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THE STATE OF E OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Lee Alford, Circuit Court Judge
2011-GS-32-1505, 2012-GS-32-6044, 6042

Appellate Case No. 2013-000819

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SC Court of Appeals

THE STATE,

Respondent,

v.

RODERQUIZ ROZELLE COOK,

Appellant

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Was the Defendant provided a fair trial when the prosecution withheld cell tower site records of the Defendant and co-conspirators until the day prior to the trial, withheld additional testimony of a co-conspirator explaining her role in the alleged conspiracy until the closing of pre-trial motions, withheld a confession by a different co-conspirator that he was the triggerman in the alleged murder until the closing of pre-trial motions, and withheld additional cellphone address records of the Defendant and co-conspirators until the second day of trial?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Roderquiz Rozelle Cook, was indicted at the December 2012 term of the Court of General Sessions for Lexington County for murder (2012-GS-32-6044) involving the October 13, 2010 death of Willie Jennings. In addition, he was indicted for conspiracy to commit armed robbery (2012-GS-32-6042). The Appellant had previously been indicted at the June 6, 2011 term for attempted armed robbery (2011-GS-32-1505).

The Appellant entered a not guilty plea before the Honorable Lee Alford. The Appellant was represented by Deon O'Neill. The prosecution was represented by Assistant Deputy Attorney General Heather Weiss and Assistant Attorney General Nancy Gunter Cote of the South Carolina Attorney General's Office.

Pretrial motions were heard April 8 and April 9, 2013. On April 12, 2013, the Appellant was convicted of conspiracy to commit armed robbery, attempted armed robbery, and murder. R.p. 831, ll. 7-16. Judge Alford sentenced the Appellant to thirty (30) years for murder concurrent, five (5) years concurrent for criminal conspiracy, and twenty (20) years concurrent on attempted armed robbery. R. 845-46. Each sentence was with credit for time served.

On April 18, the Appellant made a timely notice of appeal, as amended April 24, 2013. This appeal follows.

STATE'S VERSION OF THE FACTS

On October 13, 2011, the Appellant Roderquiz Cook, set forth a plan to rob his employer, the McDonald's in Batesburg-Leesville. The plan included three other individuals: his girlfriend (Tasha Matthews), his cousin (Meon Miller), and Angelo Tucker, who provided the gun. R. 379-80, 365-66. The Appellant apparently needed money because he and Tasha were facing eviction. R. 193-96, 357-58. Cook enticed the others with a suggestion that there might be $18,000 in

proceeds from the robbery. R. 358-59. Appellant contacted Miller that morning to see about committing a robbery. R. 356-57. The plan was that Miller needed to get a gun which brought Angelo Tucker into the plan, who possessed a gun. R. 217, 367-69. The plan was for them to go to the McDonald's garbage can, seize the elder employee who was taking out the trash, and take him inside the McDonald's. While inside, they were supposed to rob and pistol whip the Appellant and everyone inside the restaurant was supposed to be place in the freezer. R. 367-370, 379-80.

The plans went wrong at the scene. Tasha picked up Meon Miller and then Angelo Tucker who had the gun and ammo. R. 372-75. Tasha dropped them off at a stoplight and then drove and waited near the Waffle House on a road. R. 221-27. Miller and Tucker waited by the trash can. R. 384-85. The victim, Willie Jennings, came out to dump the trash and an argument ensued. Tr. 388-397. According to Tucker and Miller, Miller ended up with the gun and fired a few times. One of the bullets struck Jennings in the chest, resulting in his death. R. 391-99. When Jennings was shot, Miller and Tucker fled back to the car, rather than complete the robbery. When he returned to the car, Miller pulled the gun from his waistband, wiped it, and placed it in the glove compartment. R. 399-401.[1]

Tasha's car was stopped near the crime scene, leading to the series of arrests. R. 232-38.

[1] Angelo Tucker testified that he stood on the outside of the dumpster to look out for Meon R p 585 He said he was on the outside of the dumpster where the bushes are, was looking for anything suspicious – anybody approaching or the police R p 585-86 He saw Meon walked around the front side of the dumpster and that was the last he saw of him Tucker testified that he heard something, but not somebody approaching or wheels on gravel He said that there was not a lot of people out there and nobody was standing around in the parking lot, didn't hear any wheels rolling up He said he then heard someone laughing, but doesn't believe it was Meon At that point Tucker made his move around the front side of the dumpster to see what the laughter was about R p 586 When got around found trash spread on the ground, didn't see anything until he got all the way past the trash can to the far corner When got over there, saw Meon holding his face and Mr Jennings, the victim, laying on the ground and moaning; Jennings was laying on his back, holding the bottom part of his body and was moaning, remembers him saying "Oh, oh, oh " R p 587-88 The gun was in Meon's hand R p 589-591 They then ran off to the car

