STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2012-212387

THE STATE,

Respondent,

vs.

AHMAD JAMAL WILKINS,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
1701 Main Street, 3rd Floor
Columbia, SC 29201
(803) 576-1802

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUE ON APPEAL

I. Did the trial judge err 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?

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?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge abused his discretion by allowing the State to present evidence of statements that Wilkins made to a jailhouse informant while the two men were incarcerated together because the various admissions made by Wilkins related to his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body, as opposed to a prior bad act against her?

II. Whether the trial judge abused his discretion by refusing to allow Wilkins to present the testimony of witnesses, in his case-in-chief, to challenge the integrity of the police investigation because the proffered evidence was remote in time, it constituted inadmissible hearsay statements by the victim and it was nothing more than a veiled

effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of a third party in the victim's death?

III. Whether the trial judge abused his discretion by not allowing Wilkins to call Austin and Young as surrebuttal witnesses, after the State presented Inv. Reese and Lt. Kelly in reply to the testimony of Praylow, because the State did not introduce new matter or facts in reply and because the proffered testimony remained inadmissible hearsay and improper evidence of third party guilt?

IV. Whether the trial judge erred by denying Wilkin's motion for a mistrial based upon the prosecution's alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), for suppressing evidence that reply witness Lt. Myron Kelly, of the Columbia Police Department, self-reported to the Department's Internal Affairs unit that someone started a rumor that he had been arrested for killing Ebony Williams, where no report was issued by Internal Affairs, the evidence was not materially exculpatory or impeaching and, most importantly, this information was both disclosed to the defense and heard by Wilkins' jury?

STATEMENT OF THE CASE

Appellant, Ahmad Jamal Wilkins (Wilkins) is currently serving a life sentence for the February 3, 2009 murder of Ebony Williams, in Richland County, South Carolina. **R. pp. 1099.** Respondent adopts Appellant's "Statement of the Case."

STATEMENT OF FACTS

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, is that Wilkins murdered Ebony Williams early in the morning of February 3, 2009. She suffered blunt force trauma but he murdered her by strangulation. He then burned her body inside of her Richland County, South Carolina, apartment.

Marsha Poitier, the property manager of Bethel Bishop Apartments,[1] and Mr. Roberta Santana, the maintenance man, were notified by a resident that Ebony may have moved out of her apartment because the windows to her apartment were blackened[2] and there was a U-Haul truck in the complex. So, they went to Ebony's apartment. They saw smoke coming from around the door jamb and there was no answer when they knocked on the door. Once they opened the door, "medium smoke" came out of the unit so strong it choked them. They saw something on the floor wrapped in a comforter and noticed that the smoke detectors had been disabled. Then, they called 911 and waited on the fire department to arrive. **R. pp. 91-100; 109-13.**

Members of the Columbia Fire Department quickly responded to the scene. The front door of the apartment was open and it was clear that there had been a fire. However, they did not feel any heat, there was no smoke, and it was clear that the fire had burned itself out. Using a flashlight that he retrieved from his truck, Capt. Phillip Joyner went into the darkened apartment

[1] Bethel Bishop Apartments are near I-277, in Columbia, (Richland County) South Carolina.

[2] This is in violation of the complex's rules.

and saw a body "under some type of cloth." He also saw a burned head. He reported this to his supervisor and they secured the scene until the police arrived. **R. pp. 128-137**.

Officers from the City of Columbia Police Department were dispatched to the scene at 1:20 p.m., the call going out as a fire. Police immediately secured the scene upon learning that members from the fire department had discovered a body inside of the apartment. **R. pp. 115-21; 125**.[3]

Richard Seel is the Chief Fire Investigator for the City of Columbia's Fire Marshall's Office. His duties are going to fire scenes and determining both the point of origin and the cause of the fire. **R. pp. 162-63**. On February 3, 2009, Inv. Seel went to Ebony's apartment, arriving at roughly 1:33 p.m. **R. pp. 166-67**.

After speaking to individuals from the Fire Department and the Columbia Police Department, he learned that there was a badly burned body in the apartment. He walked around the exterior of the apartment building and determined that the fire had originated in Ebony's apartment. He then entered the apartment. The window had "a heavy black sooting on them and there was sooting around the edges of the front door, "where smoke had pushed out around the edges of that door." **R. pp. 168-70**.

Inv. Seel opined that these were indicators of a "flammable liquid being present," such as gasoline or another "petroleum based product." Although the plastic blinds in the victim's kitchen were damaged and had begun to melt, he did not find anything in the kitchen (such as appliances or electrical outlets) that could have caused this fire. Also, the "line of demarcation," or the point where smoke "filled the ceiling up, and it came down and it just kept building up" was "about three feet off the floor. This is consistent with "a rapidly burning fire," such as one

[3] EMS arrived but did not touch the body because Ebony was dead. **R. pp. 140-44**.

caused by using an accelerant. In the victim's bedroom, he found that all of the bedding had been removed, but the victim's clothing was still present. **R. pp. 170-74.**

There were no signs of forced entry on the front door and the back door, a sliding door, was intact and did not have any pry marks on it. However, both of the smoke detectors in the apartment had been disabled.[4] Ebony's body was still present and there were no signs of lividity. However, she was lying face down, wrapped in a comforter, and both the comforter and her back and legs "had been severely burned." Her feet were bound by cloth and there was cloth wrapped around her neck. **R. pp. 174-78; 195-99.** *See also* **R. p. 191.**

The fire had burned so rapidly that it consumed all of the oxygen in the closed apartment and burned itself out.[5] Also, on the carpet around Ebony's body, Inv. Seels found "pour portions or pool patterns." These indicated the use of a flammable accelerant and caused the fire to burn in an inverted "V" pattern, instead of a normal "V" pattern. In light of his findings and after eliminating all other possible accidental causes for the fire, Inv. Seel opined that "we were left with one cause:" the fire started as "the direct result of human hands using an ignitable liquid." **R. pp. 178-83; 203.**

Inv. Seels uses "a hydrocarbon detector" to test for the presence of "hydrocarbons in the air" that are consistent with the burning of ignitable liquids. This instrument gave a reading indicating the presence of those hydrocarbons "at the base of the victim's body," and he took several carpet samples from that area. While subsequent testing by SLED was negative for the presence of an accelerant, this could be explained by several factors, including the simple fact that it was possible for all of the accelerant to have been consumed by the fire or the samples

[4] One had been wrapped so that smoke could not enter it and the battery had been removed from the other one. **R. p. 176.**

[5] This would not have occurred if there had been a source of oxygen.

taken simply did not have the accelerant on them. **R. pp. 154-60; 183-89.**

Tammy Moore, a crime scene investigator for the Columbia Police Department, corroborated that she saw most of what Inv. Seels had seen in the apartment, when she processed it on the afternoon of February 3rd, including the presence of soot and other signs of damage from the fire, the fact that both smoke detectors had been disabled and the absence of any bedding on the victim's bed. She also found that there was no evidence that the sliding glass door had been forced open, but the photographs of that door (State's Exhibits 71, 110; 112 & 114) revealed that the rod used to secure that door was up and not in place. Additionally, Ebony's entertainment system and other items had been knocked onto the floor in front of her body. Further, Ms. Moore seized a pillow case that she found on the partially burned sofa, a glove that she found on the floor in the living area (State's Exhibits 17 & 19), the cloth ligature that was around the victim's neck and the cloth that had been used to bind the victim's legs. **R. pp. 247-79; 281; 285-86.**

Forty-two year old Sean Grimes testified that he was living at Bethel Bishop Apartments in February 2009, along with his wife, Cynthia Jackson, and their two children. Mr. Grimes had known "Mad" Wilkins for several years. Wilkins fathered a daughter by Grimes' niece, Nicole Grimes, and the men used to use get high together. At the time of the murder, Wilkins and Nicole Grimes were also living in Bethel Bishop Apartments. On the night of February 3, 2009, Grimes and Wilkins used cocaine out in a "cut," or path, leading into the apartment complex. Later, they went to Grimes' residence. **R. pp. 212-18.**

They continued to use cocaine once they were in the apartment. Also, Wilkins told him that Ebony had given him $20.00 with which to buy cocaine and he needed to find some. Grimes knew where Wilkins could find crack, but he did not know of a source for cocaine. Wilkins was

not interested in buying crack for her. At Wilkins' urging, Grimes later went out and found a "doub," or $20.00 worth of cocaine. Rather than take the cocaine to Ebony, Wilkins shared it with Grimes. **R. pp. 218-21**.

Shortly thereafter, Ebony began repeatedly calling Wilkins' cell phone, asking for her money. In one conversation, Wilkins said that "[h]e was coming down there" and for Ebony to "open up the back door. ... He was going to have it for her." Wilkins did not initially move. However, when Ebony called Grimes' residence, Wilkins said that he had to "get some powder" because he had taken her money. **R. pp. 221-23**.

At Wilkins request, Grimes got some flour and Wilkins packaged it to look like cocaine. Wilkins still waited until he got yet another call from Ebony. He then got up, told Grimes that "I'm going through the back way." Then he left. Although Ebony's apartment was only two buildings away, Grimes did not see Wilkins again until later that morning. Grimes thought that these events occurred about 12:00 or 1:00 a.m., but he admittedly was getting high that morning and was uncertain about the time. **R. pp. 221-23; 228-29**.

Later on February 3rd, Grimes happened to be outside when Ebony's body was found. Grimes went to Wilkins apartment and told him that she was dead. Later, Wilkins walked up as Grimes was telling police about the events from earlier that morning and that, to Grimes' knowledge, Wilkins was the last person to have spoken with her on the phone. When Grimes turned around, Wilkins was gone and that was time that Grimes saw him. Grimes testified that on February 3rd, Wilkins was wearing "black, white, and red Air Jordans, a blue pair of jeans, and a black coat" or hoodie. **R. pp. 226-30**.

