. Not even a robbery that goes bad, but pure evil. Evil walks the streets. Evil lives in Lexington County." (R. p. 1074, lines 10-15). The trial court overruling Appellant's objection,[5] the State concluded this argument: "Evil is in this courtroom. John Christopher Hart, premeditated, filled with malice with an evil heart, put a gun to the back of Paula Justice's head, pulled the trigger and left her for dead." (R. p. 1074, line 24 – p. 1075, line 2).

The trial court's basis for overruling Appellant's objection to the "evil characterization" was that the State could argue that it believed it had met its burden as to malice, an element of murder, "and the definition of it." (R. p. 1074, lines 16-22; R. p. 1118, lines 7-10). In so ruling, the trial court did abuse its discretion. "Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, *supra* at 222, 641 S.E.2d at 881. The closing's "content should stay with the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The State's closing "must not appeal to the personal biases of the jurors," nor should it "be calculated to arouse the jurors' passions or prejudices." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).

Appellant was tried for a Lexington County murder, an element of which is malice. S.C. Code Ann. § 16-3-10. "[M]alice as an essential ingredient of murder does not necessarily import ill-will toward the individual injured, 'but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.'" *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957) (quoting *State v. Heyward*, 197 S.C. 371, 15 S.E. 669, 671 (1941). "It

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[5] Which Appellant renewed after the completion of the closing argument in conjunction with a motion for mistrial, which was also denied. (R. p. 1117, lines 1-10).

is a wicked condition of the heart. It is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation . . . ." *State v. Gallman*, 79 S.C. 229, 60 S.E. 682, 686 (1908). "The Latin *malitia* means badness, physical or moral — wickedness in disposition or in conduct — not specifically or exclusively ill-will or malevolence; hence the malice of English law, **including all forms of evil purpose, design, intent, or motive**." John Salmond, *Jurisprudence* 384 (Glanville L. Williams ed., 10th ed. 1947) (emphasis added). Put more succinctly, malice is ill will or wickedness of heart. Black's Law Dictionary (10th ed. 2014) ("malice").).

Given the meaning of malice, the State's use of "evil" in its closing argument in no circumstance rendered the trial fundamentally unfair. *Donnelly v. DeChristoforo*, *supra.* "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Humphries v. State*, 351 S.C. at 373, 570 S.E.2d at 166 (2002). With malice as an essential element of murder, it follows that the State could appropriately argue to the jury that the element of malice, by another definition, equated with evil. Indeed, the jury was properly instructed that malice may be equated with an evil intent. (R. p. 1126, lines 17-21). And, supported by our jurisprudence's other intonations of the term malice, the State can freely argue to the jury that the Appellant acted with the requisite criminal intent: "a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." *State v. Mouzon*, *supra.*

The prosecutor's equating malice with evil also did not reach to Appellant's character. The syntax in which the State utilized the term evil did not equate with the Appellant himself, but rather the idea that the element of malice lurked in the actions presented. *Contra State v. Day*, 341 S.C. 410, 423-24, 535 S.E.2d 431, 438 (2000) (use of defendant's nickname "outlaw"

23 times during closing argument without purpose of proving any manner in controversy determined prejudicial impugnment of defendant's character); *contra State v. Hawkins*, 292 S.C. 418, 422, 357 S.E.2d 10, 12-13 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ("Solicitor's intemperate" use of defendant's nickname "Mad Dog" a due process violation where evidence not overwhelming, use of nickname was not an invited response, and the trial court "did not clearly admonish the jury that arguments of counsel could not be considered as evidence"). Rather, the argument was crafted to highlight the element of the offense the State sought the jury to apply to the act charged. (R. p. 1074, line 1 – p. 1075, line 2; R. p. 1097, lines 2-4).