ARGUMENT

I. Where no request for a continuance or mistrial is made, The disclosure of an additional admission of a co-defendant that he was the triggerperson, additional information from the Appellant's girlfriend that Appellant sold drugs in Batesburg, and disclosure of cell tower site location information did not require the trial court to sua sponte dismiss the charges or grant a mistrial where it was not requested or necessary to preserve a fair trial.

In his brief before this Court, the Appellant, for the first time, claims the disclosure of information from the State to the defense prior to opening statement of information and/or documents that had recently come into their knowledge and/or possession entitles him to either a new trial or dismissal of the charges. As set forth below, these newly requested remedies are because they were not requested at trial. To the contrary, the only relief requested was to oddly suppress at a pretrial motion inculpatory information by Meon Miller on March 29, 2013 that he was the person who shot Willie Jennings in contradiction to his September 15, 2011 statement that Angelo Tucker had shot Jennings. Rather than suppress who shot Jennings (and rely upon repudiated statements of Miller), the trial court wisely used its discretion and postponed the trial for a day to allow Appellant's counsel to assess the impact upon its strategy. At trial, absent any particularly claims concerning Tasha Matthews additional information on the cell tower site location information, no objection was made by Appellant to the evidence. Absent any showing that a right to a fair trial had been compromised, the appeal must be dismissed.

How The Issue Was Raised Below

On December 15, 2010, then counsel for the Appellant Carolyn Sutherland, made a "Motion for Discovery and Disclosure of Evidence." ROA 9-12. (Motion for Discovery, Dec. 15, 2010). It is uncontested that number items of evidence, records, statements of witnesses and

co-defendants, telephone records, and other items were revealed by the State to the defense, including ultimately his trial counsel, Deon O'Neill. In addition, the items produced during the around two and one-half years included statements by Tasha Matthews, Angelo Tucker, and Meon Miller. Mr. Miller's statement given on September 15, 2011 that included information which connected directly to Appellant Rod Cook's planning and involvement in the robbery, the disputed role of Tasha Matthews concerning her knowledge of the robbery plan, and a version of the incident leading to the death of Willie Jennings which placed the triggerman of the shot as Angelo Tucker, not Meon Miller.[2]

The record of the pretrial motion hearing on April 8, 2013, counsel for Appellant filed, among other matters a "Motion for Disclosure under Riddle" and a "Motion to Reveal Concessions Plea Deals or Immunities", both dated April 8, 2013. ROA 1-4,5-8. At the outset, he sought out information from the prosecution requesting notes, statements, or changes from witnesses that may be useful for impeachment. R. 17-18.

Assistant Deputy Attorney General Heather Weiss responded that the State had turned over everything that had come into its possession. R. 18. She declared that last night (Sunday April 7) she had provided notes that they had received from a co-defendant's lawyer. She stated that it had provided cell tower site location information and would provide any additional cell phone tower information once it is in their possession. R. 17-18. The prosecutor noted that the defense had the cell phone records for "a long time" prior to the trial. R.p. 17, ll. 3-1. She stated the cell tower site location information had come up yesterday. R.p. 17, ll. 8-14.

2 The State's version of the crime was that Miller was the shooter However, its theory of Appellant's guilt was related to Cook's planning of the crime and guilt under the "hands of one, hands of all" theory

As to any information from witnesses and co-defendants in response to the so-called Riddle motion, the prosecutor stated they had turned over notes they had received from the co-defendant's attorneys. R. 18-19.

Counsel O'Neill specifically asked "have they spoken to any co-defendant, Tasha Matthews, Meon Miller, Angelo Tucker, since the last statement I had from those individuals that either written or verbally contradicts anything they said previously?" R.p. 19, ll. 23-25. The prosecutor initially responded "there's nothing – I am not aware of anything that's contradictory to anything they said before." R.p. 19, ll. 23-25. [This last statements was corrected by Assistant Attorney General Cote immediately after the lunch break].

Concerning any deals to witnesses, the prosecutor responded that there were no deals offered by the State to any witness or co-defendant. R. 20-21. Rather, she stated that the only offer had been made to the Appellant. R.p. 20, l. 22 – p. 21, l. 20.