Cynthia Jackson testified that she was living in Bethel Bishop Apartments, with Sean Grimes and their nine year old son, on February 3, 2009. She knew Ahmad "Mad" Wilkins

because he was dating Ms. Grimes, and they were living in Bethel Bishop Apartments at the time of the murder. Also, Wilkins would come to the apartment and Ms. Jackson and Grimes would get high on crack with him. **R. pp. 308-11; 313.**[6]

Ms. Jackson went to bed relatively early on February 2nd because she had to get her son ready for school early the next morning. Neither Grimes nor Wilkins were in the apartment at the time. However, she and her son were awakened when her phone began ringing repeatedly. Grimes told her that it was Ebony. She spoke to Ebony, with whom she was very close, and Ebony said that she was looking for Wilkins and Grimes' nephew because she wanted "a bag of cocaine." She instructed Ebony to call Wilkins on his cell phone.[7] **R. pp. 312-17; 337-38.**

Wilkins had left between 1:00 and 2:00 a.m. He had said that he was going down the street and would come back, but he never returned. Ms. Jackson lay down again but Grimes came in "[b]etween 1 and 2" a.m., and he asked if she had any flour, so that he and Wilkins could fry chicken. She said no. She also told him not to go back outside or she would lock him out, and she went to sleep. When she got up about 6:00 a.m., she and Grimes exchanged words, he left, and she locked the door. **R. pp. 317-26; 339.**

Ms. Jackson later let Grimes back into the apartment. Although he was "smelly" as the result of getting high for two days, he did not smell of gasoline. Around 9:00 a.m., Ms. Jackson walked outside and saw that the windows of Ebony's apartment were blackened. She did not give this much thought because Ebony got high fairly frequently and she thought that there could have been a grease fire. About that time, Nicole Jones, who was romantically involved with

---

[6] She had not known Wilkins to sell drugs but he frequently used them. **R. p. 316.**

[7] Wilkins was the only person in her apartment that night with a cell phone. **R. p. 320.** She later heard him talking on his phone but she could not tell what he was saying. **R. p. 323.**

Wilkins as well, approached her and they had a conversation.[8] Jones was "shaky ... and kind of nervous." People were starting to gather at this point and Ebony's body was discovered a short time later. **R. pp. 326-33.**

Ms. Jackson went back to her apartment, awakened Grimes and told him about what had happened. She had not seen Wilkins outside that morning and, even though he had frequently visited her apartment before February 3rd, he never came back after that morning, which she thought was strange. **R. pp. 333-35.**

Nicole Grimes testified that she and Wilkins, with whom she had a child, were living in Bethel Bishop Apartments in February 2009. She had listed her then-current phone number on a statement that she gave to police. She was at her apartment with her children on the night of February 2nd. Wilkins returned early on the 3rd but he left at 1:00 a.m., after they started arguing. Nicole got up and let him in when he returned. She went back to bed but soon got up because Wilkins was pacing back and forth, saying " 'Oh, my God.' " However, he denied that anything was wrong and later came to bed. This supposedly occurred around 3:55 or 4:00 a.m. She admitted that Wilkins had a cell phone and, although she denied that he had called her at any time while he had been gone, she could not answer why on the 3rd he called her land line from his cell phone at 5:30 a.m. or why he called her number twice after 6:00 a.m. **R. pp. 344-52; 359-60.**

Nicole heard a loud noise saw outside later on the morning of the 3rd. She looked outside and saw EMS and the police. She immediately told Wilkins and they went outside. She walked over to where people had gathered, but Wilkins went in the opposite direction. Nicole stayed with Wilkins for months after the murder. **R. pp. 352-58.** Additionally, the jury heard the

[8] This was not Nicole Grimes.

testimony of Patruan Hare about the admissions that Wilkins made to him discussed in Arhgument I. **R. pp. 373-85**.

A very significant aspect of the State's case against Wilkins was the use of the phone records for Ebony's AT&T cell phone (State's Exhibit 111) and Wilkins' T-Mobile cell phone (State's Exhibit 115). These records circumstantially refuted Nicole Grimes' testimony that she and Wilkins were together from approximately 4:00 a.m. until later that morning, they undermined his subsequent "alibi" testimony (**R. pp. 870-92**), and they circumstantially corroborated the testimony of Sean Grimes and Cynthia Jackson, while putting an objectively accurate chronology to the February 3rd calls described by them. Wilkins' calls began at 2:30 a.m. on February 3rd, with the first call being to the victim and lasting 46 seconds. There were a total of nine calls between that call and the last call to her telephone number at 4:13:26 a.m., which lasted 68 seconds. **R. pp. 148-50; 239-41; 244-46; R. pp. 415-28**.

Following the last call to the victim, Wilkins made calls to Ms. Jackson's telephone at 4:19 and 4:20 a.m. The first call was not completed and the second call lasted 24 seconds. (This may have been a completed call or it may have gone to voice mail). At 5:30:08, he made a 9 second call to Nicole Grimes. He made a 17 second call to her number at 6:18:57 and he tried to call another number at 6:16:01, but that call was not completed. All of the calls from Wilkins' phone hit off of a cell tower consistent with the calls being made in the Bethel Bishop complex. **R. pp. 239-41; R. pp. 427-34; 632-33**.

Another key piece of circumstantial evidence against Wilkins was the results of DNA testing of the ligature and the glove found at the scene. Wilkins later admitted that the glove was his and that he had apparently left it in Ebony's apartment when they were using cocaine on the morning of the 3rd. (**R. pp. 870-73; 878-86**). Rachel Grant, the DNA analyst from the Richland

County Sheriff's Department who did the testing, testified that she examined several items of evidence that were submitted to her by the Columbia Police Department, including a criminal sexual conduct kit performed at autopsy; the glove found at the scene; the cloth ligature; nail scrapings; the cloth used to bind the victim's legs; bedding and shorts; two sets of cigarette butts; a beer can found in the apartment a known blood standard from the victim; and a buccal swab from Wilkins. With respect to the CSC kit, swabs from the vaginal, rectal and oral areas were negative for semen. **R. II. pp. 480-83; 489-96.**[9]

The initial analysis of the glove revealed that the DNA profile was "a mixture" of at least three contributors. "Ebony Williams [was] excluded as a contributor to this mixture and Ahmad Wilkins [could not] be eliminated as a contributor of this mixture. Based on the genetic results obtained, greater than 99.95 percent of the Caucasian population [could] be excluded from this mixture and greater than 99.95 percent of African Americans [could] be excluded." Ms. Grant could not determine whether he was the major contributor, but his DNA was included in the mixture. **R. pp. 496-505; 529.**

Because Ms. Grant suspected that the cloth ligature may have been touched, she took some scrapings from it. Initial testing of the ligature, using a diploid profile, did not reveal the presence of any DNA but the victim's. In order to determine whether any otherwise undiscerned male DNA was present on the ligature, Ms. Gant used a "Y-profiler kit." This Y-STR profile only "targets locations on the Y chromosome" and will give a result for a male or anyone who shares that male's parental lineage. This testing revealed the presence of Wilkins' DNA, or the

[9] Although Ms. Gant did not believe that further testing of the kit was necessary, she received the kit on two more occasions, once at her request and the other under the trial judge's direction. The second time there was no testing because the first test was negative for semen. The final test was negative for the presence of male DNA on Y-STR testing. While the kit may have been misplaced for a period of time by the Columbia Police Department, it was properly sealed and had Ms. Grant's initials every time that she examined it. There was absolutely no evidence of tampering. **R. pp. 496; 517-20; 525; 539-42; 558-61**. The kit was never "lost," as Wilkins suggested.

DNA of someone who shares his paternal lineage. Ms. Grant also did Y-STR testing on the glove, as well, and found a mixture of male DNA. Wilkins' DNA, or that of someone who shares his paternal lineage, could not be eliminated as contributing to the mixture. The nail scrapings only revealed the presence of the victim's DNA. **R. pp. 505-15; 525-26; 558-59.**

Dr. Bradley Marcus, a forensic pathologist, performed an autopsy on the victim. He opined that she "died of asphyxia by a ligature strangulation." He explained that:

> Asphyxia is lack of oxygen getting to the tissues of the body, primarily the brain, which can cause then a fatal arrhythmia. Strangulation is ... basically force around the neck that causes lack of blood flow/oxygen to the neck, to the head, which then causes lack of breathing/blood flow to the head and you get a fatal arrhythmia and you die.
>
> ***
>
> A ligature ... is anything that can be wrapped around the neck, ... any type of object that could be a ligature, any type of thing that can be wrapped around the neck, okay, a cord of some sort, [and] we call that just in general terms a ligature.