More, the prosecution's closing argument cannot be found to have prejudiced Appellant when considered "in the context of the entire record." *State v. Northcutt*, *supra.* Like the murder charge itself, the State delivered a closing argument mindful and reflective of the facts of the case: the victim suffered a fatal execution-style gunshot wound to the head. (R. p. 648, line 15 – p. 651, line 19). Evidence supported the State's theory that Appellant killed her because his drug supplier, Jeremy "Munchkin" Washington, directed him to complete the hit as retaliation for the victim's simultaneous entanglement as a middle-man drug dealer and confidential informant for law enforcement. (R. p. 422, lines 10-25; R. p. 426, lines 4-8; R. p. 534, line 8 – p. 535, line 6; R. p. 572, line 1 – p. 573, line 5; R. p. 837, line 25 – p. 838, line 19; R. p. 847, lines 22-24). It is reasonable to infer from the presentation of evidence, and thus permissible to argue, that the killing occurred at the hands of Appellant and that the circumstances of the murder equated with an evil act. *Humphries v. State*, *supra.*

II. Appellant volunteered an inculpatory statement to law enforcement while he was in custody but not subject to custodial interrogation. Thus, the trial court appropriately admitted the statement as one volunteered absent any *Miranda* requirement.

A. Standard of Review

A trial court's totality-of-the-circumstances determination of the voluntariness of a defendant's statement will not be disturbed absent an error of law. *State v. Franklin*, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989). The clear error standard binds the appellate court to the "the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *State v. Corley*, 383 S.C. 232, 239, 679 S.E.2d 187, 191 (Ct. App. 2009), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011).

B. Appellant Volunteered a Statement Outside of Interrogation

When law enforcement in Lexington County learned that Appellant was in custody in Utica, New York, Sergeant Mefford contacted that law enforcement agency. (R. p. 225, lines 4-10). Mefford "had to make a decision [ ] whether or not to send the investigators there to try to make an attempt to speak with [Appellant]." (R. p. 224, lines 21-24; R. p. 228, line 25 – p. 229, line 2). Mefford intended simply to contact to the agent in New York to "get an idea of Mr. Hart's demeanor and whether or not he was going to speak" with the South Carolina officer(s), but the New York agent put Appellant on the phone with Mefford. (R. p. 225, lines 13-21). Mefford did not have knowledge concerning whether Appellant had been Mirandized. (R. p. 226, lines 14-17).

With no intention of interrogating Applicant, Mefford identified himself to Appellant over the phone. (R. p. 225, line 21 – p. 227, line 12; R. p. 228, lines 19-25). The extent of

Mefford's communication with Appellant was to ask "him if he understood what he was being charged with" and to ask "if he was willing to speak" with investigators from South Carolina if they arrived in New York. (R. p. 225, line 23 – p. 227, line 25). Mefford "was not prepared to willing to do" any type of telephonic interview with Appellant or divulge any of the details of the investigation at that time: "That's now how you do an interview for this serious nature of these charges . . . I explained to him that I would not discuss any kind of evidence over the phone." (R. p. 227, lines 1-12). Mefford, who spent nineteen years with the Lexington County Sheriff's Department, furthered that he acted in the same manner as he would have in the initial stage of any interview when he first asked Appellant if he was willing to speak. (R. p. 224, lines 7-9; R. p. 228, lines 21-23).

Appellant responded by questioning Mefford whether he had found a gun with his fingerprints on it. (R. p. 227, lines 7-12).

Mefford's testimony was reviewed at a pre-trial hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), and Appellant's objection to the admissibility of Appellant's response renewed during a sidebar prior to the State's presentation of Mefford at trial. (R. p. 656, lines 6-13; R. p. 748, line 23 – p. 749, line 13); *see also State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (requiring, for issue preservation, an additional objection contemporaneous to the evidence's introduction, even if the court ruled upon its admissibly *in limine*). The trial court upon each instance ruled Appellant's response to Mefford admissible, finding "the tenor" of Mefford's question concerned whether investigators should be sent to New York or whether extradition proceedings would occur. (R. p. 229, line 23 – p. 233, line 13).