Subsequently, after a speedy trial motion was denied and a lunch break, Assistant Attorney General Nancy Cote stated that they had reviewed their notes over the break and had provided additional information to counsel O'Neill. R. 84. Counsel for Appellant stated one of the new items concerned additional information learned from Tasha Matthews, a co-conspirator and driver of Millen and Tucker to the crime site, who had stated that Cook was dealing drugs in the Batesburg-Leesville area and that Ron (Appellant) and Meon had done drug deals. R. p. 85, ll. 20-23.

An additional item was an oral statement by Meon Miller which was given in pretrial preparation on March 29, 2013. The State advised that Miller had changed his testimony from witnessing Angelo Tucker shoot Jennings to describing that Miller himself had shot Jennings. R.

86-98. This new information varied from the September 15, 2011 statement of Meon Miller that defense counsel had been provided wherein he denied shooting and placed the blame on Tucker.

The defense claimed it should be suppressed under Rule 5 and the U.S. Constitution because it changed his strategy. He claimed his strategy was that Meon Miller was clearly the triggerman from the evidence and that his statement in 2011 to the contrary revealed he was <u>not</u> a credible person. He suggested that now that he has admitted doing the shooting that this makes him more credible than less credible and therefore hurts his case. O'Neill suggests that since Miller's earlier statement tied Cook as planning and directing the McDonald's armed robbery, that this revision hurt his case and changes his whole strategy R.p. 84, l. 21 – p. 85, l. 12. He complained that learning this information moments before the opening state changed the premise of his defense. R. 86.

The prosecution stated that they had just talked with Miller on March 29 when he revised his role to be the triggerman. She noted that Miller still asserted both (he and Tucker) were involved, but that he did the shooting. Assistant Attorney General Weiss stated under the hand of one hand of all theory, it did not matter to the State whether Miller or Tucker was the triggerman because both were there and involved in the crime when Jennings was shot. R. 85. Further, Miller's statement now is essentially "I shot him, but I didn't mean to kill him." R.p. 86-p. 87, l. 7. The State contended that this new information could not change the defense.

O'Neill responded that the focus of the change concerns the level of credibility that Meon Miller has. R. 87-88. His defense was based upon a claim that the State was relying upon a person "who has no credibility", but now he has admitted his role. [Oddly, the defense asserts that Miller is the triggerman, but does not want him to acknowledge that he did it]. He states that it is not fair to be tried by ambush.

The State asserted it is the same factual scenario because now Miller has given a series of inconsistent statements still subject to impeachment and she can't change the fact he said it. She declared that Miller now claims that he is the one who fired the shot, but still said Angelo had the gun first and that Miller got it after it had dropped and he's the one that fired the shot. R. p. 89, ll. 5-9.

Judge Alford agreed that Meon Miller's new version should have been given to them sooner than today (April 8)(since it was made on March 29). R. 89-92. Judge Alford stated Miller has now given different versions and his credibility is still at issue. R. p. 91, ll. 9-15. Judge Alford stated that since it was a surprise today, he would recess until the next day to give him time to work on his defense. R. p. 91, ll. 16-21. Judge Alford noted that he did not think the change made much difference at all, but will give him overnight to address it. R.p. 91, ll. 19-21. Although the defense may think the change rehabilitates Miller, his credibility is still at issue. R.p. 92, ll. 10-24.

The State confirmed the first time they heard the admission of Miller was on March 29. R. 93-94. The State asserted it always made sense to them that Miller was the triggerman because he was instructed to go there by the Appellant, that he had pulled the gun out of his waistband and put it in the glove compartment when he returned to Matthews' car. R. 94-95. Further, in the pretrial preparation, Angelo Tucker still maintained that Miller had fired the weapon. R. 95. After further discussion, Judge Alford advised the parties to meet to resolve the disclosures and postponed the matter until the next day (April 9). R. 98-107.

When they returned the next day, the attorneys confirmed that they had met and discussed the versions of the oral statements and the inconsistencies with Miller's and Matthews' earlier statements. R. 113-125. In addition, Assistant Attorney General Cote advised the court

that the additional cell phone tower information had just been made available to them and they provided it to the defense. R. 126. Further, the defense also stated that he was satisfied with the disclosure he had received about Tasha Matthews. R. 126-130.

The trial began at 10:26 a m. with the return of the jury.

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. Tennant, 383 S.C. 245, 254, 678 S.E.2d 812, 816 (Ct.App.2009), modified on other grounds, 394 S.C. 5, 21, 714 S.E.2d 297, 305 (2011) (citation and quotation marks omitted). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Tennant, 383 S.C. at 254, 678 S.E.2d at 816 (citation and quotation marks omitted).