R. pp. 570-72.

The ligature in this case was tied around the victim's neck, with a knot behind her. Although the victim was "significantly burned," there was charring "to approximately 60 percent [of] her body" and the burning had caused skin "slippage," she did not die as the result of the fire. Rather, there was no soot in her larynx, which would have been present if she had been alive at the time of the fire. Also, "she had petechiae in her eyes and confluent hemorrhaging in the sclera of her eyes. Together with the ligature, these finding were "very significant" and reflected that she had been strangled. Internal examination of the neck revealed that there was hemorrhaging in the neck, including hemorrhaging around the hyoid bone. Nor did the blood have a cherry red color to it that occurs if someone is alive in a fire. Therefore, Dr. Marcus opined that she was dead when the fire started. Dr. Marcus did not find any evidence of either

sexual assault or pregnancy. Finally, examination of the head was consistent with blunt force trauma to her head, which meant that she had been punched or hit with something. **R. pp. 574-92.**

During their investigation, Columbia Police Department investigators discovered that Wilkins' brother, Idris Wilkins, was a maintenance man in the Bethel Bishop complex and that he worked on the apartments. Wilkins "would sometimes help his brother with maintenance issues in the complex," such as painting. As a result, "he would have access to the maintenance area and the items in there." **R. pp. 609-10; 744-45.** Police eventually learned that Wilkins is left-handed, which was consistent with the left-handed glove found at the scene. **R. pp. 645-46.**

Investigators also obtained a copy of the Bethel Bishop video surveillance for the morning of February 3rd.[10] The cameras there are placed in areas where there is a lot of criminal activity. Unfortunately, everyone living there who engages in criminal activity "knows exactly where they're placed and ...how to ... avoid them." Also, there was roughly "a four-hour-and-some-odd-minute differential" between the time reflected on the video footage and real time. However, the video was seized, introduced as State's Exhibit 69 and published to the jury. According to Inv. A.L. Thomas, an individual is shown after 4:00 a.m. in real time, in the rear of the complex. He is wearing dark clothing and a dark jacket, and he is headed in the direction of the victim's apartment. **R. pp. 621-28; 701; 745.**

Investigators with the Columbia Police Department interviewed Wilkins on February 20, 2009. While he admitted that he knew the victim, he denied having a sexual relationship with her. Instead, he was her drug dealer: she would call him and he would take cocaine to her. He also admitted to making cocaine deliveries to her in January and the first part of February, but he

[10] "They're not the best cameras." However, they work and police seized the video footage. **R. p. 621.**

terminated the interview when asked if he had delivered any to her during the time-frame of her death. **R. pp. 613-962; 738-39; 744-45.**

Moreover, the State introduced and later published a February 20, 2009 recording of two conversations between Wilkins and Nicole Grimes, which occurred while he was incarcerated at the Alvin S. Glenn Detention Center and after investigators from the Columbia Police Department had spoken to both individuals about the progress of the investigation and provided them with both accurate and untruthful information. (State's Exhibit 119). This recording is important for several reasons, not the least of which is Wilkins' demeanor in the conversations. He is laughing and thinks that it is funny that police have questioned him about the murder because he was only arrested on a simple assault charge. Also, he is extremely disparaging in how he refers to the police. At another point, Nicole Grimes asked him how the victim got his phone number. Although he lies in response, what is significant is her warning to him that there were a number of calls to his phone by the victim, with the final call at roughly 4:15 a.m. These were matters that he did not know. **R. pp. 474-76; 615; 619-20; 721-41; State's Exhibit 119.**

Wilkins said that he told them that he last talked to the victim either at the end of January or the beginning of February. Further, at the end of the first conversation, Nicole warned him that police had shown her "a picture of that damn glove." When they began their second conversation, she again told him that they had a picture of the glove that Wilkins told her that he had lost. After stumbling for an answer, he told Nicole "I ain't talking about that shit over the phone." **State's Exhibit 119.**

Police arrested Wilkins for the murder on February 2, 2011 and obtained a statement from him (State's Exhibit 144) on the same day. A key point in that interview is that he did his best to distance himself from his friends Grimes and Jackson and he denied that he would go to

their residence. **R. pp. 635-42; 746-47.**

ARGUMENTS

I. The trial judge did not abuse his discretion by allowing the State to present evidence of statements that Wilkins made to a jailhouse informant while the two men were incarcerated together because the various admissions made by Wilkins related to his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body, as opposed to a prior bad act against her.

Wilkins first claims that the trial judge erred by allowing the State to present the testimony of Patruan Hare, a jailhouse informant, concerning statements that Wilkins made to him while both men were housed at the Alvin S. Glenn Detention Center. Specifically, he contends that Hare was erroneously permitted to testify that Wilkins told Hare that "he choked the bitch, but it wasn't the same night that she's supposed to have passed." **R. p. 380, line 23 – p. 381, line 1**. He contends that Hare's testimony related to a prior bad act by him that was inadmissible under Rule 404(b), SCRE. Contrary to Wilkins' 404(b) argument, Respondent submits that the trial judge did not abuse his discretion by allowing the State to present Hare's testimony because when this statement is viewed in the context of the remainder of Hare's testimony, it is clear that this and the other admissions made by Wilkins related to his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body.

A. Wilkins' motion and the trial judge's ruling.

Wilkins counsel made a pretrial motion to exclude the testimony of Patruan Hare, a jailhouse who had been incarcerated with Wilkins at the Alvin S. Glenn Detention Center to Rules 401, 403 and 404(b), SCRE.[11] Counsel explained that Hare's statement to law enforcement

[11] After calling the case for trial, the State made a motion based on the existence of a possible conflict of interest in the Richland County Public Defender's Office representing Wilkins at trial. Although defense counsel had not

was to the effect that Wilkins said, " 'They started to argue. He choked the bitch but said it wasn't the same night that she ended up dead.' " **R. p. 61, lines 1-21**. Hare's statement "goes on to cite how he went to prison for nine months, about he was running from police, refused to turn himself in till his father convinced him, and then how Mr. Hare says that Mr. Wilkins kept lying about his whereabouts, sending police on a wild goose chase." Counsel argued that Hare's testimony concerned choking her on a prior occasion; that the entire statement was irrelevant; and that it was inadmissible under Rule 404(b). **R. p. 61, line 22 – p. 62, line 24**.

Assistant Solicitor Campbell argued that:

> I think this goes to the weight and not the admissibility of the evidence under whatever theory they're going on, 401, 403, or 404(b).
>
> He admits to choking her. It's not unusual in a jail for a defendant to elaborate or make up things. And this case (sic) goes to the weight of the testimony itself, not the admissibility.
>
> And as far as what Mr. Hare can testify to that the defendant explained to him would be up to the jury to decide what is credible and what is not. Therefore, they have the right to hear that evidence from him.

R. p. 63, lines 1-13.

After defense counsel again contended that the admissions to Hare concerned prior bad acts and were irrelevant (**R. p. 63, line 14 – p. 65, line 12**), Assistant Solicitor Campbell argued that Wilkins' "admission of choking her is specifically pretty significant in this case because she died as a result of that." She also reiterated that it was not unusual "for a defendant to minimize

---

disclosed this to the prosecution, Brian Shealy was representing Hare on state court criminal charges at the time that Hare came forward with information incriminating Wilkins in this case. This came to light when the defense served a motion indicating Wilkins' intent to impeach Hare with a juvenile conviction that was not on Hare's rap sheet and of which the State had been unaware. However, defense counsel opposed the motion, Wilkins (quite understandably) waived a possible conflict and the trial judge denied the motion based upon Wilkins' waiver and the fact only Wilkins was on trial. **R. p. 2, line 6 – p. 26, line 4**.

After the trial judge had ruled, Wilkins counsel confirmed that an investigator from the Public Defender's Office had interviewed Hare, who was not then represented by counsel on federal charges that had resulted in incarceration. **R. p. 26, line 22 – p. 32, line 5**.

their involvement [in a crime] but to make certain admissions to underlying bad acts." **R. p. 65, line 21 – p. 66, line 3.**

> The trial judge ruled that he would not exclude Hare's testimony in its entirety:
>
> Based on what I've heard at this point, there may have to be some redaction done. But the entire statement would not be excluded based on what I've heard at this point.
>
> 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. p. 66, lines 4-17.

In response to counsel's statement that "this is a prior bad acts statement under 404(b)," the trial judge added that "I find that it is 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. p. 66, line 18 – p. 67, line 3.**

B. Hare's testimony.

Hare later testified that he was currently serving a fifteen year sentence in federal prison resulting from April 2010 convictions for crack cocaine and conspiracy. **R. p.373, lines 6-22.**[12] Hare knew Wilkins and they were friends before Hare was incarcerated. While he was awaiting trial on the federal charges, he was housed of the Alvin S. Glenn Detention Center, from February through October of 2011. While he and Wilkins were both in the J. dorm of that facility, they began talking to each other about why they were incarcerated. Hare told Wilkins

[12] On cross-examination, it was established that was actually serving twenty years. **R. p. 387, lines 1-9; p. 390, lines 1-20.**

about the pending federal charges and Wilkins told Hare that the police "got him" on a murder charge for "the thing that happened in Bethel Bishop about the girl [Ebony] Williams ... being burned up." **R. p. 373, line 7 – p. 376, line 11.**

When Hare expressed disbelief in what his friend had just said, Wilkins stated, " 'Yeah, they got me for it, but they ain't got nothing on me' ...so he [was not] worrying about it." **R. p. 376, lines 12-16.** Over the renewed objection of defense counsel, Hare testified that Wilkins said he had called Ebony one night and that investigators from the police department questioned him about this. However, they did not have a phone number and had to let him go because they could not prove anything. After he had served nine months in jail, the investigators went back to Bethel Bishop and tried to find him. He thereafter "sent them on a wild goose chase," on the pretext that he would turn himself in and talk to them. **R. p. 376, line 17 – p. 378, line 14.**

Wilkins also claimed that police were attempting to get his DNA after his arrest, by offering him something to drink or cigarettes. He claimed that "he was too smart for that." He repeatedly refused to drink anything and even ate a cigarette butt, to prevent them from getting his DNA. **R. p. 378, line 15 – p. 379, line 3.**

When questioned about what Wilkins told him about "that night with [Ebony]," Hare testified that:

> Well, he didn't never really tell me ... he killed her, but he [said] [Ebony] **called him ... that night to come chill with her** and ... they was ... in her living room on a love seat and ... he said ... if she had not ... drunk up his shit and smoked his shit, she was going to do something --you know what I'm saying?
>
> **And, ... he [said] the cameras caught him out there** like 3 -- like 2 or 3 in the morning, **but it couldn't prove ... that it was him.**

R. p. 379, lines 4-7. (Emphasis added).

Wilkins also said that he had planned to tell investigators that he was at a girl's house, as

an *alibi*. However, "this girl wouldn't vouch for him, so he was just going to tell [them] that he was sitting under the bridge at 3 in the morning [because] [t]he cameras don't go under the bridge." **R. p. 379, line 17 – p. 380, line 3**.

