

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKEY WADDELL WILSON,

APPELLANT

APPELLATE CASE NO. 2018-000146

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The court erred by ruling it did not have the discretion, where it did have the discretion, to assure appellant received a fundamentally fair trial, by excluding testimony from law enforcement officials that they watched the entire surveillance tape which they claimed revealed appellant was the last person to enter or leave the decedent’s motel room on Saturday night before her body was discovered Sunday morning shortly after 11 am since the state allegedly “inadvertently destroyed” or “lost” 11-12 hours of critical videotape which showed the outside of the decedent’s motel room from Saturday night until her body was discovered on Sunday morning in that motel room4

Relevant facts.....4

Loud bang evidence10

Closing arguments11

Discussion.....11

CONCLUSION:.....17

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Youngblood</u> , 488 U.S. 51 (1988).....	13
<u>Block v. State</u> , 100 Ind. 357 (1885).....	15
<u>Campbell v. State</u> , 35 Tex.Crim. 160, 32 S.W. 774 (1895).....	14
<u>Chambers v. NASCO, Inc.</u> , 501 U.S. 32, 44 (1991).....	14
<u>Luce v. United States</u> , 469 U.S. 38, n. 4 (1984).....	14
<u>Nite v. State</u> , 41 Tex.Crim. 340, 54 S.W. 763 (1899).....	14
<u>Pee Dee Production Credit Ass'n v. Joye</u> , 284 S.X. 371, 326 S.E.2d 650 (1984).....	11
<u>People v. Crawford</u> , 114 Ill.App.2d 230, 252 N.E.2d 483 (1969).....	15
<u>State v. Brockmeyer</u> , 406 S.C. 324, 751 S.E.2d 645 (2013).....	3
<u>State v. Cheeseboro</u> , 346 S.C. 526, 552 S.E.2d 300 (2001).....	6, 13
<u>State v. Gregg</u> , 226 Kan. 481, 602 P.2d 85 (1979).....	14
<u>State v. Halcomb</u> , 382 S.C. 432, 676 S.E.2d 149 (Ct.App. 2009).....	5, 6, 12
<u>State v. Hatcher</u> , 392 S.C. 86, 708 S.E.2d 750 (2011).....	3
<u>State v. Jackson</u> , 302 S.C. 313, 396 S.E.2d 101 (1990).....	13
<u>State v. King</u> , 422 S.C. 47, 810 S.E.2d 18 (2017).....	15, 16
<u>State v. Mabe</u> , 306 S.C. 355, 412 S.E.2d 386 (1991).....	13
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	3
<u>State v. Smith</u> , 276 S.C. 494, 280 S.E.2d 200 (1981).....	15, 16
<u>State v. Taylor</u> , 202 Kan. 202, 447 P.2d 806 (1968).....	15
<u>Wayne Smith Construction Company, Inc. v. Wolman, Duberstein, & Thompson</u> , 294 S.C. 140, 343 S.E.2d 115 (Ct. App. 1987).....	12

Windham v. Lloyd, 253 S.C. 568, 172 S.E.2d 117(1970)..... 12

Rules

Rules 1001, SCRE 6

Rules 1002, SCRE 6

Rules 1003, SCRE 6

Rules 1004, SCRE 6, 11

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling it did not have the discretion, where it had the discretion to assure appellant received a fundamentally fair trial, by excluding testimony from law enforcement officials that they watched the entire surveillance tape which they claimed revealed appellant was the last person to enter or leave the decedent's motel room on Saturday night before her body was discovered Sunday morning shortly after 11 am since the state allegedly "inadvertently destroyed" or "lost" 11-12 hours of critical videotape which showed the outside of the decedent's motel room from Saturday night until her body was discovered on Sunday morning in that motel room?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offense of murder. R. 638 – 639. His case was called to trial on January 22, 2018, before the Honorable Benjamin H. Culbertson, and a jury. James Stanko and Eric Fox represented appellant. George DeBusk and Seth Oskin were the solicitors. R. 1.

On January 25, 2018, the jury found appellant guilty. R. 634, ll. 1-6. Judge Culbertson sentenced appellant to life imprisonment. R. 637, ll. 20-24.