A. FAILURE TO PRESERVE ISSUES

The Appellant seeks the relief of a new trial or dismissal of the charges (Initial Brief of Appellant, p. 14) concerning the failure to disclose in a more timely fashion certain documents or information until the times before the trial was begun. First, a review of the record reveals that at no time did the Appellant request a "dismissal of the charges" as a sanction for either an alleged Rule 5 violation or a violation under Brady. This extraordinary request for relief was not sought below and is not properly before this Court. Alternately, it would be unwarranted under these circumstances where the matters were disclosed prior to the beginning the opening statements and taking of any testimony.

Because Appellant failed to object at the admission of the allegedly belatedly disclosed "evidence" or raise the motion for a mistrial at any time, the issues are not preserved for review on appeal. See State v. Hoffman, 312 S C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); State v. Garris, 394 S.C. 336, 348, 714 S.E.2d 888, 894-895 (Ct. App. 2011) (finding objection to the testimony after the State rested its case instead of when testimony actually admitted was insufficient to preserve and issue for the Court's review); State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object.").

The particular items he challenges were disclosed before the opening statements. The Appellant initially indicated at the Apnl 8 pre-trial hearing, after a lunch break, that the (March 29) statement of Meon Miller should be suppressed under Rule 5 and the United States Constitution. R.p. 85, ll. 6-12. He opined that the disclosure of the Miller statement admission that he was the trigger person contrary to his September 2011 statement - revised his defense strategy because it was his theory that Meon Miller was not credible in his denials that he was a triggerman against the weight of the evidence and that therefore Miller's assertion of Appellant's role in the crime was not credible is affected by the admission that he was the trigger person. R. 85, 87-88.

Further, the trial was begun after the trial judge gave the Appellant and his counsel a recess overnight by postponing that start of the actual trial for a day due to the various disclosures, particularly the disclosure of Meon Miller's March 29, 2013 revelation that he was the triggerman. R. 99-100, 105-06. Counsel indicated that he was fine with the recess and

starting the next day. R.p. 106, l. 16. At the time the court reconvened, no additional request for a continuance was made.

On April 9, 2013, before the opening statement, counsel indicated that he was "fine" concerning the April 8, 2013 disclosure of **Tasha Matthews'** additional information that she had told the prosecution that Rod Cook and Meon Miller had dealt drugs together, that Rod Cook had dealt drugs in Batesburg–Leesville, that she had taken him there when he had done that, and that she had thought when she had dropped off the co-defendants that she thought this was a drug deal. R.p. 127-28, l. 10. (I was saying I was fine with the disclosure."); R.p. 128, l l. 8-9; p. 128, ll. 8-12. ("if they want it for that limited purpose, then I won't object to it").

Concerning the **cell phone tower site information** that was revealed to the Appellant on April 7, 8, and 9 before the trial began, there was no objection by the defense to the cell phone records (State Exhibit 4, 5, 6) presented through Susan Johnson,[3] T-Mobile custodian of the records concerning the two telephones registered to Tasha Matthews and one registered to Joyce Miller. R. 163-64. Fatal to the Appellant's issue, no objection was made to State Exhibit 3, the cell tower listings of the T-Mobile Towers. R.p. 166, l. 5 - p. 167, l. 12; p. 166, ll. 20-23 ("no objection").

On cross-examination, defense counsel used cell tower site information concerning the location of certain calls made in Ridgeway and Columbia and to connect the particular times.

[3] The cell phone records (State Exhibits 4,5,6) are not the cell phone tower records at issue These phone records had been disclosed well before the other challenged material according to the uncontested statements at the trial R p 17, ll 5-7 (He's had the phone records, just as we have, for a long time)

See , e.g., R.p. 170, l. 2 – p. 172, l. 10, (Ridgeway towers); p. 174, l. 18 – p. 177, l. 7 (Columbia towers).[4]

No objection is made during **Meon Miller's** testimony to his admission of being the trigger person. No motion to suppress was made prior to his testimony related to the March 29 oral statement R. 346-351. Particularly, Meon Miller, without objection, testified:

> They (Angelo Ticker and the victim Willie Jennings) was wrestling over the gun. They was wrestling, and then the gun dropped. So I picked it up. When I picked it up he rushed me, like he was on my back. And I got the gun pointed at the ground, so I fired at the ground a couple of times.
>
> And then when he finally let me go - - when he finally let me go, I looked back, it looked like he had got shot in his leg. So I'm thinking like. " I done shot this guy." So I ran.