The trial court correctly interpreted Mefford's actions as allowable without (or prior to)

the need for *Miranda*,[6] that Appellant's "voluntary comment came before he could do that," and that Appellant's comment was "not responsive" to the question asked. (R. p. 231, lines 2-15). As found by the trial court, the nature and tone of Mefford's telephonic introduction to Appellant did not reach to that of a custodial interrogation. Mefford did not subject Appellant to interrogation when asking him if he would be willing to speak with officers from South Carolina if they arrived in New York because that question was not likely (nor was it calculated) to elicit an incriminating response. (*See* R. p. 232, lines 17-23). Thus, Appellant was not required to have been Mirandized by Mefford prior to the extent of their conversation. Further, any non-responsive answer by Appellant is admissible as an uninvited reply.

Miranda is required only "if a suspect in custody is subjected to interrogation. Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *State v. Easler*, 322 S.C. 333, 341–42, 471 S.E.2d 745, 750 (Ct. App. 1996), *aff'd as modified*, 327 S.C. 121, 489 S.E.2d 617 (1997); *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (citing *Arizona v. Mauro,* 481 U.S. 520, 107 S.Ct. 1931 (1987)).

In formulating the definition of interrogation, the United States Supreme Court has pointed out that "the concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Rhode Island v. Innis,* 446 U.S. 291, 299, 100 S.Ct. 1682, 1688 (1980). The Supreme Court defined interrogation as a circumstance that "must reflect a measure of

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6 *Miranda v. Arizona*, 384 U.S. 486, 86 S.Ct. 1602 (1966).

compulsion above and beyond that inherent in custody itself." *State v. Howard*, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988).

But of import here, "*Miranda* warnings are inapplicable to volunteered statements which are not the product of interrogation." *State v. Easler* at 342, 471 S.E.2d at 750 (citing *State v. Howard,* 296 S.C. 481, 374 S.E.2d 284 (1988)). An inculpatory oral statement not made in response to any interrogation is deemed voluntary and admissible. *State v. Kennedy*, 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct. App. 1996), *aff'd as modified,* 333 S.C. 426, 510 S.E.2d 714 (1998). "Volunteered statements of any kind are not barred by the Fifth Amendment." *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)). Our courts consistently uphold these types of volunteered statements to law enforcement. *State v. Primus*, 312 S.C. 257, 258, 440 S.E.2d 128, 128 (1994) (statement wholly volunteered by defendant outside of custodial interrogation admissible); *State v. Howard*, 296 S.C. at 489, 374 S.E.2d at 288 (statements made by defendant to his federal probation officer during a parole visit admissible where they occurred outside of any express questioning and where agent's statements were not likely to invite an incriminating response); *State v. Thompson*, 276 S.C. 616, 623, 281 S.E.2d 216, 220 (1981) (conversation initiated by defendant during fingerprinting process admissible where officer's statements were not reasonably likely to elicit an incriminating response).

Inculpatory statements have been deemed nonresponsive, voluntary, and admissible even when uttered immediately prior to law enforcement's issuance of *Miranda* warnings. *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989). In that case, the defendant made a series of damaging statements at the point where he was being advised by an investigator that he was being arrested for murder and that there was an ongoing investigation into a murder at a Holiday Inn. *Id.* at 135-36, 382 S.E.2d at 912-13. When the investigator in that case told the

defendant he wished to advise him of his rights, the defendant uttered that "all [he] did was hold him while [another person] beat him." *Id.* at 135, 382 S.E.2d at 912, The trial court admitted, and the appellate court upheld, the defendant's remarks as voluntary and "spontaneous utterances" made while interrupting the investigator, whose own statements during his arrest of the defendant did not amount to custodial interrogation. *Id.* at 136, 382 S.E.2d at 913.