This appeal follows.

STANDARD OF REVIEW

“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.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The court erred by ruling it did not have the discretion, where it did have the discretion, to assure appellant received a fundamentally fair trial, by excluding testimony from law enforcement officials that they watched the entire surveillance tape which they claimed revealed appellant was the last person to enter or leave the decedent's motel room on Saturday night before her body was discovered Sunday morning shortly after 11 am since the state allegedly "inadvertently destroyed" or "lost" 11-12 hours of critical videotape which showed the outside of the decedent's motel room from Saturday night until her body was discovered on Sunday morning in that motel room.

Relevant facts

Prior to trial, defense counsel Stanko told the judge that the state had obtained surveillance tape of the outside of the decedent's motel room at the Rodeway Inn. "And they watched from Friday, [May 20th, 2016] at about 3 p.m. all the way through until the morning of the 22nd [of May, 2016], [Sunday morning], at about 11 a.m. when the body is discovered. They downloaded the video, provided that to us. Come to find out that the actual video that was provided was Friday, 3 p.m. *through midnight on Saturday. There's 11 hours missing.* We have -- now, we do have a statement from the officer claiming that he did download it. And in their reports they do say that they watched it. *The problem here obviously being a large portion of this case turns upon what is on that video.* We have a couple of officers saying that they watched it. But we have not had an opportunity to see that. We don't know what it is that they saw beyond what they put in the record. He was not provided that in discovery. It simply no longer exists. For whatever reason, whether it was a download problem, it simply wasn't obtained from the hotel. Whatever it is, it's not there." R. 2, l. 10 – 3, l. 15. (emphasis added).

The defense requested that the judge exclude law enforcement testimony “as to what they saw on the portion of the video (11-12 hours) that we did not receive. We believe that, you know, whether one officer saw it or eight officers saw it, the fact remains, myself and the Defendant, we never had an opportunity [to see it].” R. 3, ll. 16-24. Defense counsel argued out of fundamental fairness law enforcement officers should not be allowed to testify they watched “something on the video that we were not provided.”¹ R. 3, l. 25 – 4, l. 8.

The solicitor argued that the original video tape was not required “and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed unless the proponent lost or destroyed them in bad faith.” The solicitor claimed “there was no bad faith involved,” but the videotape was lost, taped over, or inadvertently destroyed. R. 3, l. 25 – 7, l. 17. The judge said he thought the defense would have to prove bad faith but said he was taking the matter under advisement. R. 7, ll. 12-14.

The solicitor then cited State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct.App. 2009), which he said supported his position that the testimony about what was on the missing, destroyed, or taped over 11-12 hours of videotape should not be excluded. R. 7, l. 18 – 8, l. 20. In State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct.App. 2009) this Court held that the trial court erred in refusing to admit evidence of “co-defendant Cottrell’s letter to Counts [his girlfriend] in which Cottrell allegedly revealed a personal motive for murdering Love.” This Court agreed that the exclusion of that letter showing a motive for Cottrell to kill the decedent Love, that did not involve Halcomb was error, but that it was harmless error. State v. Halcomb, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (2009). The trial judge in Halcomb, excluded the letter

¹ Management that owned the Rodeway Inn where the decedent stayed when she was murdered also owned the Day’s Inn. The surveillance camera at issue from the Day’s Inn was pointed at the Rodeway Inn and showed the outside of the decedent’s motel room making it critical evidence in this murder trial.

finding it was inadmissible under the best evidence rules, Rules 1001 – 1004, SCRE. However, this Court ruled that because bad faith was not shown in the destruction of the Cottrell to Amber Counts motive letter, that it should have been admitted. R. 8, l. 3 – 12, l. 6.

The trial judge here stated, “there is a difference between saying, here’s a letter that we lost, and saying, here’s the video that we just watched, we downloaded it for you and we’re producing it without even checking what you downloaded.” R. 8, l. 3 – 12, l. 6.