Asked again what Wilkins had said about "that night that he went to [Ebony's] house," Hare testified that Wilkins claimed he and Ebony were "[d]rinking and smoking" at Ebony's house. At some point, Wilkins said that he wanted to have sex with her, but "she wasn't with it." Wilkins told her that "[s]he was going to do something, not drink and smoke all his shit." This led to an argument. Asked if Wilkins had said what happened as they argued, Hare testified that "[Wilkins] [s]aid he choked the bitch, but it wasn't the same night that she's supposed to have passed." **R. p. 380, line 4 – p. 381, line 1**.

Wilkins renewed objection was overruled and Hare testified as follows:

Q Did he ever tell you how [Ebony] was killed?

A He [said] he strangled her and burned her up.

***

Q What did he say about how [Ebony] died?

A He said she got strangled and she got burnt up.

Q Did he say what strangled her?

A He said that they say a bathrobe.

Q Did he say anything about … the thing that was strangled [(sic)], what was on it?

A His DNA.

R. p. 381, line 2 – p. 382, line 4.

Wilkins explained the presence of his DNA by saying that his brother was a maintenance

man at the complex and a friend likewise worked there. Wilkins also relayed to Hare several evidentiary items that police had told him that they had recovered from Ebony's apartment. Again, Wilkins said that this could all be explained because his brother was a maintenance man for the apartments and he worked there as well. Hare testified that Wilkins was bragging when discussing the case. Hare was hoping to be rewarded for coming forward, but he had contacted police in June 2011 because his sister had been similarly victimized. **R. p. 382, line 5 p. 385, line 7; p. 405, lines 6-11**.

C. Discussion.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id. See also State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) (same); *State v. Stephens*, 398 S.C. 314, 319, 728 S.E.2d 68, 71 (Ct.App. 2012). Generally, all relevant evidence is admissible. Rule 402, SCRE. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

" 'As a general rule, statements or declarations made by one accused of a crime are admissible against him.' *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980). Of course, such evidence must meet the threshold test of admissibility, *i.e.*, relevance." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (citing Rule 401, SCRE). Applying the above principles to the facts of this case, Respondent submits that the trial judge did not abuse his discretion by

allowing the State to introduce Hare's testimony.

Wilkins' contention that these statements by him constituted evidence of prior bad acts takes the statements out of context. Rather than evidence of a prior bad act or acts against the victim, the foregoing discussion of Hare's testimony makes clear that they were admissions of a party opponent under Rule 801(d)(2), SCRE. As demonstrated, the State's questioning of Hare was directed to what Wilkins had said occurred on the night of the killing, not at some point in the distant, or even recent, past.

In other words, this was evidence concerning his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body, despite his efforts to suggest that the choking had occurred prior to that night. Thus, the challenged statements were relevant and admissible under Rule 801(d)(2). *Id. See also State v. Needs*, 333 S.C. 134, 149-51, 508 S.E.2d 857, 864-65 (1998) (murder defendant's statements that victim had insurance policies on his life, that killing victim would allow defendant's mother to collect on those policies, and that defendant's mother intended to give him $100,000 of proceeds to start business, were admissible as "admissions" of party-opponent); *State v. Gilchrist*, 342 S.C. 369, 372-73, 536 S.E.2d 868, 870 (2000) (error in admitting co-conspirator's statement was harmless in light of witness' testimony that appellant "said, in reference to Victim, 'If I don't kill this nigger tonight he will be on my list,' " which was admissible as an admission by a party opponent under Rule 801(d)(2)(A), SCRE, and constituted "evidence of appellant's preexisting intent to kill Victim"); *State v. Caldwell*, 378 S.C. 268, 285, 662 S.E.2d 474, 483 (Ct. App. 2008) (statements by defendant that "he 'was there to look at the boys, but hadn't touched anyone' and that he 'preferred to look at the younger boys' were not introduced to show his bad character, but were intended to convey to Officer Porter that he had committed the offenses with

which he was subsequently charged, *i.e.* being a peeping tom. Accordingly, as in [*State v. Tufts*, 355 S.C. 493, 585 S.E.2d 523 (Ct.App. 2003), *cert. denied* (June 24, 2004)], the statements were properly admitted as a confession to the charged crimes"); *State v. Hughes*, 336 S.C. 585, 593-94, 521 S.E.2d 500 (1999) (defendant's statements to witnesses that " 'The best feeling I ever had is when I killed that cop' " and that " 'he was going to kill him another white boy' " were admissible against defendant "as statements against his own interest and required no corroborating evidence") (citing Rule 801(d)(2), SCRE).

Because the trial judge correctly found that the challenged admissions were admissible under Rule 801(d)(2), it was unnecessary for the trial judge to undertake a rule 404(b), SCRE, analysis, as Wilkins suggests. Further, much like "[t]he temporal attenuation between the making of this statement and the crime" in *Beck*, Respondent submits that Wilkins contention that he did not admit to strangling the victim on the night of the murder "is of no moment in assessing its admissibility. ... [A]t most [this is] a matter bearing on the weight of the evidence, which was for the jury to determine." *Beck*, 342 S.C. at 135, 536 S.E.2d at 682 (citing *State v. Glenn*, 328 S.C. 300, 492 S.E.2d 393 (Ct.App.1997)). *Accord* Joseph W. Cotchett, *Federal Courtroom Evidence* §801.5.1, 21-20 (4th ed. 2000) ("A party's admissions are substantive evidence of the fact[s] stated, the **credibility** of which is to be **determined by the trier of fact**") (emphasis in original). The admissibility of these admissions did not hinge upon whether he expressly admitted murdering the victim on February 3, 2009. Wilkins argument in this regard ignores that an admission need not be inculpatory in order to be admissible as nonhearsay under Rule 801. *See, e.g., United States v. McGee*, 189 F.3d 626, 632 & nn. 7-9 (7th Cir. 1999); *United States v. Slone*, 833 F.2d 595, 601 (6th Cir.1987) (defendant's statement to a grand jury was admissible under Rule 801(d)(2) even though it denied rather than admitted the facts that the prosecution

was trying to prove); *United States v. Barletta*, 652 F.2d 218, 219 (1st Cir.1981) ("[A] statement need not be inculpatory or against interest to be admissible under Rule 801(d)(2)") (citing *United States v. Matlock*, 415 U.S. 164, 172, 94 S.Ct. 988 (1974)).[13] Moreover, after the testimony that he choked the victim "but not on that night," Wilkins told Hare either that he strangled the victim or that "she got strangled" and was burned. Also, Wilkins was concerned because his DNA was on the bathrobe with which she was strangled. **R. p. 381, line 2 – p. 382, line 4.**

Likewise, the challenged admissions withstand a Rule 403, SCRE, analysis. Rule 403 provides that even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." That did not occur here.

These admissions are words out of Wilkins' own mouth. Moreover, he admitted that he had choked the victim, and the other evidence presented was that she had died by strangulation.[14]

---

[13] "[A]n admission must be contrary to the trial position of the party against whom it is offered." *McGee*, 189 F.3d at 632 n. 9. *See also* Cotchett, *Federal Courtroom Evidence* at §801.5, 21-18. Obviously, this requirement was met here.

[14] Thus, even if Hare's testimony did concern a prior bad act by Wilkins, this evidence would have been evidence to show motive, intent, identity and common scheme or plan. *See, e.g., State v. Johnson*, 306 S.C. 119, 125-26, 410 S.E.2d 547 (1991) (evidence concerning murder of owner of RV defendant was driving, including evidence first victim's body was secreted in RV, was admissible to establish Johnson's motive and intent to kill Trooper Smalls for whom he was being tried); *State v. Aiken*, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996) (noting the more similar the prior act is to the charged act, the more likely the evidence will be admissible under common scheme or plan exception); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice); *State v. Ford*, 334 S.C. 444, 452-53, 513 S.E.2d 385, 389 (Ct.App. 1999) (evidence that defendants had robbed and attempted to rob victim on two prior occasions was highly probative of their guilt on charges of robbery and criminal conspiracy, especially because defendants disputed state's allegations about their motives and intent, and thus the probative value of the evidence substantially outweighed any prejudice that might result from its admission as evidence of motive and intent and common plan and scheme). *State v. Sweat*, 362 S.C. 117, 124-26, 606 S.E.2d 508, 512-13 (Ct.App. 2004) (finding that evidence of prior episode of domestic violence was admissible in prosecution for first-degree burglary, assault and battery with intent to kill, and assault of a high and aggravated nature to show defendant's motive - that defendant was driven by anger over ex-girlfriend causing him to go to jail and terminating their relationship, and that he intended to "get his property" - and his intent - that defendant maliciously sought to inflict harm upon ex-girlfriend and her new boyfriend); *State v. Holmes*, 171 S.C. 8, __, 171

This was extremely important since the prosecution's evidence was that the residents of the apartment complex where the murder occurred are very reluctant to cooperate with law enforcement. Also, even though there was overwhelming evidence of Wilkins' guilt (including the Y-profiler test results of touch DNA from the ligature used to strangle the victim and a glove left at the scene that could not exclude him or other paternally related males; phone records and testimony of friends showing that he was the last person known to have spoken to the victim while she was alive; and surveillance video of someone near the victim's apartment shortly before she was murdered who was dressed similarly to him), this other evidence was circumstantial and did not emanate from the mouth of the accused. *See United States v. DeAngelo*, 13 F.3d 1228, 1232 (8th Cir. 1994) ("To the extent that DeAngelo talks about the cash he obtained in the robberies and the car he bought with it, those parts of the taped conversation are, in our view, nonhearsay admissions by the defendant concerning the crimes he is charged with committing. *See* Fed.R.Evid. 801(d)(2)(A). They are not evidence of some 'other crime,' nor are they themselves 'bad acts', and they do not need Rule 404(b) to authorize their introduction. If they did, those admissions would also tend to show DeAngelo's motive for the robberies, which is, of course, one of Rule 404(b)'s listed reasons for admission"); *United States v. Turner*, 995 F.2d 1357, 1363 (6th Cir. 1993) (statements of accused to firemen concerning identity of arsonist, location where fire started, and type of matches used to set fire were admissible as admissions by party opponent; accused's statements bore upon guilt as they provided evidence of his knowledge of specific circumstances concerning crime).

