STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHMAD JAMAL WILKINS,

APPELLANT

APPELLATE CASE NO. 2012-212387

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err by refusing to allow Appellant to present the testimony of witnesses in his case-in-chief to challenge the integrity of the police investigation in violation of Appellant's state and federal constitutional rights to present a defense?

III. Did the trial judge err in denying Appellant the ability to call witnesses in surreply where the prosecution presented new evidence on reply entitling Appellant to the right to present surreply denying Appellant's right to present a complete defense as guaranteed by the United States Constitution and the South Carolina Constitution? In the alternative, even if the prosecution did not present new evidence, did the trial judge err in denying Appellant the ability to call witnesses in surreply due to the trial judge's previous rulings denying Appellant's right to present a complete defense as guaranteed by the United States Constitution and the South Carolina Constitution?

IV. Did the trial judge err in failing to grant Appellant's motion for a mistrial where the prosecution suppressed evidence that a police officer had been implicated as the murderer and an internal investigation ensued, in violation of Appellant's state and federal constitutional rights?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant for murder on October 5, 2011 (2011-GS-40-4656). R. 1208. The prosecution, represented by Kathryn Luck Campbell, Meghan Walker, and Nicole Simpson, called the case for trial on April 9, 2012 before the Honorable Clifton Newman. Brian Shealey, Luke Shealey, and James May represented Appellant. R. 1. The jury found Appellant guilty of murder. R. 1090, lines 14-17. Judge Newman sentenced Appellant to life imprisonment. R. 1099, lines 6-7; R. 1210. By a written motion filed April 20, 2012, Appellant moved for a new trial. R. 1196. Judge Newman presided over a hearing on on the motion on June 1, 2012. R. 1101. Ultimately, Judge Newman denied the motion. R.1181, line 23 – R. 1184, line 2.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On February 3, 2009, the Bethel Bishop Apartments staff found the body of the deceased in her apartment. R. 92, lines 12 – 24; R. 95, line 9 – R. 100, line 2; R. 109, lines 15-20; R. 111, line 3 – R. 112, line 16. There were no signs of forced entry, and the apartment staff had to use a key to gain entry. R. 106, line 21 – R. 107, line 7; R. 114, lines 12-14. The police and fire departments responded. R. 117, lines 1-20; R. 131, line 17 – R. 134, line 10. During the botched[1] investigation that followed, the police obtained the deceased's phone records, which showed phone calls between the deceased and Appellant shortly before her death. R. 149, line 16 – R. 150, line 14. Despite an initial claim of following every lead and the existence of multiple promising leads, police investigators admitted to focusing solely on Appellant after learning of the phone records. R. 606, lines 4-5; R. 607, lines 10-12.

Although the apartment clearly had burned by fire, the state's expert could find no ignitable liquids. R. 159, lines 11-13. Nevertheless, the chief fire investigator for the City of Columbia concluded the fire was "the direct result of human hands." R. 180, lines 4-17. The state's pathologist, Dr. Bradley Marcus, determined the cause of death was asphyxia by ligature strangulation. R. 571, lines 19-24. However, he was unable to determine a time of

[1] Although the Columbia Police Department lost the sexual assault kit for several months, they incredibly found the kit after the DNA analyst with Richland County repeatedly requested the kit for testing. Although Richland County placed the kit into a sealed box and delivered it to the Columbia Police Department and the box was returned to Richland County sealed, the kit was not in the box. Clearly, the seal on the box had been broken, the kit removed, and the box re-sealed. R. 517, line 18 – R. 518, line 1; R. 539, line 20 – R. 542, line 20. Despite the obvious tampering with evidence, the Columbia Police Department denied any tampering or even that the kit had been lost. Rather, the explanation offered was that "occasionally," there are "times when this might happen, that an individual piece doesn't make it into a box." R. 457, line 20 – R. 458, line 21.

death. R. 590, lines 4-7. Dr. Marcus found no signs of sexual assault. R. 580, lines 3-11.[2] Based upon the autopsy, Dr. Marcus concluded the deceased had died before the fire started. R. 582, line 1 – R. 583, line 5. The toxicology report revealed the deceased had not ingested alcohol, but she had recently ingested cocaine and was a chronic user of cocaine. R. 588, lines 1-20.