R.p. 388, l. 25- p. 389, l. 9. Rather than just run after the victim got the gun out of Angelo's hands, Miller stated : "I just thought to pick the gun up, you know, to continue the robbery." R.p. 391, ll. 1-3. When he picked up the gun, the victim was standing in front of him and Miller stated he told the victim to not move, but the victim rushed him and grabbed his hand and started wrestling for the gun, and Miller shot initially once into the ground and then pulled the trigger two more times. R.p. 395, ll. 17-24. Miller stated that he was just shooting into the ground to get him off of him. R.p. 396, ll. 5-10. See also, R.p. 473, ll. 5-11. After the third shot, Miller stated that he looked back and saw that the victim had let go and fallen and was hopping like he had been shot. R. 396-97. He stated that he and Angelo then ran. R. 397.

The defense cross-examined Miller on his September 15, 2011 four page statement (Defendant's Exhibit One for ID) and the inconsistencies with his present testimony. R.p. 425,

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[4] The state called James Dobbins, custodian of the records for AT&T Without objection, he presented the telephone records for two numbers which included a phone associated with the McDonald's and Tasha Matthews No objection was made to the presentation of these records R 297-98 No questions were made by the defense R 300

l. 5- p. 435; p. 474, l. 8- p. 475, l. 1, p. 484.[5] Miller stated that it was a lie in the statement when he said that the gun was in Tucker's hand when it went off and that he saw Tucker shoot Mr. Jennings. R.p. 435, ll. 5-13; p. 495, ll. 10-25.[6] As Miller stated to defense counsel concerning the September 2011 statement: "some of it's the truth, but it's a lot of lies in it." R.p. 437, ll. 16-17. He further stated he was lying in September 2011 because he was trying to get home. No objection was made to the testimony about the shooting by Miller.

Similarly, no objection was made or motion to strike the testimony of Tasha Matthews. R. 179-261. Particularly there was no objection to her testimony that Cook would sell marijuana as his other source of income. R.p.196, l. 13 –p. 197. She testified that it was not unusual for Cook to tell Tasha to bring Meon back with her to Batesburg or to pick Meon up and drive him around, which happened on a fairly regular basis. R. 214-15. She stated this was done through Cook, but she did not ask why. R. 215. Tasha stated that when she went upon Cook's direction with Meon to Sandhills to pick up Angelo Tucker, who she did not know, she saw Angelo had his bookbag with him, which she thought had drugs since she knew Meon sold drugs sometimes. R. 218-221. She stated that she initially thought she was taking him to do a drug deal. R. 220-21. [No objection]. Angelo opened the book bag and Meon stated there was a lot of ammo and Tasha then thought they had guns and bullets and that this was not a drug deal. R. 221. However, she later testified that after she dropped them off at the stoplight she stated that she would wait for them at a road by the Waffle House where she parked. R.p. 227, l. 18- p. 229, l. 3. She stated that she thought it was going to be a drug deal. R. 229-230. She stated that she then saw Meon and Angelo return to the car without carrying anything and they were arguing

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[5] The prosecution objected to the admission the Miller's written statement into evidence. R p 425, ll 17-20
[6] The copy of the trial transcript the Respondent received has duplicated various portions of Meon Miller's testimony It appears that his testimony set forth Tr p 514, l 17 – p 575, l 1 is repeated from Tr p 575, l 2 – p 635, l 13

and Meon was sweating and Angelo kept asking him what happened. R. 230-31. She stated that Meon then took the gun from out of his waistband and put it in the glove box. R. 231-32. She stated that police then pulled up to them. R. 232. On cross-examination, Tasha testified that she thought Angelo Tucker and Meon Miller were going to do a drug deal and thought that drugs were concealed in the book bag. She stated she did not have any idea about a robbery. R. 276-77. She also stated that the Appellant never talked to her about a robbery or setting up a robbery with her. R. 278-79.

Further, at the close of the state's case, no objection is raised concerning this evidence or the allegedly late disclosure. R. 695-715. Similarly, no issue was raised after the verdict concerning the alleged disclosure issues related to the statements of Tasha Matthews, Meon Miller and the cell phone tower site material.

The abandonment of the issues related to the individual pieces of evidence bars appellate review.[7] It must be dismissed.

ANALYSIS

RULE 5 ISSUE RELATED TO DISCLOSED INFORMATION.