The solicitor responded: “I don’t have personal knowledge of cases where that says it’s inadmissible except under bad faith.” The solicitor also said, “I’m only concerned with ones that follow Rule 1004.” The solicitor repeated unless the defense could prove the prosecution here destroyed eleven or twelve hours of the surveillance tape in bad faith that the judge could not exclude the law enforcement testimony about what law enforcement claimed was on or not on the missing tape. R. 8, l. 3 – 12, l. 6.

Assistant solicitor Oskin said there were in reality there was closer to twelve hours of missing videotape from “midnight to noon,” Saturday night to Sunday morning. R. 12, l. 14 – 15, l. 17. The judge again repeated he would take the matter under advisement. The solicitor said the state contended – for convenient reason -- that the murder did not take place during the hours that were missing on the surveillance tape so, in the state’s view, it apparently did not matter. It claimed: “[N]o one else went in or out of the room during that (missing videotape) time until the body was discovered by housekeeping, or by hotel staff.” R. 15, ll. 15-22.

The following day, the judge, citing State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), ruled that the state had the right to proceed with testimony about what allegedly was on the destroyed or lost videotape unless it could be shown that “the state did destroy the evidence

or lost it in bad faith, or that the evidence possessed an exculpatory value. I mean, I agree, that's burden shifting to me, but the appellate decisions are what they are." R. 18, ll. 5-16.

Defense counsel Stanko replied that "the failure of the state to preserve that twelve hours' worth of video is denying Mr. Wilson the right to a fundamentally fair trial. He simply cannot get that video any other way. The only way that we could have gotten the video to begin with was from the state. They did not -- they simply did not preserve that." The defense admitted that it could not prove bad faith, but argued that fundamental fairness and appellant's right to a fair trial dictated that the state should not be allowed to offer testimony during its case as to what allegedly occurred on the eleven to twelve hours of missing videotape that they allegedly watched and they then destroyed or lost. R. 18, l. 5 – 20, l. 9.

The judge responded, "Mr. Stanko, I agree with you 100 percent, but the Supreme Court and the Court of Appeals doesn't. That's where I am in this juncture. I've got to follow the appellate decisions." R. 20, l. 10 – 21, l. 8.

The judge offered that he thought he had discretion as far as a jury charge on "spoliation of evidence" at the close of the trial, but that the appellate decisions mandated that he could not grant the defense's requested relief to exclude law enforcement testimony about what was allegedly on the missing videotape. R. 20, l. 10 – 21, l. 8.

In appellant's statement to the police, where he was not told the decedent had been murdered, he told the police he met the elderly decedent – she was in her eighties and appellant was in his late sixties – on a city bus. He helped the "bag lady" like decedent check into the Rodeway motel on Friday. Appellant came back to the motel on Saturday and he assisted the decedent with moving from the third floor room to the second floor room because the decedent

did not like heights. The decedent was fine when appellant left her on Saturday in her motel room, Room 211. Appellant's statement, State's exhibit 2, is on file with this Court.

Detective Peter Woods of the Myrtle Beach Police Department investigated this homicide at the Rodeway Inn, where the decedent's body was discovered by motel staff on Sunday morning, May 22, 2016 about 11:15, after she did not check out at 11:00. Her body was found fully clothed in the bathtub with the water running.² R. 97, l. 9 – 100, l. 20.

Woods said that he watched most of the surveillance tape "of Saturday, Saturday day into Sunday morning." R. 100, l. 5 – 104, l. 11. Woods claimed on Sunday morning, "I saw video at the hotel of housekeeping going in [the room] and then the police arriving later on that Sunday morning." R. 103, l. 25 – 111, l. 8. Woods said on redirect examination that from the time appellant left the decedent's motel room at about 8 o'clock on Saturday night, until housekeeping went into that motel room on Sunday morning, he was certain that no one except appellant entered that room. R. 113, l. 3 – 115, l. 20.

After Woods' testimony, the defense told the judge they wanted to ensure that they renewed their objection "to anyone being able to testify about the video that began from midnight [Saturday night] onward." The judge responded he understood the defense motion in limine to exclude that testimony, and that he ruled against the defense. The judge told defense counsel that their objection in this regard was preserved. R. 119, l. 5 – 120, l. 6.