The state's DNA expert from the Richland County Sheriff's Office, Rachel Grant, claimed a mixture of DNA from at least three contributors was found on a glove found in the deceased's apartment. R. 502, lines 15-24. Grant further claimed that Appellant's DNA could not be excluded from the mixture. R. 505, lines 3-8. In direct contradiction to her report and to accepted practices, Grant testified that this meant Appellant's DNA "was included in this mixture." R. 505, lines 9-11; R. 511, lines 1-12; R. 525, line 16 – R. 526, line 6; R. 527, lines 3-21; R. 558, line 21 – R. 559, line 16. Grant was forced to clarify that due to the type of DNA testing she was conducting, the DNA results could not exclude Appellant or any of his paternally related relatives, including his brother, who was employed as a maintenance man at the apartment where the deceased died. R. 512, lines 1-7. On the cloth material that was used as a ligature, Grant found a mixture of DNA from at least four male contributors. Although she testified on direct that Appellant's DNA "was included in the mixture," which was in direct contradiction of her report and accepted practices, she was forced to admit on cross-examination the testing actually revealed that Appellant or any

[2] The DNA analyst opined that the kit was negative for semen, and therefore, the analyst performed no more testing initially. R. 519, lines 15-17. When the analyst tested the kit that was mysteriously found by the Columbia Police Department, the analyst found no male profile. R. 520, lines 1-13. Notably, the DNA analyst failed to test the kit for the deceased's DNA to ensure that the mysteriously found kit was indeed the kit used to collect samples from the deceased.

paternally related male could not be excluded as a contributor to the mixture. R. 513, lines 8-20.

ARGUMENT

I. The trial judge erred in allowing a jailhouse snitch to testify about Appellant's alleged admission to a prior bad act involving the deceased where the prosecution failed to articulate an exception to the general prohibition against the admission of such evidence, failed to articulate the logical connection between the prior bad act and one of the exceptions, and failed to present evidence establishing the prior bad act by clear and convincing evidence.

Relevant facts

Pre-trial motion

Before trial, Appellant moved to exclude the testimony of Patruan Hare, a jailhouse snitch, pursuant to Rules 401, 403, and 404(b) of the South Carolina Rules of Evidence. R. 143, lines 1-8. Hare had provided a statement to law enforcement claiming to be Appellant's confidante while the two were housed together at the detention center. Appellant explained that Hare's statement could be summarized as follows: "'They started to argue. He choked the bitch but said it wasn't the same night that she ended up dead.'" R. 61, lines 14-21. Thus, the proposed testimony by Hare would be that Appellant had choked the deceased on some unknown night prior to the night of her death. R. 61, line 22 – R. 62, line 2. Appellant further explained that Hare claimed that Appellant had run from the police by sending the police on a "wild goose chase." R. 62, lines 9-14. Appellant clearly objected that Hare's testimony would run afoul of Rule 404(b), SCRE.

The prosecution countered "this goes to the weight and not the admissibility of the evidence." R. 63, lines 1-4; R. 63, lines 7-8. The prosecution's position was that Hare's statement was an admission by Appellant to choking the deceased. R. 63, line 5. Further,

the prosecution argued that the jury could decide what was credible and had "the right to hear that evidence from him." R. 63, lines 9-13. Later, the prosecutor argued the "evidence applied is generally admissible." R. 65, lines 16-20. Then, the prosecutor made clear that the evidence was being offered to show character and conformity therewith, when the prosecutor stated:

> The fact that he made [an] admission of choking her is specifically pretty significant in this case because she died as a result of that. There's nothing unusual at all in my experience - - Your Honor, I'm sure you've had more experience than I have - - for a defendant to minimize their involvement but to make certain admissions to underlying bad acts.

R. 65, line 21 – R. 66, line 3.

The judge then ruled that although there may be a need for some redaction, the entire statement would not be excluded. He elaborated:

> As far as he choked her but she didn't die that night, the evidence the state has is that the death occurred between some hour and some other hour when her body was discovered the next day.
>
> All of that would be up to the jury to kind of listen and figure out the extent to which this may implicate this defendant or not. Of course, part of their being in prison - - some of this has to be redacted, and we'll have to get into how much of it has to be.

R. 66, lines 8-17.

When Appellant sought clarification, the judge responded that Hare's testimony was admissible. "The weight that the jury would give to whether he's talking about something else or not, I don't see on its face that it's referencing some other situation other than the murder of this victim." R. 66, line 23 – R. 67, line 3.

Hare's testimony at trial

Hare testified that he and Appellant were friends prior to their incarceration at the detention center in 2011. R. 373, line 23 – R. 375, line 14.[3] While the two were incarcerated, Hare questioned Appellant about his pending case and took notes of their conversations. R. 376, lines 2-4. Appellant shared with Hare what evidence the police represented to Appellant that they had against him and how Appellant allegedly evaded the police. R. 376, lines 20-22; R. 377, line 10 – R. 378, line 14. Hare claimed that Appellant admitted that the deceased had called him on the night of her death to "chill with her." The two were in her living room on the love seat. R. 379, lines 4-13.