Rule 5(a)(1)(C), SCRCrimP, provides, in relevant part:

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are

[7] Therefore, this matter may be affirmed on the lack of prejudice alone See *State v Hughes*, 336 S C 585, 593, 521 S E 2d 500, 504 (1999) (reviewing Rule 5 issue, "We need not determine here whether the report in question is exempt since we agree with the trial judge's ruling that appellant has shown no prejudice from the failure to disclose ")

intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant

In addition, Rule 5 (a)(2) and (3) provide:

> (2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), **this rule does not authorize the discovery or inspection** of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, **or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.**
>
> (3) Time for Disclosure. The prosecution shall respond to the defendant's request for disclosure no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court.

Rule 5 (c) sets forth the continuing duty to disclose and recognizes that the disclosure to the other party should be "promptly" done concerning the existence of other material:

> (c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, **he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material**.

The definition of "material" in Rule 5 has been found to be the same as in the *Brady*[8] line of cases. *State v Moses*, 390 S.C. 502, 516, 702 S.E.2d 395, 402 (Ct.App. 2010). "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.'" *State v Frazier*, 394 S.C. 213, 223-224, 715 S.E.2d 650, 655 (Ct.App. 2011) (*quoting United States v Bagley,* 473 U.S. 667, 682 (1985)). The inquiry is not whether a different result would have obtained, but whether there

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[8] *Brady v Maryland,* 373 U.S. 83 (1963).

is '"a probability sufficient to undermine confidence in the outcome'" of the proceedings. *Id* Reversal may only be granted on a Rule 5 violation upon a showing of prejudice. *State v. Hughes*, 336 S.C. 585, 521 S E.2d 500 (1999) (*citing State v Trotter*, 317 S.C. 411, 453 S.E.2d 905 (Ct. App. 1995), *aff'd in result* 322 S.C. 537, 473 S.E.2d 452 (1996)). Where the trial record supports the trial judge's decision, the reviewing appellate court should affirm. *See State v Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct.App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion."). A violation of Rule 5 is not reversible unless prejudice is shown. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006); State v. Lawton, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009).[9]

Rule (5)(d)(2), SCRCrimP provides for a variety of appropriate remedies concerning a failure to comply with the discovery dictates:

> ... the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. ...

The trial court also has discretion to declare a mistrial. *State v Garris*, 394 S.C. at 345, 714 S.E.2d at 893. It is well established, however, that the court should fully exhaust other methods before declaring a mistrial. *Id See also State v Frazier*, 394 S.C. 213, 223, 715 S.E.2d 650, 655 (Ct.App. 2011) ("mistrial should not be granted unless absolutely necessary"). A defendant seeking such radical relief "must show error and resulting prejudice to receive a mistrial." *Id* (*citing State v Council,* 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999)).

Here, the trial judge, in light of the value (if any) of the additional information, fashioned an appropriate measure of relief in allowing the defense to have a recess overnight and meet with

[9] The Lawton case involved a situation in which the State withheld strong impeachment evidence which was then used once the defendant testified at trial Lawton, 382 S C 122, 127-128, 675 S E 2d 454, 457

the prosecution team to insure receipt of full information about the witnesses oral statements to them and to adjust his strategy in light of Meon Miller's admission of being the triggerperson. And further consider what, if any, prejudice may be argued. This was not an abuse of discretion concerning the limited value in light of the evidence already presented. Respondent does not question that the information concerning the revision of Meon Miller's position as the triggerperson was subject to being turned over under Brady as an inconsistent statement and impeachment material. However, the statement was turned over prior to the beginning of trial although belatedly. However, the Appellant was given an adequate period of time to adjust from the change. As he noted, Angelo Tucker had already placed the blame on Miller. The defense theory was that Miller was clearly the triggerperson, but that he was not credible because he had placed the blame on Tucker as the shooter. Since he made an inconsistent statement and still inconsistent with Tucker's version, Meon Miller was still subject to impeachment. The striking of Miller revision would have been an abuse of discretion under the circumstances where it was disclosed and the trial court gave him time to adjust his strategy. As to the Miller disclosure, relief is not warranted. As stated previously, the Appellant attempted to impeach Miller throughout by showing the inconsistencies between the September 2011 statement, the forensic facts concerning the shooting and the evident differences with Tucker's statement. *See State v Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423- 424 (Ct.App. 1991) ("the trial judge did not abuse his discretion in not suppressing the statement for failure to respond" where "[t]he sanction the trial judge chose ... recessing the trial and affording Newell's counsel an opportunity to interview the officer to whom Newell allegedly made the incriminating oral statements, was an appropriate sanction under the circumstances.") (*citing State v Patterson,* 290 S.C. 523, 351 S.E.2d 853 (1986), *cert dismissed, sub nom Patterson v South Carolina,* 482 U.S. 902, 107

S.Ct. 2490, 96 L.Ed.2d 382 (1987)). There is no basis for finding prejudice and ordering a mistrial sua sponte where none was requested. *See State v Frazier*, 394 S.C. at 223, 715 S.E.2d at 655 ("no prejudice to be remedied by a mistrial because both the State and Frazier elicited the favorable testimony from" the witness).