The defense noted that they could either renew their objection with each subsequent witness or that the objection could carry forward "through each of those witnesses, whichever way you would prefer, sir." The judge responded that he assumed the defense objection was on

² Dr. Proctor, the pathologist, testified that the decedent had suffered blunt force trauma to her face, and she had been strangled. She had not been sexually assaulted. R. 228; R. 232; R. 235; R. 344:

the same grounds that it had earlier argued. Defense counsel confirmed it was “the exact same objection for each one of them.” The judge repeated that that objection had been overruled, and it remained overruled. R. 119, l. 5 – 120, l. 6. The judge’s assurances to defense counsel in this regard preserved the defense’s objection to state witness testimony about what was allegedly seen on the destroyed, lost, or missing 11-12 hours of surveillance tape.

James Barfield, who installed and was responsible for the cameras at the Rodeway Inn and the Days Inn Hotel next door, had a lengthy criminal record, and even a pending drug charge when he testified as a state’s witness. Barfield testified that he also watched the tape – out of curiosity – and he maintained that no one other than appellant entered the decedent’s motel room, Room 211 at the Rodeway Inn, between Saturday night and the decedent’s body being found on Sunday morning. R. 128, l. 12 – 129, l. 20; R. 131, ll. 7-21; R. 134, ll. 2-5.

SLED agent Jade Roy testified that he downloaded the videotape on the morning of Monday, May 23, 2016 “to our network drive at the police annex onto our computer system.” Roy said that no one checked to be sure that the video had been properly downloaded. R. 172, l. 7 – 175, l. 19.

Roy testified he had watched the tape on more than one occasion and repeated that appellant was the only person who came or left the decedent’s motel room from Saturday night at 8:06 until the decedent’s body was discovered on Sunday morning. R. 175, l. 20 – 176, l. 5; R. 170, ll. 2-11.³

³ Myrtle Beach police evidence custodian Malinda Shadone testified that the videotape from the Days Inn or the Rodeway Inn did not show up on her list of exhibits. Shadone said she did have the DVD of hotel footage for Victory Motel [appellant’s motel room], but no record of the “thumb drive or anything” regarding the videotape of the Rodeway Inn in question. R. 313, l. 11 – 318, l. 4.

Investigator Tiffany Whitmire also testified she watched the entire videotape and that appellant entered the motel room at 7:21 on Saturday evening and left at 8:06 on Saturday evening. Whitmire also maintained that no one else entered the motel room from midnight on Saturday night until the staff of the motel entered the room on Sunday morning. R. 474, l. 20 – 475, l. 25.

Loud bang evidence

Whitmire admitted on cross-examination that she talked with one witness who told her about hearing a “loud bang” in the early morning hours of Sunday before the decedent’s body was found. This witness was right next door or one room down from the decedent’s motel room, Room 211. However, Whitmire said she did not think the evidence about the loud bang was pertinent because she did not see anything on the [missing] videotape “to correspond with that during the timeframe.”⁴ R. 529, l. 4 – 530, l. 2.

Whitmire testified she did not know what happened to the thumb drive that the videotape was allegedly placed on during the investigation. She said, “[W]e recycle our thumb drives and use them to transmit cases and to pick up video evidence from different scenes.” However, she

⁴ The state presented evidence of actions it alleged make appellant appear suspicious in this case. Appellant apparently returned to his motel room at one point not wearing a shirt or his shoes or carrying a bag he previously had with him. However, none of the decedent’s DNA was found on appellant’s clothes. There was a 1-900 chance appellant’s DNA was mixed on a towel inside the decedent’s motel room but even the solicitor – “I don’t want to be gross” – admittedly downplayed the cleanliness of beach towels particularly at this motel. Appellant left his sunglasses behind in the decedent’s room, and the state alleged he took a “long way” walk home from the Rodeway motel to his motel on one occasion. The decedent’s friend, Irene Miller, from the Sunrise Motel, spoke with appellant on the phone and she testified appellant appeared “overly interested” in the decedent, her monthly check from the government, and that she told appellant to leave the decedent alone. If the decedent was missing property after she was murdered none of it was traced to appellant. Further, the jury later returned for a further definition of “circumstantial doubt” during its over three hours of deliberations – 4:49 p.m. until 7:54 p.m. -- further evidencing this circumstantial case was a difficult one for the jury. R. 415 - 437; r. 377-383; r. 506; r. 509; r. 512; r. 516; r. 628-632.

claimed, “We make sure that our thumb drives are emptied before we put anything new on them.” R. 542, l. 11 – 543, l. 3.