Concerning an alibi, Appellant allegedly told Hare that he was going to tell investigators that he was at this girl's house, but she would not vouch for him so he was going to tell the officers that he was sitting under the bridge at three in the morning. R. 379, lines 14-21.

Hare contended that Appellant said he went to the deceased's house to drink and smoke. When Appellant indicated he wanted sex with the deceased, she "wasn't with it." R. 380, lines 7-14. Then, they argued. Appellant said "he choked the bitch." **However, this was not the same night that she died.** R. 380, line 21 – R. 381, line 1. Appellant

[3] At the time of trial, Hare had been convicted in federal court for drugs and guns. He was serving a twenty-year sentence. R. 390, lines 12-16. As part of his federal debriefing process, Hare had admitted to giving false information to police in March 2009 and to giving fake drugs to his customers. R. 396, line 1 – R. 397, line 19. Hare was forced to admit that he could receive a reward for his testimony against Appellant, but denied that he had been promised anything in exchange for his testimony. He further claimed he was testifying "out of the goodness of [his] heart." R. 383, line 25 – R. 384, line 24.

objected to this testimony based upon his pretrial objection regarding Rule 404(b), SCRE. R. 381, lines 2-4.

Very confusingly, and exemplifying why Hare should have never been allowed to testify, Hare claimed that Appellant said he had strangled the deceased with a bathrobe and burned the deceased. R. 381, lines 7-10. After objections were made, Hare corrected himself to say that Appellant explained the deceased had died as a result of strangulation. R. 381, lines 23-24. Allegedly, Appellant informed Hare that his DNA was on the bathrobe, that officers had found traces of flammable gas on his clothing, and that officers found a footprint matching a shoe seized from Appellant's residence. R. 382, lines 5-19.[4] Inexplicably, the judge then allowed Hare to read his statement to police on re-direct examination despite any evidence that Hare could not remember what his statement contained or any need to refresh his recollection. R. 412, line 12 – R. 413, line 2.

On cross-examination, Hare admitted that Appellant was sharing with him what the detectives had told Appellant about the crime and Appellant was not admitting that certain evidence against him actually existed. Additionally, **Appellant never told Hare that he killed the deceased**. R. 399, line 14 – R. 400, line 2.

Discussion

The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v.

[4] The prosecution presented no evidence of a footprint or flammable gas on Appellant's clothing. These were lies used by officers during Appellant's interrogation.

Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In fact "[e]vidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). As explained by the Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation.[5] At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

Neither the judge nor the prosecutor explained how the evidence of this alleged prior bad act was admissible against Appellant under one of the exceptions in Rule 404(b), SCRE or that the act had been proven by clear and convincing evidence.

Exceptions to Rule 404(b), SCRE

[5] Due to the danger this type of evidence poses, "[e]vidence of other crimes must be put to a rather severe test before admission." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

One of the exceptions contained within Rule 404(b), SCRE is when the evidence is offered to show a common scheme or plan. Evidence of other crimes or bad acts is admissible to show a common scheme or plan when there is "a connection between the prior bad act and the present crime." State v. Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993)(citing State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979)). The connection "must be more than just a general similarity." Id. (citing State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983)). The prior bad act evidence must have a "close degree of similarity" to the crimes charged. State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009). "The evidence must be logically relevant to the particular purpose or purposes for which it is sought to be introduced." State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

In Parker, the South Carolina Supreme Court held that a previous fight between the defendant and the deceased was only of a general similarity. The two had met in the same parking lot six months prior to the fatal fight and the defendant had declined the deceased's invitation to fight at that time. 315 S.C. at 234, 433 S.E.2d at 833. The record failed to disclose the similarities or to draw a real connection between the incidents. Id.

In the instant matter, the prosecution failed to demonstrate how the incident alleged by Hare was logically relevant to show a common scheme or plan by Appellant. At best, the evidence showed a general similarity – choking. However, there was no indication that a ligature was used previously or that a fire had been set. Further, there was no temporal connection because Hare provided no time for when the alleged prior bad act occurred except that it was not the night that the deceased died.

Another exception is identity. In State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), the South Carolina Supreme Court held that a defendant's alleged statement to

another that he was fleeing from police because a female had accused him of murdering someone and he was out on bond for that murder charge "in no way" identified the defendant as the person who murdered the victim. Rather, the evidence only illustrated that the defendant knew he had been accused of murder and knew the name of the witness. Id. at 211, 631 S.E.2d at 267. Similarly, Appellant's alleged statement to Hare that he had choked the deceased at some unknown date in no way identified Appellant as the person who used a ligature to strangle the deceased and set her apartment afire on February 3, 2009.