In this case, Mefford asked Appellant "if he understood what he was being charged with" and "if he was willing to speak" with local law enforcement if Mefford sent them to New York. (R. p. 225, line 23 – p. 227, line 25). Mefford explained to Appellant that he would "not discuss any kind of evidence over the phone." (R. p. 227, lines 1-12). Appellant argues that because questions were asked, *Miranda* must apply. (Br. of App. at 18-20). But the circumstances of Mefford's contact with Appellant were not likely to elicit an incriminating response. Similar to *State v. Franklin*, *supra*, Appellant reacted to Mefford's communication in a non-responsive manner, volunteering a remark in response to Mefford's advising him of the charge against him. Mefford did not ask Appellant for any answers regarding the origin of the charge. Mefford was trying to work out logistics because he was faced with a suspect in custody a fifteen-hour drive away from his jurisdiction. *Miranda* was not required at this juncture. *Id.*; *see also State v. Kennedy*, *supra*; *State v. Easler*, *supra*.

The circumstances of Mefford's phone call failed to meet those in which Appellant could be found subject to custodial interrogation. Mefford, like the officer in *Franklin*, was neither expressly questioning Appellant about the charges levied against him, nor was Mefford executing the functional equivalent of express questioning. The conditions of their conversation did not subjugate Appellant to the will of the examiner. *Rhode Island v. Innis*, 446 U.S. at 299, 100 S.Ct. at 1688; *State v. Howard*, *supra*. Indeed, there was no examiner. While it is undisputed

that he was in the custody of a local agency in Utica, New York, at the time of the phone call, Appellant had no face-to-face contact with any law enforcement officer in South Carolina. That is to say, law enforcement was not towering over Appellant requiring him to speak to any officer or provide any answers in furtherance of the investigation. The circumstances of the phone call cannot be equated with an ordinary interrogation, which occurs in-person, sometimes in the presence of more than one law officer, and in a closed room where there may be audio or video recording taking place. There existed at the time of this phone call no physical or mental threat to overpower the will of the defendant. Thus, Mefford's telephonic contact with Appellant failed to present in a manner likely to elicit an incriminating response.

Because Mefford was not seeking to further the investigation but rather acted to ascertain the logistics required to transport Appellant to South Carolina, Appellant's statements in response to Mefford were admissible as statements made outside of custodial interrogation. *State v. Franklin*; at 136, 382 S.E.2d at 913. The circumstances in which Appellant responded to Mefford lacked those which may be found to have overpowered the will of the defendant. Thus, Appellant's reactionary statements made during the phone call were properly admitted as voluntary statements made without need for *Miranda*. *Id.*; *State v. Easler*, *supra*; *State v. Primus*, *supra*; *State v. Howard*, *supra*; *State v. Thompson*, *supra*; *State v. Kennedy*, *supra*.

C. Harmless Error Applies

"[A]ny error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis." *State v. White*, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014). "The failure to suppress evidence for possible Miranda violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt." *State v. Lynch*,

375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct. App. 2007).

If the statement offered in response to Mefford's telephone contact is deemed the product of custodial interrogation, any error in the trial court's admission of the statement cannot be said to have contributed to the verdict obtained. As an initial consideration, any focus by Appellant on fingerprints was not corroborated by any forensic evidence presented at trial. Analysts did not recover any fingerprints from the weapon recovered from the pond. (R. p. 587, lines 1-11). Moreover, even had fingerprints been found, Appellant admitted at trial that he disposed of the gun himself, and that he picked it up from the scene following the murder. (R. p. 963, lines 2-8). Thus, any error in the admission of Appellant's telephone statements about fingerprints on the gun proves harmless when considered in the context of the entire trial because they do not reach to any fact in dispute.

III. No abuse of discretion occurred in the trial court's denial of Appellant's motion for continuance because the discovery at issue was disclosed over a month prior to trial and Appellant has failed to demonstrate how he was prejudiced by the manner of the particular disclosure argued on appeal.