Closing arguments

In his closing argument, the solicitor referenced the videotape and argued that appellant was the only man who entered the motel room until the decedent’s body was found. “Find him guilty because he is guilty.” R. 595, ll. 14-19.

The defense argued that the state allegedly lost the videotape and that they were now asking the jury to “trust us, we watched it. That’s good enough.” R. 603, ll. 9-15. Defense counsel argued that while appellant changing his clothes and the fact appellant allegedly took a different path away from the motel room on one occasion may look suspicious to the jurors, that the state had not proven appellant’s guilt beyond suspicion. R. 604, l. 14 – 605, l. 20.

Discussion

The solicitor argued that under the best evidence rules that the law enforcement testimony about the contents of the destroyed or lost videotape in this case could not be excluded unless the defense proved bad faith. However, Rule 1004 states, “The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.” The law enforcement claims about what allegedly occurred on the material 11-12 hours of missing videotape in a murder case do not appear to be what Rule 1004 envisioned as “other evidence” when the original was lost or destroyed. Cf. Pee Dee Production Credit Ass’n v. Joye, 284 S.X. 371, 326 S.E.2d 650 (1984) (judge did not abuse his discretion in admitting a xerox of a note in a deficiency case where the original note disappeared after the foreclosure hearing).

Windham v. Lloyd, 253 S.C. 568, 172 S.E.2d 117(1970) (photostatic copy of deed was not admissible on ground that it was not available, lost, or destroyed).

The solicitor cited State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009) in support of his position that other evidence about the contents of missing videotape was admissible absent proof of bad faith. Halcomb held that the trial court erred in refusing to admit testimony from Amber Counts, co-defendant Cottrell's girlfriend, that Cottrell revealed a personal motive to murder the decedent on his own, without the assistance of Halcomb, in a letter to her. The letter could not be located. This letter was exculpatory of Halcomb and inculpatory of Cottrell during their joint trial. Halcomb also said this testimony about the contents of the letter supported his argument that he was entitled to a severance of his trial from Cottrell's trial.

This Court found that this error was harmless given other overwhelming evidence of Halcomb's guilt. This Court in Halcomb noted that the admission of evidence under "the best evidence rule," was also addressed to the discretion of the trial court, but that the judge erred in refusing to admit the Cottrell to Counts letter in the Halcomb case. See, Wayne Smith Construction Company, Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 146, 343 S.E.2d 115, 118 (Ct. App. 1987). This Court in Halcomb only held that the judge erred in excluding the Cottrell to Counts letter under the best evidence rule since there was no evidence the original letter was destroyed in bad faith.

The judge here initially agreed with the defense that the letter in Halcomb was a much different situation than the eleven or twelve hours of destroyed or missing videotape in this case that the state wanted to use as a sword against appellant where law enforcement members would testify that they had viewed the 11-12 hours of missing tape, and that tape conclusively showed

proved no one but appellant entered or left the decedent's motel room except appellant during that critical time.

The judge also relied on State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), and ruled he did not have the discretion to exclude the videotape in this case. In Cheeseboro, the defendant argued that the indictments against him should be dismissed or evidence regarding the murder weapon suppressed because the gun was destroyed before the defense could examine it. The Court found no error in the trial judge's ruling not to dismiss the indictments or allowing other testimony about the gun. The Court noted that the state did not have an absolute duty to preserve a potentially useful piece of evidence that might exonerate a defendant. *Citing Arizona v. Youngblood*, 488 U.S. 51 (1988).

The Court noted to establish "a due process violation, a defendant must demonstrate: (1) that the state destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." *Citing State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). *See, State v. Cheeseboro*, 346 S.C. 526, 538-539, 552 S.E.2d 300, 307 (2001). The Court found comparable evidence was available to Cheeseboro, and the exculpatory value of the evidence was not apparent.