Motive and intent are additional exceptions to the rule prohibiting the introduction of prior bad acts. As these exceptions "are closely related," Appellant will discuss them together. See State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 4 (Ct. App. 2009). On this point, the South Carolina Supreme Court has explained that

> [I]n a prosecution for homicide, evidence of other crimes committed by the defendant which are in time and circumstances so intimately connected with and a part of the crime with which he is being charged as to show a motive for the commission of the homicide or a state of mind indicating a purpose for its commission, is admissible to establish such motive or state of mind.

State v. Grainger, 275 S.C. 417, 421, 272 S.E.2d 175, 176 (1980). In State v. Sweat, 362 S.C. 117, 124-125, 606 S.E.2d 508, 512 (Ct. App. 2004), this Court held that a prior criminal domestic violence incident between the defendant and victim in an assault and battery trial was admissible to show intent and motive where the victim had pressed charges against the defendant for the prior incident, the defendant had gone to jail for the incident, and the assault and battery occurred only eleven days after his release from jail.

In State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980), our Supreme Court allowed evidence of a verbal altercation between the victim and the defendant three days prior to the killing. The Court explained that "[e]vidence of previous difficulties or ill

feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime." Id. (emphasis added). Only where the prior bad act evidence shows motive on the part of the accused and is not so remote in time as to negate its probative value may the evidence be admitted. Id.

Notably, Hare provided no time for when this alleged incident occurred. It could have occurred one week prior to the deceased's death or years prior to her death. Thus, the temporal proximity aspect is completely lacking; therefore, the prosecution failed to show the alleged prior choking was so intimately connected to the deceased's death as to show a motive. There was no evidence the deceased pressed charges against Appellant for the alleged choking like in Sweat, supra. The record disclosed absolutely no connection of cause and effect between the prior bad act evidence and the charges against Appellant.

Clear and Convincing Evidence

"Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Fletcher, 379 S.C. at 24, 664 S.E.2d at 483.

In Fletcher, 379 S.C. at 25, 664 S.E.2d at 483-484, our Supreme Court held it was error to admit the testimony of a witness who testified about observing two incidents of alleged child abuse where the prosecution presented no evidence that the defendant was the person who engaged in the abuse despite evidence in the record that the defendant was at least present at the time of the alleged abuse. Similarly, in State v. Pierce, 326 S.C. 176,

178, 485 S.E.2d 913, 914 (1997), the Court found error in permitting testimony from witnesses who previously treated the victim for a split lip and a swollen eye in the homicide by child abuse case where there was no evidence the defendant inflicted the injuries. In another homicide by child abuse case, the Court held the trial court erred in admitting evidence of the death of another child and the injuries of a third child due to a lack of evidence that the defendant had caused the death or injuries despite the children having died and acquired the injuries while in her and her husband's care. State v. Cutro, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998).

This case differed sharply from other cases where this Court has found clear and convincing evidence of the prior bad act. See State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013)(finding clear and convincing evidence of a prior bad act where the parties related their positions during a hearing and written motions and a brief, the proffered testimony was very specific and appeared credible); State v. Martucci, 380 S.C. 232, 257, 669 S.E.2d 598, 611 (Ct. App. 2008)(finding clear and convincing evidence where the witness testified about his direct observations of prior incidents and other witnesses testified about bruises and burns in this homicide by child abuse case); State v. Gillian, 373 S.C. 601, 610, 646 S.E.2d 872, 877 (2007)(finding the evidence of the defendant's involvement in a prior residential burglary to be clear and convincing where several witnesses were able to testify to his involvement and he conceded the issue); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(finding clear and convincing evidence where the alleged victim testified that the defendant previously assaulted her, the defendant was arrested and incarcerated, and another witness testified to having seen bruises on the alleged victim's arm following the assault).

During the pre-trial hearing on this matter, the prosecution failed to offer any evidence to support a finding that Petitioner had choked the deceased on some date prior to her death. The only evidence of the alleged prior choking was from a noted jailhouse snitch, who had lied to police previously and sought a reward for his testimony. Hare offered no personal observations of the alleged choking or any corroborative evidence. He simply made bold allegations in an effort to better his position within the federal prison system.

Rule 403, SCRE

Even if this Court were to conclude that the prior bad act described by Hare fell within one of the exceptions to Rule 404(b), SCRE and that the act was proven by clear and convincing evidence, this Court must find that the trial court erred in admitting the prior bad act because the danger of unfair prejudice outweighed the probative value. See Rule 403, SCRE. Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012), this Court explained the proper framework for analyzing the admission of evidence pursuant to Rule 403, SCRE. The opinion's analysis follows directly from the rule itself and the line of cases interpreting the rule. The obvious starting point in the analysis is to determine what, if any, probative value the proffered evidence has. Next, a court must examine the danger of unfair prejudice, confusion of the issues, and potential of misleading the jury, unduly delaying the case, wasting time, and needlessly presenting cumulative evidence. Finally, the court must balance those factors. Id.