At the heart of the disclosure prejudice analysis is "whether the appellant's right to a fair trial has been impaired." *State v Proctor*, 358 S C. 417, 423, 595 S.E.2d 476 (2004) (*quoting State v Taylor*, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998)). *See also United States v. Agurs*, 427 U.S. 97, 108 (1976) ("the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial"). The trial judge correctly noted the minimal value – perhaps impeachment concerning records, but not a challenge to the method or match of identification. Given the minimal value, if any, the failure to obtain paper copies could not have impaired the defense. *See Proctor*, 358 S.C. at 423-424, 595 S.E.2d at 479-480 (finding nondisclosure of DNA lab proficiency tests results was not material where information goes to proficiency only, and, even if probability estimate was reduced, the number would still be decidedly inclusive *of defendant's* profile). *See also Gilday v Callahan*, 59 F.3d 257, 272 (1st Cir. 1995) (finding "no remediable *Brady* violation" where "the evidence here taken cumulatively sheds no new light on the crime or petitioner's involvement in it."); *United States v Glaze*, 643 F.2d 549, 552 (8th Cir. 1981) (failure to disclose unrecorded inconclusive field test for drugs did not offend appellant's rights or prejudice his defense where formal testing results reported and disclosed).

A. MISTRIAL OR NEW TRIAL

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion. State v. Crim, 327 S.C. 254,

489 S.E.2d 478 (1997). "The power of the court to declare a mistrial ought to be used with the greatest caution and for plain and obvious causes stated into the record by the trial judge. The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (internal citations omitted). "The trial court should first exhaust other methods to cure possible prejudice before declaring a mistrial. The defendant must show error and resulting prejudice to receive a mistrial." Garris, 394 S.C. at 345, 714 S.E.2d at 893 (internal citations omitted).

To warrant either a mistrial or reversal based on an evidentiary ruling, the complaining party must prove both the error of the ruling and the resulting prejudice. Tennant, 383 S.C. at 254, 678 S.E.2d at 816 Id. at 254, 678 S.E.2d at 816–17 (as to the admission or exclusion of evidence); Harris, 340 S.C. at 63, 530 S.E.2d at 628 (as to a mistrial). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." Tennant, 383 S.C. at 254, 678 S.E.2d at 817 (citation and quotation marks omitted).

Recently, in State v. Jenkins, _ S.C. _, _ S.E.2d _ 2014 WL 2119009 (S.C.App. May 21, 2014), the Court of Appeal rejected a mistrial motion or a motion to strike issue concerning the prosecutions failure to disclose a fingerprint expert's file prior to the trial. The Court of Appeals noted that nothing showed the defense had tried to interview the witness prior to the trial. However, the Court noted that no one contested the victim's identity at trial. The court concluded the trial court properly refused to strike the testimony and no prejudice was shown, citing See State v. Sweet, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct.App.2000) ("A criminal defendant is entitled to a fair trial, not a perfect one.") and Tennant, 383 S.C. at 254, 678 S.E.2d

at 816 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and quotation marks omitted)); Harris, 340 S.C. at 63, 530 S.E.2d at 627–28 ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law."). As stated, the failure to present the revised version of Meon Miller's statement between March 29, 2013 and April 8, 2013 do not mandate a sua sponte mistrial where none was sought and the court gave Appellant at least until the next date – and possibly more if he had requested it. It must be dismissed.

Further, the addition to **Tasha Matthews statement** made to the prosecution about that Appellant and Meon had done drug deals and that that Appellant had done drug deals in Batesburg –Leesville did not require any sanction by its disclosure on April 8, 2013. First, as a witness statement, it was not required to be disclosed until the witness testified. Rule 5(a)(2). A similar claim was presented and rejected in State v. Patterson, 200 S.C. 523, 351 S.E.2d 853 (1986). In Patterson, the Court found that the informing of the defense, like here, on the day of jury selection of evidence of a statement interview with a witness. The Court found no violation of Rule 5 because by its clear terms it was not violated. Disclosure is not required of a statement until after the witness testifies unless otherwise ordered to be disclosed prior. There is no record that any attempt had been made to have Ms. Matthews statements revealed before she testified. The fact that the prosecution revealed before she testified should be encouraged, not criticized. Further, as noted below, there is nothing in the additional information that would bring Brady into play. There was no error. Additionally, as noted above, the defense abandoned this issue at trial.