S.E. 440, 443 (1933) (in prosecution for murder, State properly allowed to elicit evidence on cross-examination of defendant of his prior attempt to poison victim). Likewise, an earlier incident in which Wilkins choked the victim for refusing to have sex with him would be admissible because "[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." *State v. Plyler*, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980).

Additionally, Wilkins testified. He admitted going to the victim's apartment on the morning of the murder and he admitted that he left the glove found at the scene. However, he offered an explanation for the glove being present and he expressly denied killing the victim or that he had any reason to do so. In fact, he claimed that she performed oral sex on him in exchange for cocaine. He also presented evidence of an "alibi" and he suggested that the DNA results were consistent with having been left by his brother (Idris Wilkins), a maintenance man at the complex who had a master key for the apartments. **R. pp. 870-903; 940-41**. *See also* **R. p. 382** (Hare); **p. 527-38** (cross-examination of State's DNA analyst); **pp. 775-94** (testimony of defense's DNA analyst); **p. 1012** (closing argument of counsel). Hare's testimony contradicted much of Wilkins' testimony, by supplying a possible motive for the murder (the victim's refusal to have sex with her drug dealer, Wilkins), the identity of the killer and evidence of Wilkins' malice.

Nor was Hare's testimony prejudicial to Wilkins in an evidentiary sense. As the South Carolina Supreme Court has explained, " '[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Again, the credibility of the comments did not relate to their admissibility. Also, while there was no requirement that the admissions be corroborated in order for them to be admissible, the physical evidence at the crime scene, including the DNA testing of the bathrobe that was used as a ligature and the glove, did tend to corroborate these admissions. Moreover, Wilkins had ample opportunity to cross-examine Hare about these admissions and he availed himself of that opportunity. **R. pp. 385-404; 414**. Therefore, the admissions were admissible.

Finally, any error in the introduction of Hare's testimony must be viewed as non-

prejudicial and harmless beyond a reasonable doubt, since its introduction could not reasonably have affected the result of the trial, in light of the other circumstantial evidence of guilt discussed in the "Statement of Facts." This evidence included the Y-profiler test results of touch DNA from the ligature used to strangle the victim and a glove left at the scene that could not exclude him or other paternally related males; the cell phone records of his phone and that of the victim, as well as the testimony of friends showing that he was the last person known to have spoken to the victim while she was alive; and surveillance video of someone near the victim's apartment shortly before she was murdered who was dressed similarly to him. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result").

II. The trial judge did not abuse his discretion by refusing to allow Wilkins to present the testimony of witnesses, in his case-in-chief, to challenge the integrity of the police investigation because the proffered evidence was remote in time, it constituted inadmissible hearsay statements by the victim and it was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the victim's death.

Next, Wilkins contends that the trial judge erred by refusing to allow him to present Sierra Austin and Dawn Davis Young in his case-in-chief because their testimony allegedly would have challenged the integrity of the police investigation by "indicat[ing] the police had failed to conduct an adequate investigation by failing to follow-up on leads concerning 'one of their own' - Melron Kelly. [Young] and Austin would have provided the link between the testimony of Tasha Praylow about the deceased's fear of Kelly" and supposed shortcomings in

the City of Columbia Police Department's investigation. He further contends that their testimony would have "show[n] a motivation for such shoddy work." Respondent submits that the trial judge did not abuse his discretion in excluding this testimony because the proffered evidence was remote in time, it constituted inadmissible hearsay statements by the victim and it was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the victim's death. *Contra State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

A. How issue developed at trial.

During the defense's case-in-chief, Assistant Solicitor Campbell observed that Wilkins had asked a police officer on cross-examination about whether "Tasha Praylow [had] accus[ed] a police officer of something untoward in this case." She noted that the trial judge had already ruled on third party guilt and she asked for notice and for the trial judge to have a hearing outside the presence of the jury prior to testimony by any witnesses who were "going to go into third-party guilt issues that violate[d]" the trial judge's previous ruling. The trial judge agreed to "conduct that hearing, if necessary." **R. p. 815, lines 3-24**.

Wilkins asserted that while the State was arguing about third party guilt, the defense "was mirroring" the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). After listening to further argument and Wilkins' oral proffer of the three proposed witnesses (**R. p. 816, line 4 – p. 818, line 17**), the trial judge heard the witnesses' testimony *in camera*.

Tasha Praylow testified that she lived in Bethel Bishop Apartments. She knew Ebony Williams and saw Ebony around 11:30 p.m., on the night before Ebony's murder. Ebony

supposedly told Praylow that she was scared that a police officer, Melron Kelly, was "coming to kill her." Both women were standing in the rain looking for crack cocaine when the conversation allegedly occurred. Ebony also told Praylow that she and Lt. Kelly had a "*platonic relationship*." **R. p. 819, line 22 – p. 820, line 16; p. 820, line 23 – p. 821, line 1; p. 822, lines 8-11; p. 825, line 24 – p. 827, line 12**. (Emphasis added).

Praylow claimed that Inv. Reese interviewed her at her cousin's apartment, on the morning that Ebony's body was found. She asked him whether Lt. Kelly "was a suspect, and he said no." She did not tell Inv. Reese about Ebony's alleged fear of Kelly, and she never subsequently disclosed this supposed conversation to police. Rather, she first divulged it when interviewed by the defense's investigator. **R. p. 820, lines 17-22; p. 822, line 17 – p. 825, line 23; p. 827, lines 18-24**.

Sierra Austin testified that she lived next door to Ebony at Bethel Bishop. Ebony allegedly told Austin "probably like two or three weeks before [the murder]" that she was pregnant and that "Officer Kelly" was the father. Austin did not know whether or not Ebony was actually pregnant. When questioned by police on the day that Ebony's body was found, Austin never mentioned this conversation with the victim. Rather, she first mentioned it when the defense investigator interviewed her. **R. p. 828, line 15 – p. 831, line 5; p. 834, line 8 – p. 838, line 16**.[15]

Dawn Davis Young testified that she also lived in Bethel Bishop Apartments when Ebony was murdered. "A couple of days before her death," Ebony asked Young "how would she go about messing ... around with an officer, would I do it, and I told her no." Ebony never mentioned that she was pregnant although the women were "good friends," and Young did not

[15] During Austin's testimony and over objection, the trial judge compelled the defense to provide the State with copies of the statements that it had taken from these three witnesses. **R. pp. 829-34**.

"learn" that Ebony was supposedly pregnant, "[u]ntil after." She never told the police about this conversation and first mentioned it when the defense's investigator spoke to her. **R. p. 839, line 4 – p. 843, line 1.**

The State argued that none of these statements were admissible because they were hearsay; they did not constitute evidence of the victim's state of mind under Rule 803(3), SCRE, *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006) and *State v. Garcia*, 334 S.C. 71, 512 S.E.2d 507 (1999); and that the proffered evidence was actually an effort to improperly introduce evidence of third party guilt. **R. p. 843, line 21 – p. 844, line 16; p. 847, lines 1-19.** On the other hand, Wilkins argued that "this is relevant evidence as it goes to whether or not the defendant is guilty of murder." He characterized Praylow's testimony as the "lynchpin," which made the other testimony relevant. **R. p. 844, line 18 – p. 846, line 24.**

After reviewing *Garcia* at length, the trial judge ruled that Praylow's testimony was admissible under the state of mind exception but he found that the testimony of Austin and Young was inadmissible. **R. p. 847, line 20 – p. 848, line 25; p. 849, line 9 – p. 850, line 10; p. 851, lines 1-10.**

Praylow subsequently testified before the jury that around 11:30 p.m. on the night of the incident, Praylow and Ebony were standing in the street doing crack cocaine when Ebony told Praylow that "someone was coming to kill her." Ebony identified that "someone" as "Kelly." Praylow, a confessed drug user, knew that this meant Lt. Kelly, who was in charge of the Columbia Police Department's narcotics unit. When allegedly questioned by police on the following morning, Praylow asked Inv. Kevin Reese whether Lt. Kelly was a suspect and he informed her that Lt. Kelly was not. She admitted that she never provided information about Ebony's alleged statement to law enforcement. Rather, she first revealed this a week prior to

trial, when questioned by the defense investigator. **R. p. 855, line 5 – p. 859, line 18; p. 862, line 3 – p. 866, line 18.**

On cross-examination, Praylow testified that Ebony had asked Praylow to come to her apartment because she was scared. Although Bethel Bishop is a closely-knit community, Praylow did not go to Ebony's apartment. Instead, Praylow testified that "I didn't pay her no attention," and went "[a]bout my business." **R. p. 859, line 23 – p. 860, line 2; 860, line 23 – p. 861, line 13.**

Following the State's presentation of Inv. Reese and Lt. Kelly in reply, Wilkins asked for permission to call Austin and Young as surrebuttal witnesses but the trial judge ruled that he could not do so. **R. p. 972, line 19 – p. 974, line 24; p. 975, line 16 – p. 977, line 15.**

B. Wilkins' new trial motion.

Wilkins raised the trial judge's ruling as a ground in his April 20, 2012 motion for a new trial (**R. pp. 1196-1200**) and the State opposed this motion in the State's Response To Defense Motion For A New Trial. **R. pp. 1201-07**. The trial judge heard argument by the parties on this issue and the failure to allow the witnesses to testify in surrebuttal. **R. pp. 1102-23**. He thereafter denied the motions. **R. pp. 1181-84**. *See also* **Argument III**, *infra*.