Even if this Court were to determine that the proffered evidence satisfied one of the exceptions to Rule 404(b), SCRE and was proven by clear and convincing evidence, the trial

judge erred in admitting the evidence as violative of Rule 403, SCRE. Hare's claims regarding Appellant's alleged statement about choking the deceased at some unknown time in the past was not probative of whether Appellant had choked the deceased on February 3, 2009 with her bathrobe belt and set her apartment on fire. The only value the evidence offered was to paint Appellant as a bad person. The danger of unfair prejudice was great as the evidence would lead a jury to conclude that if he had done it before, he would do it again. Further, the danger of unfair prejudice was exacerbated when Hare's testimony was twisted by the prosecution to indicate that Appellant had admitted to killing the deceased. Obviously, the mischaracterization of the conversation created a high level of unfair prejudice and misled and confused the jury. In balancing the minimal probative value against the significant danger of unfair prejudice and misleading of the jury, the conclusion is obvious – Hare's testimony should have been excluded.

II. The trial judge erred by refusing to allow Appellant to present the testimony of witnesses in his case-in-chief to challenge the integrity of the police investigation in violation of Appellant's state and federal constitutional rights to present a defense.

Relevant facts

A.L. Thomas, one of the lead investigators on the case, responded to the fire at the decease's apartment. R. 595, lines 7-11. During the investigation, Thomas claimed he "followed up on every name and so forth." R. 606, line 4-5. When Thomas received the deceased's phone records, the direction of the investigation changed. R. 607, lines 10-12. The most important thing in the investigation became determining who had exchanged approximately ten calls with the deceased between 3 a.m. and 4:13 a.m. R. 607, line 24 – R. 608, line 16. Thomas soon learned that the number belonged to Appellant. R. 608, line 19 – R. 609, line 19.

On February 20, 2009, Thomas interviewed Appellant's girlfriend who stated that Appellant arrived home at 3:55 a.m. on the morning of February 3, 2009. R. 610, line 14 – R. 611, line 22. That same day, Thomas interviewed Appellant. R. 613, lines 1-6. Appellant admitted to knowing the deceased and explained that he was her drug dealer. He further admitted to delivering cocaine to the deceased during the last portion of January or early part of February. R. 613, lines 7-21. The police terminated the interview. R. 614, lines 1-2. Thereafter, the investigation remained focused on Appellant. Two years later, the police arrested Appellant for the deceased's murder. R. 635, lines 16-22.

During cross-examination, Appellant explored and questioned the quality of Thomas' investigation – particularly, his sworn testimony that he followed up on every lead. Thomas admitted that he learned the deceased had a number of male and female friends and

dated off of chat lines. R. 655, lines 2-10. Thomas admitted that he spoke to Sierra Austin as part of the investigation. Austin provided the names and descriptions of several individuals involved with the deceased. R. 656, line 13 – R. 660, line 5.

Thomas admitted that the video obtained from the apartment complex was time stamped incorrectly. Thomas estimated the video was four hours slow. R. 700, lines 18-20. However, Appellant demonstrated the video footage was three hours and seventeen minutes slow. Therefore, the video showed the suspect walking up the hill in the vicinity of the deceased's apartment at 3:37 a.m., not 4:20 a.m. as Thomas claimed to the jury and in the warrants he requested. Further, the video showed the suspect walking down the hill at 4:13 a.m., not 4:56 a.m. as Thomas claimed to the jury and in the warrants he requested. R. 705, line 4 – R. 713, line 9.

The video also showed a police car arrive at the apartment complex at 4:30 a.m. The car idled in the parking lot until 4:57 a.m. R. 714, line 8 – R. 716, line 6. Thomas admitted that while the police were at the scene, a narcotics officer – Melron Kelly – located bedding in a dumpster. R. 682, lines 13-25.

Kevin Reese, the other lead investigator on the case, spoke to a group of women at the scene as part of his investigation. R. 756, line 21 – R. 757, line 1. Although Reese did not recall speaking with Tasha Praylow, he admitted he "could have." R. 757, lines 2-8. Appellant probed:

> Q. Do you remember Tasha Praylow asking you or telling you that you-all need to look at Kelly on this case?
>
> A. I think she might have told somebody else that because I heard something about that, but I don't know what she was - - no one ever told me that.
>
> Q. Okay. You heard something about it?

A. Uh-huh.

Q. Okay. Where is this in your notes?

A. I don't have notes.

Q. Okay. But you remember hearing something, "You need to check out Kelly," and as a lead investigator, what did you do to investigate Melron Kelly as a suspect in this case?