A. Standard of Review

"Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *State v. Kerr*, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998). The determination of whether a trial court has abused its discretion in denying to levy sanctions for a State's disclosure or nondisclosure during the discovery process is fact-intensive, turning on a discernment of prejudice caused by the method of disclosure. *See id.*; *State v. Tanner*, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989) (relying upon *State v. Squires*, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966) ("There is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points in their behalf could have been raised had more time been granted for the purpose of preparing the case for trial.")); *see also State v. Sims*, 304 S.C. 409, 417, 45 S.E.2d 377, 382 (1991) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.").

B. Appellant Fails to Demonstrate that any Disclosure Occurred "On the Eve of Trial"

In the months and weeks leading up to his May 22, 2017 trial date, Appellant raised a series of discrete discovery motions, most of which were resolved in timely fashion. (R. pp. 1-56). On May 8, 2017, Appellant moved for a continuance citing in support of his motion delayed disclosures of supplemental discovery by the State and a need by Appellant to fully investigate those materials. (R. pp. 43-56). To the extent the State was characterized as only recently

disclosing a bevy of discovery, the record of this hearing established that those disclosures were largely duplicative of materials provided at an earlier time. Appellant had been represented by multiple lawyers over time, and the State re-produced discovery to Appellant's most recent trial counsel out of an abundance of caution. The trial court declined to finally decide the motion at that time. (R. p. 54, line 11 – p. 56, line 2).

Appellant renewed this motion following jury selection and the trial court denied the request for continuance on the basis that (1) Appellant was prepared to go forward in March but the trial was continued for reasons outside of Appellant's control, and (2) any materials produced near the time of trial only contained a limited amount of new, non-duplicative, information from that already disclosed. The trial court granted Appellant leave to renew the motion at any point during trial. (R. p. 137, line 23 – p. 181, line 19). Moreover, a series of motions filed by Appellant demonstrated that the disclosures complained of prior to the start of trial on May 22 were largely requested by Appellant just the week prior and produced in due course thereafter. (R. p. 155, line 2 – p. 164, line 23; R. p. 174, lines 2-25; R. pp. 1156-67; R. pp. 1178-1204).

Appellant argues on appeal that the court abused its discretion in denying the continuance motion because the complete reports of interviews with Jeremy Washington were belatedly disclosed to the prejudice of Appellant. (Br. of App. at 22-23; R. p. 164, line 24 – p. 165, line 25). Specifically, Appellant cites to *two pages* of a 79-page report by Spivey as containing the late-disclosed information. (Br. of App. at 22 n.12). Jeremy Washington did not testify at trial. (*See* R. p. 564, line 22 – p. 565, line 1).

The record demonstrates that the November 9, 2016, statement of Jeremy Washington was not wholly disclosed for the first time in April 2017, but rather was produced at that time in duplicate with a limited number of new pages. (R. p. 161, line 22 – p. 165, line 23; R. p. 178,

lines 1-19). The State explained, "because of the way that the sheriff's department system formats," the report will not always be reproduced with the same pagination. (R. p. 161, line 22 – p. 162, line 5; R. p. 164, lines 10-23). The State furthered that a limited amount of new disclosures were produced in April because there existed evidence to support the State's belief that Appellant served "as a high ranking member of the Blood gang and has the ability to reach out and touch people," leading the State to take care in turning over discovery "for fear that [another's] name would be drug into this needlessly." (R. p. 174, lines 2-13).

Of additional import, the State explained that the new, supplemental, pages contained in Spivey's report which concerned Jeremy Washington were disclosed in April because Washington changed his story in April. Washington also changed his story during the week before trial, when he was ultimately transported from federal custody in California to South Carolina, interviewed by the Solicitor's Office, and charged with murder. (R. p. 180, lines 5-24; *see also* R. p. 559, line 11 – p. 565, line 21). The remainder of the Court's Exhibits admitted on this issue demonstrate that Spivey supplemented his report more than once during the pre-trial period in Appellant's case and that the State annotated the number of pages of supplementation in each subsequent discovery production. (R. p. 1140, line 5 – p. 1141, line 20; Court's Exhibit 16).