C. Discussion.

The trial judge did not abuse his discretion by refusing to allow Wilkins to present Austin and Young as part of his case-in-chief. As noted, "[a]n abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Wise*, 359 S.C. at 21, 596 S.E.2d at 478. Here, the proffered testimony about statements supposedly made by the victim was rank hearsay. "Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d

138, 141 (Ct.App.1996)). "Hearsay is inadmissible as evidence unless an exception applies." *Id.* *See also Watson v. State*, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006).

Wilkins has not offered this Court any applicable exception to the hearsay rule.[16] Instead, he asserts that the proffered testimony was admissible to demonstrate the supposed reason for his perceived deficiencies in the investigation by the Columbia Police Department and as part of his constitutional right to present a complete defense. Yet, neither of these reasons demonstrates that the trial judge abused his discretion by excluding evidence that was otherwise patently inadmissible.

Initially, Respondent submits that attacking the adequacy of the investigation is not an independent basis for allowing the introduction of inadmissible evidence. Also, it is difficult to fathom how the testimony of either witness was admissible to help show a reason for a "shoddy" investigation, as Wilkins suggests, since neither woman was willing to share the information that she allegedly had with police and the women only came forward when interviewed by Wilkins' investigator, shortly before trial.[17] Further, as the Initial Brief of Appellant makes unerringly clear, the real purpose for presenting these witnesses was to present the victim's alleged statements for the truth of the matter asserted. In other words, this was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the

---

[16] Although he did make arguments about exceptions to the hearsay rule at trial, these have not been argued on appeal and have been abandoned. *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal); *State v. Mitchell*, 399 S.C. 410, 420 n. 4, 731 S.E.2d 889, 895 n. 4 (Ct.App. 2012) (same).

[17] Austin clearly testified that she never mentioned this conversation with the victim when questioned by police on the day that Ebony's body was found. Rather, she first mentioned it when the defense investigator interviewed her. **R. p. 829, line 15 – p. 831, line 5; p. 834, line 8 – p. 836, line 5; p. 837, lines 9-19.** Young likewise never told the police about this conversation and first mentioned it when the defense's investigator spoke to her. **R. p. 841, line 20 – p. 843, line 1.**

victim's death, either directly or circumstantially. Obviously, this contravenes well settled South Carolina law.

Nor does Wilkins' constitutional right to present a complete defense show that the trial judge abused his discretion. As this Court explained in *State v. Burgess*, 391 S.C. 15, 21-22, 703 S.E.2d 512, 515-16 (Ct.App. 2010),

> The United States Constitution guarantees a criminal defendant the right "to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14 (2009). *See* S.C.Code Ann. § 17–23–60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct.App.2008). In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302, 93 S.Ct. 1038. However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." *U.S. v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are "not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Id.* (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

In *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534-535, the South Carolina Supreme Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third party guilt" was stated as follows:

> " '[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible..... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.' " 198 S.C., at

> 104-105, 16 S.E.2d, at 534-535 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939); footnotes omitted).

(quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939)) (footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 328-29, 126 S.Ct. 1727, 1733 (2006), the United States Supreme Court held that subsequent decisions of the South Carolina Supreme Court "had radically changed and extended the rule," and that this extension violated due process by considering the weight of the prosecution's evidence when ruling on the admissibility of such evidence. 547 U.S. at 328-30, 126 S.Ct. at 1733-34. However, the rule as announced in *Gregory* is constitutional and remains in effect. *Id* at 328, 126 S.Ct. at 1733. *See also Burgess*, 391 S.C. at 23, 703 S.E.2d at 516-17. Also, Wilkins' due process right to present a complete defense is subservient to the well-established rule in *Gregory*. *See Holmes*, 547 U.S. at 326-28, 126 S.Ct. at 1732-33; *Burgess*, 391 S.C. at 23, 703 S.E.2d at 516-17.

Wilkins cannot meet this demanding standard. To the contrary, there is no evidence that Lt. Kelly was in the vicinity of Bethel Bishop Apartments, much less near the victim's residence, around the time of the offense. Also, Wilkins cannot point to an alleged admission by Lt. Kelly. Nor is there any physical evidence suggesting Lt. Kelly was involved in her death. Thus, the proffered hearsay evidence was inadmissible. *Contra Holmes*, 547 U.S. at 322-23 (several witnesses placed third party in the victim's neighborhood on the morning of the assault, four other witnesses testified that third party had either acknowledged that petitioner was " 'innocent' " or had actually admitted to committing the crimes). *Accord Gregory*, 198 S.C. at 104, 16 S.E.2d at 534-535; *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013), *cert. denied*, 2014 WL 319696 (U.S.S.Ct., Oct 20, 2014).

Moreover, Wilkins cannot show any conceivable prejudice resulting from the exclusion of the proffered hearsay and, at most, the trial judge's rulings were harmless beyond a reasonable doubt. First, and assuming *arguendo* that the evidence was truly proffered to show a motive for a "shoddy" investigation or to prove further deficiencies in the investigation (as opposed to attempting to improperly end-run the limitations on evidence of third party guilt), then it was cumulative to other evidence in the record that did not constitute inadmissible hearsay. For instance, Praylow was permitted to testify that Ebony was scared Lt. Kelly was going to kill her. Additionally, the jury heard evidence that: (1) although the parties agreed that the time stamp on the surveillance video was inaccurate, Wilkins' disputed the estimated times given by Inv. Thomas and claimed that the time stamp was off by forty-seven minutes less that Inv. Thomas' admitted approximation; (2) Lt. Kelly had been involved in seizing a comforter out of a recently-emptied dumpster; (3) the comforter seized by Lt. Kelly was not tested for the presence of DNA; (4) the sexual assault kit taken from the victim at autopsy was misplaced for some time by the Columbia Police Department after the analyst from the Richland County Sheriff's Department, Rachel Grant, had finished her original testing; (5) the state's expert could find no ignitable liquids that may have been used to start the fire although opining that an ignitable liquid was used; and (6) the dispute by Wilkins' DNA expert as to whether, in fact, his DNA was present, as testified to by Ms. Grant.

Second, the record demonstrates that, in fact, the victim was not pregnant. On cross-examination by Wilkins, Dr. Bradley Marcus, the pathologist, testified that he looked for indications that the victim was pregnant but did not find any. This was confirmed by his failure to mention evidence of pregnancy in his report because his report would have reflected that she

was pregnant if he had found signs of pregnancy. **R. p. 590, line 22 – p. 592, line 20.**[18] Further, if he had been permitted to present these witnesses, the State could have recalled Praylow to repeat that Ebony told her that she and Kelly had a "platonic relationship." As a result and contrary to Wilkins' position at trial and on appeal, the excluded testimony did not hinder his ability to question the integrity of the investigation, nor was it relevant for purposes of an analysis under *Kyles*, supra. Thus, he was not prejudiced by the trial judge's ruling. *See State v. Pipkin*, 359 S.C. 322, 328, 597 S.E.2d 831, 834 (Ct.App. 2004) ("Even if excluded in error, the exclusion of evidence which would be merely cumulative to other evidence ... is harmless"); *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 86, 431 S.E.2d 625, 628 (Ct.App.1993) ("Even if the trial court erred in excluding evidence, there is no reversible error where the testimony would have been cumulative"); *State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Finally, there was overwhelming evidence of guilt, such that the result of the trial could not have been different, even with the excluded testimony. *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596; *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

III. The trial judge did not abuse his discretion by not allowing Wilkins to call Austin and Young as surrebuttal witnesses, after the State presented Inv. Reese and Lt. Kelly in reply to the testimony of Praylow, because the State did not introduce new matter or facts in reply and because the proffered testimony remained inadmissible hearsay and improper evidence of third party guilt.

Alternatively, Wilkins contends that the trial judge erred by refusing to allow him to call Austin and Young as witnesses in surrebuttal because the State introduced new matter though Lt.

[18] Thus, either Ebony misled Austin by falsely claiming that she was pregnant or Austin fabricated the conversation at issue.

Kelly in reply or simply because it was then admissible as part of his constitutional right to present a complete defense. Once again, he cannot show an abuse of discretion because the State did not introduce new matter or facts in reply and because the proffered testimony remained inadmissible hearsay and improper evidence of third party guilt.

A. The State's evidence in reply.

In light of Praylow's testimony concerning her fear that Lt. Kelly was going to kill her, the State presented Inv. Reese and Lt. Kelly as reply witnesses. Contrary to Praylow's testimony that she was interviewed on the morning of February 3, 2009, Inv. Reese testified that he and Inv. Thomas did not arrive at Bethel Bishop until after 1:00 p.m. that afternoon. He also denied ever speaking to Praylow or having "any contact with her whatsoever," and he denied that she ever relayed to him the information about her conversation with Ebony, to which she testified. **R. p. 945, line 1 – p. 946, line 5**. Although he remained adamant on cross-examination that he did not speak to Praylow, he testified that he did not know why Inv. Thomas' notes reflected that they went into the building in which she lived. **R. p. 946, line 15 – p. 948, line 1**.

Lt. Myron Kelly testified that he was assigned to the Columbia Police Department's investigative division, but that he had previously been a Sgt. in the narcotics unit. In that capacity, he had "worked numerous cases" at Bethel Bishop Apartments. He knew the victim because Ebony lived on Senate Street when he was assigned as a residential officer in the Waverly-Martin Luther King neighborhood in 1999. **R. p. 949, line 1 – p. 950, line 14**. Because he had worked the Bethel Bishop area in the narcotics unit, he went there on February 3, 2009, and he assisted the investigation into Ebony's death, by identifying names and nicknames. **R. p. 951, lines 6-21**.