A. Probably about as much as I would have done if somebody would have told me you need to check out Jim May.

R. 757, line 13 – R. 758, line 2. Appellant continued with this questioning by clarifying that Reese and other investigators had heard that the police needed to investigate Kelly concerning the murder. Reese responded, "Yeah, one time or so and I heard Melron talking about it and everybody thought it was a joke." R. 765, lines 6-11. Despite learning of possible criminal activity by Kelly, Reese did not investigate him, did not inform the solicitor's office, and did not report the matter to internal affairs. R. 765, lines 12-18. When Appellant asked if Reese was aware of a rumor that Kelly had impregnated the deceased, the prosecution objected and the judge sustained the objection and instructed the jury to disregard it. R. 765, lines 19-24.

Appellant proffered the testimony of three witnesses: Tasha Praylow, Sierra Austin, and Dawn Davis Young. The judge ruled he could only present testimony from Praylow. Austin lived next door to the deceased. R. 828, lines 15-17. The deceased told Austin that she was pregnant by Melron Kelly. R. 831, lines 1-5. The deceased asked Young about "messing basically around with an officer." R. 839, lines 11-17. Young informed the deceased that she would not mess around with an officer. R. 839, lines 17-18.

The prosecution objected to the testimony of all three witnesses as hearsay and third-party guilt. R. 844, lines 3-11. Appellant countered that the proffered testimony attacked the integrity of the investigation. R. 845, line 22 – R. 846, line 9. Judge Newman ruled that Appellant's first proffered witness could testify because the testimony was an exception to hearsay in that it went to the deceased's state of mind that she was fearful that Officer Kelly was going to kill her. However, the judge excluded the testimony of Austin and Young. R. 851, lines 1-8.

Thereafter, Appellant presented the testimony of Tasha Praylow. Praylow, who lived in Bethel Bishop Apartments, saw the deceased at 11:30 on the night of her death. The deceased confided in Praylow that she was scared because Kelly, a police officer, was coming to kill her. R. 855, line 5 – R. 856, line 1; R. 857, lines 8-9. Although Praylow did not tell Reese about her encounter with the deceased, she did ask Reese if Kelly was being investigated. Reese quickly informed Praylow that Kelly was not a suspect. R. 856, lines 2-9.

Discussion

The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)(holding the Sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's Constitution provides similarly: "Any person charged with an offense

shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Taylor v. Illinois, 484 U.S. 400, 408 (1988)(citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). "'The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question or hesitation, the United States Supreme Court declared "'[t]his right is a fundamental element of due process of law.'" Id. Undermining the "ostensible integrity of the investigation" is one method by which a defendant may present a defense. See Kyles v. Whitley, 514 U.S. 419, 448 (1995).

"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403 (citing Assoc. Mgmt. v. E.D. Sauls Constr.Co., 279 S.C. 219, 305 S.E.2d 236 (1983)); see also Rule 401, SCRE (defining relevant evidence). Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Id. (citing Toole v. Salter, 249 S.C. 354, 154

S.E.2d 434 (1967)); see also Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided . . . . Evidence which is not relevant is not admissible.").

In State v. Page, 406 S.C. 272, 287, 750 S.E.2d 623, 631 (Ct. App. 2013), this Court held the trial judge abused his discretion by finding the proffered testimony offered by the defendant was not relevant. Page sought to introduce a text message and testimony by a witness that the alleged victim had admitted to the witness that she had lied to the police. Id. at 288, 750 S.E.2d at 632. On the other hand, this Court affirmed a trial judge's preclusion of evidence that was irrelevant and unfairly prejudicial. State v. Lyles, 379 S.C. 328, 344, 665 S.E.2d 201, 209 (Ct. App. 2008). Lyles sought to introduce evidence of prior drug sale solicitations at the apartment where the shooting occurred and the presence of drugs next to the deceased. Lyles claimed the proffered testimony established that drugs were being sold from the deceased's apartment and bolstered the credibility of Lyles by supporting his claim that he went to the apartment merely to purchase drugs. Id. at 336, 665 S.E.2d at 205. This Court held the evidence was properly excluded because there existed no probative link between the proffered testimony and the pending charges. The proffered testimony established that drugs were offered for sale outside of the apartment several months prior to the shooting by an unknown individual. Id. at 340, 665 S.E.2d at 207.