The trial court cannot be found to have abused its discretion when ruling on this continuance motion. "[R]eversals of a continuance are as 'rare as the proverbial hens' teeth.'" *State v. McKennedy*, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002) (quoting *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) and quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)). "This Court has repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the

defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial." *Id.*; *State v. Squires*, 248 S.C. at 244, 149 S.E.2d at 603. Appellant cannot demonstrate prejudice from the April disclosure nor can Appellant prevail in his claim that he was not afforded the opportunity to prepare a complete defense. *State v. McKennedy*, *supra* at 280-81, 559 S.E.2d at 856 ("Appellant was captured on video tape selling crack, and has made no showing that any new or exculpatory evidence would have been likely to surface if more time was granted."); *see United States v. Agurs,* 427 U.S. 97, 109-10, 96 S.Ct. 2392, 2400 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."); *Clark v. State,* 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

Nothing in the record indicates that Appellant was prejudiced by the April disclosure because Appellant's counsel was given notice of the complete statement with more than one month's opportunity to investigate it. Moreover, the information contained in the specific pages at issue are hardly exculpatory: ". . . Washington advised him that he was stated openly on numerous occasions that he wanted Paula dead. Washington added 'I have said that I wish someone would murder [her]. Washington also advised that others have stated that they were going to 'kill [her],' referring to Justice." (Court's Exhibit 3, "Spivey-Full Report," pp. 62-63; Court's Exhibit 16, "discovery 040717," pp. 62-63). Washington gave no indication of any "other" person whom he declared having heard say they would kill the victim. These two pages elsewhere demonstrate that Washington had a number of telephonic communications with

Appellant, including on the date of the murder, but that Washington denied speaking with Appellant specifically about killing the victim. Washington also denied hiring someone to kill the victim, but "Washington believed that Hart killed Justice on his own" and for his "own reasons." (*Id.*). Washington also stated that "Hart has already plead to the body" and told at least two other comrades at the detention center. (*Id.*). The discovery at issue thus squarely identified Appellant as someone taking responsibility for the murder.

As to Washington's reference in the April 12, 2017, disclosure to hearing "others" state they wanted the victim dead, the record reflects that Appellant had time to investigate third-party guilt. Appellant presented a third-party guilt defense. Alex Wallace provided a full confession to the murder at trial. (R. p. 938, lines 13-20; R. p. 1169-77). Regardless, Appellant testified that he was present at the time and place of the shooting and that he picked up and disposed of the handgun, but that he did not know the shooting was going to occur. (R. p. 963, lines 2-8; R. p. 1014, lines 16-23); *see also State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 ("one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose"). There also exists no indication that the State had any more time to speak with and investigate the accounts made by Jeremy Washington than did Appellant. Washington was in federal custody and was not transported to South Carolina until the week prior to Appellant's trial. (R. p. 180, lines 5-24; R. p. 559, line 11 – p. 565, line 21). In that respect, Appellant and the State stood on the same footing in investigating and parsing out the statements produced over the course of the pre-trial period.

Accordingly, the record reflects that Appellant had over a month to prepare a defense based on the disclosure of Spivey's full report and did present a third-party guilt defense. Thus,

the trial court did not abuse its discretion in denying the continuance motion. *State v. McKennedy*, *supra*; *State v. Squires*, *supra*; *see also State v. Wilkins*, 310 S.C. 81, 85, 425 S.E.2d 68, 70 (Ct. App. 1992) (The omission of such evidence "must be evaluated in the context of the entire record.").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant's conviction for murder.

Respectfully submitted,

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February 21, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN CHRISTOPHER HART,

Appellant

Appellate Case No. 2017-001291.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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