Further, the cell tower sit location ınformation does not require extraordinary sanction suggested in the appeal. The Appellant has wholly failed to articulate how this prejudiced him. At no time did he ask for a delay in any matter about the information. This information revealed the locations of all cell tower sites. Is was not information about the conspirator's cell phone records, but could be used, with the information they already had to pinpoint what cell tower ID numbered location the call "pinged" off . This data was revealed prior to the trial and no showing has been made that the disclosure at that time deprived him of a fair trial. [In fact, the record does not reveal when he was made in the custody of prosecution agents other than the Sunday night before the first day of trial]. Nevertheless, the court did not abuse its discretion in failing to issue any sanction under Rule 5 on this disclosure.

B. Brady v. Maryland

The United States Supreme Court holding in Brady v. Maryland requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S., at 87, 83 S.Ct., at 1196. Defendants making a claim under Brady must demonstrate that 1) the evidence was favorable to the defense; 2) it was in the possession of or known to the prosecution; 3) it was suppressed by the prosecution; and 4) ıt was material to guilt or punishment. State v. Bryant, 372 S.C. 305, 314-315, 642 S.E.2d 582, 587-588 (2007) (citing Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)). "The 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley, 473 U.S. 667, 682 (1985).

The State's failure to disclose information warrants a reversal as a Brady violation only if the omission deprived the defendant of a fair trial." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988) (citing State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987)).

It is undisputed that the Appellant had the inconsistent statement of Meon Miller prior to the swearing of the jury, opening statements and his examination of Miller. This case is similar to State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) (finding no err in denial or motion for a mistrial when defendant's counsel was able to impeach victim using statement State failed to disclose); State v. Lunsford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no error in refusing to declare a mistrial when "[d]efense counsel had access to the questioned material before he resumed his cross-examination of Higgins and he elected to proceed with Higgins's cross-examination without taking advantage of the trial judge's offer to provide him with 'as much time as' he thought he needed to review the previously undisclosed evidence and to prepare for cross-examination of the witness in light of this new evidence"); and Gathers, 295 S.C at 481-482, 369 S.E.2d at 143 (finding no prejudice when the defense counsel was able to effectively cross-examine an expert witness about a statement made by the witness that allegedly was not disclosed in violation of Brady). In those cases, as in the case *sub judice*, the defendant had the information prior to the close of trial and was able to use and develop the evidence to the extent desired. Appellant's counsel elicited the information during cross-examination and proceeded without objection. Appellant, therefore, had the opportunity to address the information when it first came to light and chose not to address it. See State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (the State's failure to produce discovery material consisting of a taped interview with the prosecution witness until the morning jury selection began did not warrant a dismissal or a mistrial where the trial court allowed defense counsel to listen to the

tape before the witness took the witness stand and the trial court delayed cross-examination until the next day); State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984) (the trial court did not abuse its discretion in not granting a mistrial as a sanction for the state's failure to comply with a discovery request by not timely producing a composite drawing made from the victim's description of the robbery suspect where the defendant cross-examined the victim about the drawing).

Alternately, there is no showing that pretrial disclosure of the addition to Tasha Matthews statement was exculpatory or mitigating to Appellant. To the contrary, it was neither and it was disclosed before the jury was sworn.

Further, he has not shown, in any manner that the cell phone tower site information was either exculpatory or mitigating. To the contrary, it was disclosed to the defense. In addition, the defense used it at trial. There was no Brady violation shown related to this disclosure.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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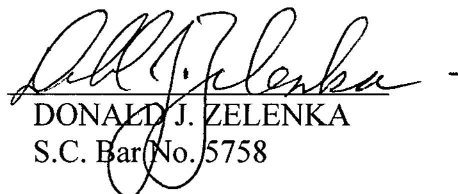

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October 31, 2014
Columbia, South Carolina.

THE STATE OF E OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Lee Alford, Circuit Court Judge
2011-GS-32-1505, 2012-GS-32-6044, 6042

Appellate Case No 2013-000819

THE STATE,

Respondent,

v.

RODERQUIZ ROZELLE COOK,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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October 31, 2014