The trial judge erred in refusing Appellant's request to present the testimony of Davis and Austin in his case-in-chief. The proffered testimony indicated the police had failed to conduct an adequate investigation by failing to follow-up on leads concerning "one of their own" – Melron Kelly. Davis and Austin would have provided the link between the testimony of Praylow concerning the deceased's fear of Kelly, the appearance of a police

officer's car on the video outside of the deceased's apartment at the time of her murder, the appearance of Kelly at the scene the following day despite his role as a narcotics agent not requiring his presence at the scene of a homicide, and the loss of a key piece of evidence by the Columbia Police Department – the rape kit. This denial of the presentation of witnesses denied Appellant the most fundamental of his his state and federal constitutional rights - to present a complete defense. Appellant's case-in-chief sought to cast doubt on the Columbia Police Department's investigation and to show a motivation for such shoddy work - allegations of improprieties between a fellow officer and the deceased and the potential murder of the deceased by that officer. This denied Appellant his right to present his version of the facts to the jury so it may decide where the truth lies.

III. The trial judge erred in denying Appellant the ability to call witnesses in surreply where the prosecution presented new evidence on reply entitling Appellant to the right to present surreply denying Appellant's right to present a complete defense as guaranteed by the United States Constitution and the South Carolina Constitution. In the alternative, even if the prosecution did not present new evidence, the trial judge erred in denying Appellant the ability to call witnesses in surreply due to the trial judge's previous rulings denying Appellant's right to present a complete defense as guaranteed by the United States Constitution and the South Carolina Constitution.

Relevant facts

Appellant incorporates the discussion of relevant facts contained in Issue II, supra. After Praylow testified for the defense, the prosecution presented Reese as a reply witness. Reese claimed he had no contact with Praylow "whatsoever." R. 945, lines 11-19. Additionally, the prosecution called Melron Kelly as a reply witness. Kelly admitted that he knew the deceased because she lived in the neighborhood where he was a residential officer at the start of his career. R. 950, lines 6-14. Kelly further admitted that he was at the crime scene on February 3, 2009 "to assist the on-scene investigators." R. 951, lines 10-14. Kelly denied threatening the deceased at any time prior to her death. R. 951, lines 22-24. He further denied any contact with the deceased on February 2nd or February 3rd. R. 951, line 25 – R. 952, line 3. He flatly denied knowing the deceased in any personal capacity or having any personal contact with her. R. 952, lines 10-11. He had no dealings with the deceased other than "[j]ust knowing her as a juvenile growing up in the neighborhood." R. 952, lines 18-21. He unequivocally denied threatening to kill her. R. 952, lines 12-17.

Kelly claimed the residents of Bethel Bishop resented the police and were unhelpful in solving crimes. Further, he claimed it was not uncommon for rumors about police officers to be started there. R. 953, lines 15-25. During the summer of 2009, Kelly claimed he took time off from work to be with his wife and child. R. 954, lines 3-17. During that time he "was notified by one of [his] subordinate officers that an informant was telling them that [Kelly] had been arrested for the murder" of the deceased. R. 954, lines 18-22. Kelly denied being arrested, and claimed he contacted Internal Affairs regarding the allegation. He prepared a written statement and asked the office to investigate. Nothing developed, however. R. 955, lines 2-12.

On cross-examination, Kelly claimed he never had a sexual relationship with the deceased. R. 958, lines 21-25. When Appellant asked, "It wouldn't be good if she claimed that she was pregnant by you either, would it?" the prosecution objected. The judge excused the jury to take up the prosecution's matter of law. R. 959, line 25 – R. 960, line 16. Inexplicably, the prosecution claimed the reply was limited to whether Kelly had threatened the deceased. Appellant pointed to questions asked by the prosecution on direct examination going beyond Kelly having threatened the deceased to include whether Kelly even had a personal relation with the deceased at all. Of course, Kelly had denied such a relationship. R. 960, line 19 – R. 961, line 7. Appellant noted that he had a witness prepared to testify that the deceased claimed to be pregnant by Kelly. R. 961, line 13 – R. 962, line 17.

After the state rested its reply case, Appellant moved to call Austin and Davis as witnesses. R. 972, lines 23-25. Appellant explained that Austin and Davis would be in response to the state's reply witnesses, particularly, Kelly. R. 973, lines 1-3. The judge

asked "what would you call that?" R. 973, lines 4-9. Appellant responded, "Sur-reply." R. 973, line 10. The judge then denied the motion. R. 974, line 14. He elaborated that the defense could not create issues that compelled the state to reply, and "then call additional witnesses to further extend the trial through sur-rebuttal." He refused to exercise his discretion to permit Appellant to present the testimony of Austin and Davis. R. 974, lines 14-24.

Later, the judge cited State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003) to support his ruling. R. 975, lines 22-23. According to Judge Newman, sur-rebuttal is allowed where "new matter or new facts are injected for the first time in rebuttal, especially where the evidence offered in sur-rebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal and could or should have been entered at an earlier time, then it's not new matter." R. 976, line 24 – R. 977, line 4. The judge then explained that whether Kelly had anything to do with the death of the deceased was brought up through Appellant's case, and therefore the proffered testimony was not "new matter." He determined "[t]hese other issues [were] collateral issues" with no bearing on the case. R. 977, lines 6-15.