Lt. Kelly repeatedly denied ever threatening Ebony "in any way" at any time before she

was murdered, he denied having any contact with her on February 2nd or 3rd, and he denied knowing her "in any personal capacity." Rather, his only dealings with her were "[j]ust knowing her as a juvenile growing up in the neighborhood." **R. p. 951, line 22 – p. 952, line 21**. He had previously spoken to Praylow, twice, when the manager of Bethel Bishop indicated that a resident wanted to provide "drug information." He testified that the residents had "resentment" to police and he explained that "[w]hen it comes to identifying or asking for help from residents, we don't get much help." Also, it was not unusual for rumors about officers to circulate in Bethel Bishop. **R. p. 949, line 17 – p. 948, line 6; p. 952, line 22 – p. 954, line 2.**

Lt. Kelly took personal leave in the summer of 2009 because he and his wife had their first child in July. However, he testified that "I was notified by one of my subordinate officers that an informant was telling them that I had been arrested for the murder of [Ebony] Williams." This was untrue because he had never been arrested. **R. p. 954, lines 3-24**.

Despite the fact there was no truth to this rumor,

> I contacted the Internal Affairs Division and spoke with Lieutenant Smith. At that time I asked could I see him. When I saw him in person, I advised him of what had been said by the informant. I also prepared him a written statement and ask that he investigate it.

R. p. 955, lines 2-6. Internal Affairs did not issue a report on this and nothing further developed from his self-reporting. **R. p. 955, lines 7-12**.

On cross-examination, W*ilkins twice asked whether Lt. Kelly if he had ever had a sexual relationship with the victim* and twice Lt. Kelly said that he had not. Indeed, Wilkins went so far as to assert that Lt. Kelly had committed the crime of criminal sexual conduct in second degree with a minor, by having sex with Ebony when she was merely fifteen, even though there is no evidence in the record to support this line of inquiry:

Q And it is your testimony today that you only just knew who she was, you never had a sexual relationship with her?

A That is correct, I've never had a sexual relationship with her.

Q You never had a sexual relationship starting at age 15 on Senate Street?

A No, ma'am. [(Sic)].

Q You understand that at age 15 that would be a criminal sexual conduct in the second degree with a minor?

MS. CAMPBELL: Objection, Your Honor, asked and answered.

THE COURT: The objection's sustained.

BY MR. MAY:

Q But you know about the laws about having sex with minors, correct?

A I'm familiar with those, yes, sir.

Q And you know that the punishment's not only prison time --

MS. CAMPBELL: Objection, Your Honor.

THE COURT: The objection's sustained.

BY MR. MAY:

Q You said that you had -- you're married?

A Yes, sir.

Q And it would not be good if some girl in Bethel Bishop said you were having sex with her, would it?

A It wouldn't be true.

Q It wouldn't be good either?

A It wouldn't be good, no, sir.

Q It wouldn't be good if she claimed that she was pregnant by you either,

would it?

A No, sir.

R. p. 958, line 21 – p. 960, line 2.[19]

B. Wilkins' new trial motion.

Wilkins raised the trial judge's ruling on this issue as a ground in his motion for a new trial (**R. pp. 1196-1200**) and the State opposed this motion in the State's Response To Defense Motion For A New Trial. **R. pp. 1201-07**. The trial judge heard argument by the parties on this issue and the failure to allow the witnesses to testify in the defense's case-in-chief. **R. pp. 1102-23**. He thereafter denied the motions. **R. pp. 1181-84**.

C. Discussion.

"South Carolina courts have approved the use of surrebuttal testimony in the discretion of the trial court." *State v. Watson*, 353 S.C. 620, 624, 579 S.E.2d 148, 150 (Ct.App. 2003). "Admission of evidence in surrebuttal is very much in the discretion of the trial judge." *Goethe v. Browning*, 146 S.C. 7, 143 S.E. 362 (1928). "Surrebuttal is appropriate when, in the judge's

[19] The State objected on the ground that there was "no basis" for this line of cross-examination in the record. The trial judge sustained the objection. **R. p. 960, line 3 – p. 967, line 1**. *See State v. Lyles,* 210 S.C. 87, 91, 41 S.E.2d 625, 627 (1947) ("The cross-examiner must be fair and act in good faith. The matters inquired about should not be merely chimerical, or drawn from the vivid imagination of opposing counsel, but the inquiry should be directed only to those matters concerning which the cross-examiner has information warranting a reasonable belief on his part that the fact is as is implied by the question"); *Duncan v. Ford Motor Co.,* 385 S.C. 119, 134, 682 S.E.2d 877, 884 (Ct.App. 2009) ("Because no evidence supported Ford's claim that the 1999 recall was prompted by manufacturing defects at Texas Instruments, the trial court acted within its discretion in preventing Ford from questioning the Duncans' experts in that regard. At this point in the trial, Ford's contention that manufacturing defects at Texas Instruments caused it to recall vehicles in 1999 amounted to mere conjecture").

After the trial, the trial judge apparently directed trial counsel to brief and argue why this cross-examination of Lt. Kelly, for which there is no evidentiary support in the record, did not violate Rule 3.1 of the Rules of Professional Conduct, Rule 407 SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established"). **R. pp. 1124-33**.

discretion, new matter or new facts are injected for the first time in rebuttal[,] especially where the evidence offered in surrebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal." *Watson*, 353 S.C. at 623, 579 S.E.2d at 150 (quoting 88 C.J.S. *Trial* § 197 (2001)). *See also State v. Summer*, 55 S.C. 32, 40, 32 S.E. 771, 774 (1899) ("[I]f the plaintiff [or the prosecution in a criminal case] 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"); *Camlin v. Bi-Lo, Inc., Store No. 2*, 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct.App. 1993).

Respondent submits that the trial judge properly exercised his discretion in denying Wilkins permission to call Austin and Young in surrebuttal. For the reasons argued in **Argument II**, their proffered testimony contained inadmissible hearsay statements by the victim and was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the victim's death. Further, Wilkins' due process right to present a complete defense is subservient to the well-established rule in *Gregory*, as both the United States Supreme Court's decision in *Holmes* and this Court's decision in *Burgess* make clear. *See Holmes*, 547 U.S. at 326-28, 126 S.Ct. at 1732-33; *Burgess*, 391 S.C. at 23, 703 S.E.2d at 516-17.

Their testimony did not become relevant and admissible in surrebuttal simply because **Wilkins elicited** testimony on cross-examination that Lt. Kelly denied having a sexual relationship with the victim. The State never asked the witness about a sexual relationship with the victim. It merely wished to establish that he did not threaten the victim and only knew her because she had lived near him at one point in his career.

Further, **in the absence of any evidence, whatsoever, that would connect Lt. Kelly to**

the victim's murder, the impeachment went to a purely collateral matter. "When a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness." *State v. Beckham*, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999). "[T]he cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed even for the purpose of impeaching a witness." *State v. Williams*, 263 S.C. 290, 302, 210 S.E.2d 298, 304 (1974). *See also State v. Will*iams, 409 S.C. 455, 467-70, 761 S.E.2d 770, 777-78 (Ct.App. 2014) (in prosecution for criminal sexual conduct, trial judge's exclusion of evidence of stepbrother's abuse of child victim, which the defense sought to admit to impeach mother's testimony that she answered all the questions on an intake form truthfully, was not an abuse of discretion because the testimony pertained to a collateral matter).

Certainly, there cannot be an abuse of discretion in refusing to permit Wilkins to present witnesses in surreply to impeach Lt. Kelly on a collateral matter, where Wilkins elicited the testimony that he wished to impeach and the witnesses' testimony was inadmissible under both the rule in *Gregory* and the rule against hearsay. At worst, any error was harmless beyond any reasonable doubt for the reasons set forth in Argument II.

IV. The trial judge did not err by denying Wilkins' motion for a mistrial based upon the prosecution's alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), for suppressing evidence that reply witness, Lt. Myron Kelly, self-reported to the Columbia Police Department's Internal Affairs unit that someone started a rumor that he had been arrested for killing Ebony Williams, where no report was issued by Internal Affairs, the evidence was not materially exculpatory or impeaching and, most importantly, this information was both disclosed to the defense and heard by Wilkins' jury.

Wilkins' remaining allegation is that the trial judge erred by denying Wilkin's motion for a mistrial based upon the prosecution's alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), for suppressing evidence that reply witness Lt. Myron Kelly, self-reported to

the Columbia Police Department's Internal Affairs unit that someone started a rumor that he had been arrested for killing Ebony Williams. Respondent submits that the trial judge properly denied this motion because (1) no report was issued by Internal Affairs, (2) the evidence was not materially exculpatory or impeaching under *Brady* and its progeny and, (3) most importantly, this information was both disclosed to the defense and heard by Wilkins' jury.