Here, the missing 11-12 hours of missing videotape after appellant had left the decedent's motel room was undeniably material, and its exculpatory value apparent if anyone else appeared to enter the decedent's motel room. As seen, loud sounds were heard by one motel guest near Room 211 at this critical time, but law enforcement allegedly dismissed this evidence apparently

because they thought appellant was **the suspect**. This was a much different situation than the “technical” destruction of evidence claim put forth in Cheeseboro.

Further, appellant in this case did not assert a due process violation by the state that justified the dismissal of the indictment or exclusion of the police evidence on the grounds of a due process violation. The defense did vigorously argue that the judge had the discretion to assure fundamental fairness -- and appellant's right to a fair trial -- by excluding law enforcement evidence about what was allegedly on the missing 11-12 hours of surveillance video. The judge could have prevented the state from profiting from its own gross negligence to appellant's disadvantage where he faced a sentence of life without parole if convicted.

Courts have found that the judge has the inherent authority to assure a defendant receives a fair trial. Appellant understands a court's inherent authority is a power that must be exercised with caution, but inherent authority does allow a court to assure a defendant receives a fair trial. See, Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). Such inherent authority even extends to the judge's right to order a change of venue on his or her own motion. See, Campbell v. State, 35 Tex.Crim. 160, 32 S.W. 774 (1895); Nite v. State, 41 Tex.Crim. 340, 54 S.W. 763 (1899).

A court's inherent power to admit or exclude evidence provides the basis for a motion in limine such as in this case. The United States Supreme Court has, for example, long recognized such motions as within the discretionary right of the federal trial court pursuant to their inherent authority to control the course of trials. Luce v. United States, 469 U.S. 38, 41, n. 4 (1984).

Another example, courts have found that a judge has the absolute right to compel a psychiatric examination of a complaining witness under its inherent authority. See, State v. Gregg, 226 Kan. 481, 486-487, 602 P.2d 85, 90 (1979). Also found to be within the court's

inherent authority to provide a fair trial is its discretion to furnish the services of a needed expert. See, State v. Taylor, 202 Kan. 202, 447 P.2d 806 (1968).

It has also been held that the court has the inherent authority to dismiss a biased perspective juror regardless of the number of peremptory challenges available. “The courts are charged with the imperative duty of according every person accused of a crime an opportunity of being tried by an impartial jury, and to that end they are required to exercise every judicial power inherent in courts, not abridged, or taken away by some valid legislative enactment.” See, Block v. State, 100 Ind. 357, 361 (1885). See, also People v. Crawford, 114 Ill.App.2d 230, 252 N.E.2d 483 (1969).

The judge in this case had the discretion and inherent authority to do what was necessary to provide appellant a fundamentally fair trial. The judge respectfully erroneously ruled he did not have the discretion to exclude the law enforcement testimony that they had viewed the missing 11-12 hours of videotape and that appellant was the only person seen entering or leaving the decedent’s motel room prior to the discovery of her body on Sunday morning about 11:15 am.

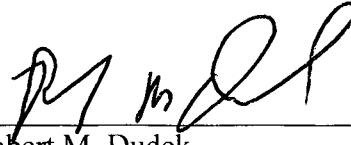
The failure to exercise discretion where the court erroneously ruled it did not have the discretionary authority was reversible error. “It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise discretion improperly.” See, State v. King, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29 (2017); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

Defense counsel in this case correctly argued that the judge had the discretion to assure appellant, in fundamental fairness, received a fair trial, by excluding this self-serving law enforcement explanation of what was on the 11-12 hours of critical evidence it lost. The judge

did not have to allow the state to be rewarded for its gross negligence in this close case. The judge's error in not understanding he had to discretion to prevent what happened here by excluding the evidence pursuant to the defense motion should entitle appellant to a new trial. State v. King, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29 (2017); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

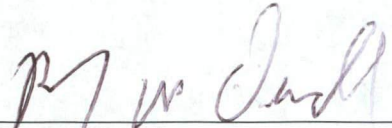
ATTORNEY FOR APPELLANT

This 19th day of September, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my 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."

September 19, 2019.



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