Discussion

As discussed in Issue II, supra, the trial judge's denial of Appellant's surrebuttal also implicated Appellant's federal and state constitutional rights to present a defense. "South Carolina courts have approved the use of surrebutal testimony." State v. Watson, 353 S.C. 620, 624, 579 S.E.2d 148, 150 (Ct. App. 2003). In fact, "[a] defendant has a right to respond to **new evidence** given in reply." Camlin v. Bi-Lo, Inc., Store No. 2, 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct. App. 1993)(emphasis added)(citing Strait v. City of Rock Hill, 104

S.C. 116, 88 S.E. 469 (1916)). When a party does not inject new evidence, the trial court may allow surrebuttal, but it is not as a matter of right. Bunch v. Charleston & W.C. Ry. Co., 91 S.C. 139, ___, 74 S.E. 363, 365-366 (1912)(stating that "if the plaintiff in reply puts new matter in evidence or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal. And it is within the discretion of the court to permit the introduction of evidence in surrebuttal, where the plaintiff in reply has not transgressed the proper bounds of evidence in rebuttal, though in that case the privilege cannot be claimed as a matter of right.").

Appellant was entitled to surreply as a matter of right because the prosecution injected new evidence – whether Kelly had a personal relationship with the deceased. Despite the prosecutor's blatantly false claim to the trial court that its reply evidence had been limited to a threat, the record is clear the prosecutor's questioning went far beyond a threat. The prosecutor posed questions to Kelly to elicit testimony not only of whether Kelly knew the deceased, but of the nature of their relationship. See R. 952, lines 10-11; R. 952, lines 18-21. The prosecution also elicited that Kelly was aware of "rumors" that he had killed the deceased. Kelly allegedly informed Internal Affairs of the "rumors." The evidence that Kelly had no personal relationship with the deceased and that he was aware of rumors of his having killed the deceased was new evidence which granted Appellant the right to surreply. The trial judge erred in denying Appellant the opportunity to present two witnesses who would have contradicted Kelly's testimony concerning the nature of his relationship with the deceased and the "rumors" regarding his involvement in her death.

IV. The trial judge erred in failing to grant Appellant's motion for a mistrial where the prosecution suppressed evidence that a police officer had been implicated as the murderer and an internal investigation ensued, in violation of Appellant's state and federal constitutional rights.

Relevant facts

As discussed supra, when the prosecution presented Kelly as a reply witness, it was revealed that the Columbia Police Department was aware of the allegation that Kelly had been involved in a romantic relationship with the deceased and that he had killed her. Not only was the Columbia Police Department aware of the allegations, but Kelly had prepared a written statement and requested an investigation. R. 955, lines 2-6. Despite the rumors of Kelly's involvement and the internal investigation, Kelly was never interrogated and never provided DNA samples. R. 970, lines 19-23.

Appellant moved for a mistrial based upon the prosecution's withholding of the evidence identifying Kelly as a suspect and having been investigated internally. R. 967, lines 12-18. The trial judge summarily denied the motion. R. 967, line 22.

Discussion

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment. See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Evidence is favorable to the accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability

that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

In Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), the South Carolina Supreme Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle's trial, police officer interviewed a key witness in the case who provided a statement inconsistent with his previous statement. The prosecutor failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. Our Supreme Court disagreed, holding "[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires." As explained by the Court, "[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Id.

Recently, in State v. Anderson, 407 S.C. 278, 286-287, 754 S.E.2d 905, 909 (Ct. App. 2014), this Court made clear, yet again, that the "[t]he Brady disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." (citing Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012)); see also, Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (holding that the Brady

rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf including the police).

As early as the summer of 2009, Kelly and the Columbia Police Department was aware of the "rumors" that Kelly had murdered the deceased. Yet, the prosecution failed to disclose any information to Appellant of evidence in the possession and control of the Columbia Police Department for such evidence despite numerous and repeated requests for discovery by Appellant. The very fact that Internal Affairs conducted an investigation should have been disclosed to Appellant prior to trial to permit him additional investigation. According to Kelly's testimony, Kelly learned of the "rumor" from a subordinate officer, whose name was never disclosed. The subordinate officer learned of the "rumor" from an informant, whose name was never disclosed. Interviewing those individuals and gathering additional information was crucial to Appellant's defense and his constitutional right to present a complete defense. The trial judge erred in denying Appellant's motion for a mistrial in light of the prosecution's clear violation of clearly established federal law governing discovery.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

December 16, 2014

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHMAD JAMAL WILKINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of December, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.