A. Wilkins motion for a mistrial.

In the course of responding to the State's objection to Wilkins' cross-examination of Lt. Kelly, Wilkins moved for a mistrial based upon a supposed "*Brady* violation" because the State had only disclosed that Lt. Kelly was a possible suspect during the break shortly before Lt. Kelly's testimony as a reply witness. The trial judge denied his motion. **R. p. 957, lines 12-22.**

B. Wilkins new trial motion based upon a *Brady* violation.

Wilkins raised the trial judge's denial of his mistrial motion as a ground in his motion for a new trial (**R. pp. 1196-1200**) and the State opposed this motion in the State's Response To Defense Motion For A New Trial. **R. pp. 1201-07.**

At the hearing on Wilkins' new trial motion, he argued that the State did not notify the defense of the Internal Affairs investigation until "right before" Lt. Kelly testified. Wilkins admitted that, when questioned, Lt. Kelly testified that he had self-reported. However, he contended that "this would have been essential" evidence that should have been disclosed under *Kyles* and *Brady*, even if "there never was anything done about it" He contended that the inability of the defense to use this information "undermines confidence in the verdict." Further, he contended that the State could not escape the obligation to disclose this information, even if not aware of it until trial, since it was known to police. **R. p. 1133, line 19 – p. 1137, line 1.**

Assistant Solicitor Simpson argued that:

> Your Honor, this matter came to our attention during the course of the defense's case. We then got Lt. Kelly in here and talked to him prior to him coming to court, as I told them on the day when I told them all this information. He did check in Internal Affairs.
>
> There are no documents. There's nothing he turned over. He self-reported several months after this murder occurred because he had heard a rumor. He did it out of the abundance of caution. There was no follow-up, as I informed them ... that day.
>
> There was no follow-up that they explored on the stand as far as anything else being done in this case. He merely did it out of an abundance of caution. And there is nothing that could be turned over.
>
> It's my understanding he checked with the office. There's no documentation, there's nothing else, other than what was told to them, and what was brought out on the stand, and what they cross-examined him on.
>
> I do not know how this could in any way affect the verdict in this case, because they [had] been sent all that information ahead of time. Had they informed us of their intent to accuse – Your Honor, we'd submit a [baseless] claim -- against ... he's now Capt. Kelly, Your Honor --we would have explored this at an earlier time.
>
> However, we were not aware of it. As soon as we became aware of it, we turned it over. There is nothing else to be had.

R. p. 1137, line 4 – p. 1138, line 11. The State argued that the verdict could not be affected because there was nothing left to disclose. **R. p. 1138, line 11 – p. 1139, line 4.**

Wilkins then repeated many of the arguments that he made earlier. He also contended that the Solicitor's file should have contained a note about the self-report, which would have allegedly made the implication of Kelly's involvement "more credible." When the trial judge pressed him for case law requiring disclosure of Internal Affairs reports, Wilkins asserted – without evidentiary support - that "I think someone in law enforcement found out, and the investigators in this case knew about the self-report, if the investigators had found out after another person had told somebody that ... there's talk about someone else doing that and they

investigated that." In light of the other information that Wilkins had allegedly "pointing towards Melron Kelly," he contended disclosure was required. He claimed that Internal Affairs officers could have been subpoenaed to testify about the investigation **R. p. 1139, line 6 – p. 1145, line 15.**

The trial judge later denied the motion. **R. pp. 1181-84.**

C. Discussion.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). In *Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S.Ct. 1936 (1999), the United States Supreme Court stated the applicable law under *Brady*, as follows:

> "In *Brady* this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' . . . We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence. . . . Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'. . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."

(Citations omitted). The Court in *Strickler* explained the "materiality" prong under *Brady*:

> As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. ... Rather, the question is whether 'the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.

Id. at 290, 119 S.Ct. 1936 (citations omitted).[20] *See also United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985); *State v. Taylor*, 339 S.C. 159, 508 S.E.2d 870, 879 (1999).

In the present case, there was no *Brady* violation. The making of a *Brady* request does not grant criminal defendants "unfettered access to government files." *United States v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 110-11, 96 S.Ct. at 2400. Rather than offer idle speculation in support of this motion, it was incumbent upon Wilkins to "establish a basis for his claim that it contains material exculpatory or impeachment evidence." *State v. Nance*, 320 S.C. 501, 504, 466 S.E.2d 349, 351 (1996). *See also, e.g., United States v. Williams*, 576 F.3d 1149, 1163 (10th Cir. 2009) ("[T]he Government did not commit a *Brady* violation, nor did the district judge commit reversible error by failing to order an *in camera* inspection of Officer Henderson's Internal Affairs files. Mr. Williams has not made even a plausible showing that the Internal Affairs files will produce material evidence"); *United States v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002) (holding that a defendant seeking an *in camera* inspection to determine whether a particular source contains *Brady* material needs to make a plausible showing that the file will produce material evidence); *Riley v. Taylor*, 277 F.3d 261, 301 (3rd Cir. 2001) ("A defendant seeking an *in camera* inspection to determine whether files contain *Brady* material must at least make a 'plausible showing' that the inspection will reveal material evidence"). Wilkins did not and could not make such a showing because the only evidence in the record is

[20] The Court in *Strickler* found that the petitioner could not show prejudice resulting from the procedural default of his *Brady* claim because the suppressed evidence was not material. 527 U.S. at 292-96, 119 S.Ct. 1936.

that Internal Affairs did not take any further action after Lt. Kelly self-reported the **rumor** of his arrest.

Thus, Wilkins' claim fails to satisfy the "materiality prong because he did not prove a "reasonable probability under *Brady* and *Kyles* that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280, 119 S.Ct. at 1948. As the Court stressed in *Kyles*: "The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but rather in its absence did he receive a fair trial, understood as a trial resulting in a verdict worthy of confidence 514 U.S. at 434, 115 S.Ct. at 1566.

The existence of any investigation by Internal Affairs in this case was not "material" exculpatory or impeaching information because Lt. Kelly self-reported the alleged rumor of his arrest, which was obviously false, since he was not arrested. Because the rumor was clearly and demonstrably false, Internal Affairs took no further action and no report was generated. *Brady* does not require the State to create evidence that does not otherwise exist. *See Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir. 2002) ("the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation"); *United States v. Makarita*, 576 Fed.Appx. 252, 262 (4th Cir., June 26, 2014) ("*Brady* does not require the Government to investigate the defense's theory of the case or create evidence that might be helpful to the defense"); *United States v. Gray*, 648 F.3d 562, 567 (7th Cir.2011) ("We find the proposed extension of *Brady* difficult even to understand. It implies that the state has a duty not merely to disclose but also to create truthful exculpatory evidence") (internal quotation marks omitted)); *United States v. Alverio–Meléndez*, 640 F.3d 412, 424 (1st Cir. 2011) ("The failure to create exculpatory evidence does not constitute a *Brady* violation").

Additionally, the absence of "materiality" under the *Brady* line of cases is underscored by the fact that Lt. Kelly was a reply witness and was only called to refute Praylow's suggestion that the victim feared that he was going to kill her. Moreover, he did not play any significant role in the investigation of Ebony Williams' murder. Despite the scurrilous rumors proffered at trial, as well as the *innuendo* and argument by Wilkins, Lt. Kelly's involvement in the case was limited to retrieving bedding from a dumpster, which he turned over at the scene, and providing assistance with the names and nicknames of the residents of Bethel Bishop. Again, there was not sufficient evidence of his involvement in the victim's death to satisfy the standard of *Gregory* and *Holmes*, in spite of Wilkins' contrary contention.

Most importantly, information that Lt. Kelly self-reported the rumor of his arrest and that Internal Affairs did nothing further after his self-report was disclosed prior to Lt. Kelly's testimony; he testified; and Wilkins' jury heard this information. Further, Wilkins was able to utilize this information at trial, both on cross-examination and in closing argument. **R. p. 968, lines 8-17; p. 970, line 19 – p. 971, line 8; pp. 1004-05; pp. 1018-19**. No *Brady* error will occur if the material is turned over at a time when disclosure is of value, as was done in this case. E.g., *Powell v. Quarterman*, 536 F.3d 325, 340-41 (5th Cir. 2008) (state conclusion that *Brady* material was turned over in time for effective use was not unreasonable); *Wilson v. Mitchell*, 498 F.3d 491, 512-13 (6th Cir. 2007) (belated disclosure of medical reports until trial did not impact result of trial where the petitioner failed to show that timely disclosure would alter either the defense expert analysis or the result of trial); *Joseph v. Coyle*, 469 F.3d 441, 472 (6th Cir. 2006) (in trial disclosure did not warrant relief because if defendant needed more time, counsel could have requested a continuance); *United States v. Vgeri*, 51 F.3d 876, 880 (9th Cir. 1995) (no error where the disclosure of impeaching evidence during trial gave the defense an opportunity to use

information in cross-examination); *Moore v. Casperson*, 345 F.3d 474, 492-93 (7th Cir. 2003) (witness' changed testimony was disclosed during trial and counsel was able to use the change during cross-examination); *United States v. Spencer*, 753 F.3d 746, 748 (8th Cir. 2014) ("Spencer learned about both pieces of evidence at trial. 'Under the rule in our circuit *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial' ") (citation omitted); *Knighton v. Mullin*, 293 F.3d 1165, 1175 (10th Cir. 2002).

Respondent submits that Wilkins did not argue in support of this mistrial motion that the Internal Affairs investigation "should have been disclosed to Appellant prior to trial to permit him additional investigation." Rather, this was first asserted at the hearing on the motion for a new trial. *See State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to [a] question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial"). *cf. Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (holding post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it). Finally, there is nothing in the record to suggest that further investigation of the Internal Affairs officers could have possibly had any impact on the case. Rather than attempting to satisfy the "materiality" requirement of *Brady* and its progeny, he asserts that disclosure of the

Internal Affairs "investigation" was required, irrespective of whether the self-reporting resulted in materially exculpatory or impeaching information. Although the information was disclosed in this case and used at trial, his position demonstrates the weakness of his current argument because it is inconsistent with *Brady*, since the defendant's right to the disclosure of favorable evidence does not "create a broad, constitutionally required right of discovery." *Bagley*, 473 U.S. at 675 n. 7, 105 S.Ct. at 3380 n. 7.

CONCLUSION

For the above-stated reasons, Respondent respectfully submits that the judgment of conviction must be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

1701 Main Street, 3rd Floor
Columbia, SC 29201
(803) 576-1802

December 22, 2014.

By: 
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 22 2014
SC Court of Appeals

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2012-212387

THE STATE,

Respondent,

vs.

AHMAD JAMAL WILKINS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 22nd day of December, 2014.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2012-212387

THE STATE,

Respondent,

vs.

AHMAD JAMAL WILKINS,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan Hackett, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of December, 2014.

WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT