STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,.....RESPONDENT

v.

ROBERT DAVID NOLEN,.....APPELLANT

INITIAL BRIEF OF RESPONDENT
Appellate Case No. 2019-000591

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT ON APPEAL

Did the trial judge err in refusing to allow Appellant to cross examine, as evidence of bias, the only witness who was present at the time of the shootings, Fred Mazyck, about the fact that he was never charged by the federal authorities for being a felon in possession of a firearm when he admitted firing weapons in the hours leading up to the shootings?

RESPONDENT'S COUNTER STATEMENT ON APPEAL

Did the trial judge properly decided not to allow Appellant to cross examine a witness regarding the possibility of being charged by the Federal authorities of being a felon in possession of a weapon due to the fact he was never subject to any of these charges, so any question regarding this matter would be purely speculative?

And if the court did improperly limit the cross-examination of the Appellant can this be considered harmless error?

STATEMENT OF THE CASE

Due to his marital issues the Appellant was living for a short period of time with the victim Mr. Lance Kenyon. On October 7, 2016, a hurricane was predicted to hit their area. Mr. Kenyon made an offer to his neighbor Fred Mazyck for him to stay at his house with him and the Appellant until the storm ended. During the day the three men drank alcohol and shot guns. Later in the day they decided to go to Publix, Piggly Wiggly and the liquor store. There was testimony that the Respondent took some pills during the day and he admitted to drinking an excessive amount of alcohol.

Later that night two other friends of Mr. Kenyon came to the house, a Mr. Harry Gressette, and Mr. James Harrison. First, they were all in the house drinking and watching a movie. They later decided to go outside to shoot guns and drink more; however, Mr. Mazyck knowing he drank too much decided to stay inside. Appellant along with the other victims decided to go outside. Soon Mr. Mazyck fell asleep on the couch only to be awaken by the sound of gunfire. After hearing this gunfire the Appellant come into the residence. He told Mr. Mazyck "I killed them all I was tired of them messing with me." Then fired two shots at Mr. Mazyck missing him. While standing before Mr. Mazyck with his weapon drawn a dog took the Appellant's attention giving Mr. Mazyck a chance to escape out of the opened front door. He ran outside wearing no shoes into the woods. Respondent took another shot at him missing again. Mr. Mazyck proceeded to run across a densely wooded area to his cousin's Tiki's house to call 911.

When the authorities arrived they witnessed the Respondent performing CPR on Mr. Kenyon. They were seeking the shooter so they began questioning the Appellant. Appellant stated to the police, "I'm the fucking shooter," he was then taken into custody. Both Mr. Gressette and

Mr. Harrison were both pronounced dead at the scene, Mr. Kenyon was later pronounced dead at the hospital.

Appellant was charged with three counts of murder, one count of attempted murder, and one count of possession of a weapon during the commission of a violent crime. When he got to the police station being upset about the cuffs being on too tight and sitting in the police car for what he think was too long, Appellant told the transporting officer, "I'll shoot you in the head." This statement caused him to also be charged with threatening the life of a public official.

On March 25, 2019, the Respondent's trial began. Before trial Appellant plead guilty to possession of a weapon during the commission of a violent crime. Upon the conclusion of this guilty plea the trial judge decided to withhold sentencing until the conclusion of the jury trial. During his trial the Appellant claimed that he killed Mr. Gressette and Mr. Harrison in self-defense, and Mr. Kenyon was killed accidently.

Appellant testified that it was him and not Mr. Mazyck in the house sleeping. He stated that Mr. Mazyck came into the house informing him that, "there're out there fighting," he decided to go outside. Once outside he was struck twice by Mr. Gressette who then he held a gun to his head. During that time Mr. Harrison was outside yelling at Mr. Keynon accusing them of stealing their crystal meth. The Appellant stated that he got Mr. Gressette to allow him back into the house to search for the meth. Once inside he took a .22 caliber rifle, inserted a loaded clip and went back outside. He testified that he shot Mr. Gressette first then he shot Mr. Harrison numerous times. He claimed that later he found Mr. Kenyon under the porch accidently shot.

Appellant then testified that he went into the house to inform Mr. Mazyck to call 911. He claims that he shot twice in the house to gain Mr. Mazyck attention. Mr. Mazyck then left the

house to find a place to call 911 and after he left Appellant stated that he shot into the woods because he saw some people out there.

All of the physical and forensic evidence disputed the claims made by the Appellant. Dr. Susan Erin Presnell the forensic pathologist who performed the autopsies testified that the victims were shot a total of twenty-two times. Mr. Kenyon was shot a total of twelve times six times in the back; Mr. Harrison who was shot nine times including five times in the upper back; and, Mr. Gressette who was shot once in the back of the head. The responding officers and ballistic experts from the South Carolina Law Enforcement division each testified that 26 shell casings were found matching a .22 caliber weapon, the same type of weapon the Appellant admitted using during the course of this incident.

At the conclusion of this trial a jury of his peers found Appellant guilty of three counts of murder; one count of attempted murder; one count of threatening the life of public official; and one count of possession of a firearm during the commission of a violent crime. Upon being found guilty of all charges Appellant appeared before the Honorable Deadra L. Jefferson for sentencing. Judge Jefferson sentenced Appellant to a period of incarceration for the remainder of his natural life for each count of murder; thirty years for attempted murder; and, five years for threatening the life of a public official. (Tr. p. 938 lines 11-25) Since he received three life sentences she could not to sentence him on the possession of a firearm in the commission of a violent offense.[1]

[1] If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. **This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.** S.C. Code Ann. §16-23-490 (2018)(emphasis added)

Upon conviction Appellant filed a timely notice of appeal before this Court. Within this appeal Appellant alleges that the trial court erred in limiting the cross-examination of Mr. Mazyck in violation of the confrontation clause. Trial court did not allow the Appellant to question Mr. Mazyck on the possibility of him being charged in federal court for the offense of a felon in possession of a weapon. The trial Court decided that since there exist no evidence of any pending charges or any deals of leniency offered, these accusations are simply speculation; therefore, should not be allowed in evidence.

Respondent will argue that the trial Court was correct in not allowing the questioning of this witness regarding matters that do not exist. There exist no deal, and since felon in possession of a weapon is a federal offense, the Solicitor has no control over whether or not any charges would eventually be brought. Respondent argues that any questioning regarding this matter would have been more prejudicial than prohibitive. The Respondent will also argue that even if the inclusion of this testimony constitutes a violation of the confrontation clause, any error that might have occurred should be considered harmless.

The decision of the trial court was correct, so it should be affirmed by this court. The initial brief of the Respondent supporting these defenses follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Colf,* 337 S.C. 622, 625, 525 S.E.2d 246,247 (2000). The cross-examination of a witness to test his credibility is largely within the discretion of the trial judge. *State v. Lynn,* 277 S.C. 222, 284 S.E.2d 786 (1981).

Constitutional error does not automatically require reversal, but may be subject to the harmless error analysis. *State v. Mouzon,* 326 S.C. 199, 485 S.E.2d 918 (1997).

ARGUMENT

1. **The trial judge did not violate the confrontation clause by limiting Appellant's cross-examination in not allowing him to ask questions of a witness regarding federal charges that do not exist.**

Appellant argues that the trial court erred in not allowing him to cross-examine Mr. Mazyck regarding a possible federal charge of a felon in possession of a weapon. Appellant is of the position that questioning regarding a possibility of facing charges for this offense must be brought out before the jury because this will show bias on behalf of the witness. The trial court properly determined that all of this information is speculative since there were no charges pending, the witness was never been offered nor accepted a deal, and the solicitor's office has no control over prosecutions done by the United States Attorneys Office. Respondent argues that this information would have been of a prejudicial nature with absolutely no probative value, and the trial court was proper in not allowing this information to before the jury.

The trial court has broad discretion regarding what is allowed to be brought out before the jury through cross-examination. The cross-examination of a witness to test his credibility is largely within the discretion of the trial judge, and his discretion whether to allow the contradictory testimony will not be disturbed on appeal except for manifest abuse of discretion. *Lynn,* 277 S.C. at 225, 284 S.E.2d at 788. There existed no abuse of discretion because there existed no deal. The witness said himself that this matter was never discussed with him by the solicitor's office. (Tr. p. 508 line 22) The solicitor's office have no jurisdiction over a federal prosecution. They were not in the position to promise him anything regarding because it is out of their jurisdiction.

It was proper for the trial court not to allow this testimony due to the fact that if it was allowed it would be total speculation. There was no proof raised by Appellant that any deal or favors was given or promised to the witness for his testimony. The admission of evidence falls under the trial court discretion and the court cannot allow evidence before the jury where there exist no basis for admission of this information. Pursuant to rule 608(c) of the rules of evidence, "bias prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced. Rule 608(c) SCRE. There must be some type of evidence that the witness has some bias either through a deal or a promise of leniency. That was never presented by the Appellant. He just speculated that since the witness was a convicted felon, and there are some testimony that he was in possession of firearm he could be charge in federal court so he must be bias on behalf of the solicitor. Appellant never revealed any evidence proving a possibility of a charge or indictment against the witness. There was also no evidence presented revealing that the solicitor offered a deal for his testimony.

Appellant argues that they have the right to confrontation pursuant to the United States Constitution. However trial judges retain wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on such cross-examination based on concerns about among other things, harassment, prejudice, confusion of the issues, the witness safety, or interrogation that is repetitive or only marginally relevant. *Delaware v. VanArsdall,* 475 U.S. 673, 677, 106 S.E.2d 1431, 1435 (1986). The information that Appellant wished to be allowed to present before the jury was purely speculative and prejudicial. There was absolutely no evidence that the witness was ever promised any deal. The witness even testified he was not concerned about being charged, because "he can't worry about things he cannot change." (Tr. p. 509 lines 7-15) The witness also stated that his sole purpose for testifying was "for Lance" (Tr. p. 508 lines 2-3) and not the promise

of any leniency on federal charges that do not exist. There was totally no bias revealed on the part of the witness, no promises, nor any deal. He expressed under oath that he was not worried about facing any further charges so the trial court was correct in not allowing this information before the jury.

Appellant argued that it was important for this information to be presented before the jury since he was the only eyewitness. This was necessary to show that his reason to testify, was either to avoid prosecution or to be allowed some leniency if prosecuted. However, all of the information presented to the trial judge was strictly speculative. There exist no charges, no deal, or promises. This should not be allowed to be released before the jury. Mere speculation on the appellant's part as to impeachment evidence is insufficient to show prejudice. *Sellers v. State,* 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005).

There existed no evidence whatsoever that he was given any sort of favors in order for a favorable testimony. The court was proper in not allowing Appellant to conduct this type of search of the witnesses' character in order to show a bias that did not exist. Counsel should not be permitted an irrelevant or speculative search in hopes of finding some misconduct involving moral turpitude by a witness. Merely asking a question that has no basis in fact may be prejudicial. *State v. McGuire,* 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979). The trial court said herself that to allow this questioning without no proof of any favors or leniency on a pending charge would unlawfully bring up the character evidence of the witness. (Tr. p. 511 lines 24-25) This would have been prejudicial which would have not revealed any prohibitive value to Appellant's case.

The Appellant cites three cases within his brief regarding decisions made by the court as to the suppression of testimony in violation of the confrontation clause. Neither of these cases relates to the present case. In *State v. Nash,* 475 So.2d 752 (La. 1985), the witness was on parole

in Oklahoma, and he could be prosecuted for distribution of marijuana by the prosecutors' that were currently prosecuting the case in that he was testifying. There exist obvious exposure for this witness that does not exist for the witness in the present case. Mr. Mazyck was not on parole and he did not have any pending charges. He is not going to be prosecuted by the ninth circuit solicitor's office, and there was no evidence presented that he will even be prosecuted in Federal Court. In *State v. Clark,* 315 S.C. 478, 445 S.E.2d 633 (1994), the witness had a pending murder indictment that was being prosecuted by the same circuit solicitor's office that was prosecuting the case in which he was currently testifying. This is definite evidence of favorability that exist on the part of the witness that does not exist in the present case. In *State v. Mizzell,* 349 S.C. 326, 563 S.E.2d 315 (2002) the witness in this case was actually a co-defendant of the Appellant. So there is obvious bias that exist on the behalf of the witness.

In the present case there exist no evidence of bias. No evidence of any deals nor any evidence of any future prosecutions was presented by Appellant. Appellant in this case is going strictly by presumptions which should not be allowed and was rightly denied by the trial judge. There exist no error by the trial judge in not allowing the Appellant to question the witness on a case or deal that currently does not exist. The trial court correctly stated that the Appellant "failed to establish or demonstrate any link between the case and any potential pending federal investigation. They have not demonstrated that any pending investigation exist that in any way will affect his testimony, or any federal investigation that is remotely related to the crimes in this case." (Tr. p. 515 lines 15-23)

This would have been highly prejudicial to the State's case since there was no evidence of any favoritism. This case was ruled correctly and should by affirmed by this Court.

2. **If this Court does find that the trial court erred in not allowing the Appellant to question a witness on a possible federal charge that error should be considered harmless.**

The Respondent will argue that the courts limitation on the Appellant's cross-examination of Mr. Mazyck was not in violation of the confrontation clause. Even if this court decides that this limitation was done in error it should be considered harmless. There was more than sufficient forensic and physical evidence presented proving beyond a reasonable doubt these murders was not committed in self-defense. There was evidence to prove the Appellant's guilt without the testimony of Mr. Mazyck, the limitation of the Appellant's questioning if done in error was harmless.

During his trial the Appellant raised the defense of self-defense. It is the argument of the Appellant that this issue is not harmless due to the fact Mr. Mazyck was a crucial witness the prosecution called to testify to dispute his self-defense claim. Respondent argues that Mr. Mazyck's testimony was not as crucial as perceived by Appellant. Other evidence was presented that would allow a jury to determine that the actions of the Appellant was not due to him defending himself but an act of malice. When making a determination if an error should be considered harmless jurisprudence requires not to question whether the State proved their case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not constitute to the guilty verdict. *State v. Trapp,* 398 S.C. 376, 390, 728 S.E.2d 468, 475 (2012). There is ample evidence presented by the solicitor revealing that the Appellant committed murder beyond a reasonable doubt. There exist no definite rule that governs harmless error, rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. "Error is harmless when it 'could not reasonably have affected the result of trial." *Trapp,* 398 S.C. at 389, 728 S.E.2d at 475, quoting, *State v. Key,* 256 S.C. 90, 180 S.E.2d 888 (1971).

There is ample of evidence proving that this offense was committed with malice. There exist forensic and physical evidence proving this was not an act of self-defense. The limitation of questioning of Mr. Mazyck did not affect the outcome of this trial.

The autopsy of two of the victims was performed by Dr. Susan Presnell, forensic pathologist at the Medical University of South Carolina. She testified regarding the amount and location of gunshot wounds in the bodies of all three victims, and their cause of death.[2] The amount of times shot and the location of the wounds could have easily led the jury not to believe that this was committed in self-defense. The victims were shot a total of twenty-two times. Dr. Presnell testified that Mr. Kenyon suffered a total of twelve gunshot wounds. (Tr. p. 335 line 22). Mr. Kenyon was shot once in the forehead on the top of his head, once on his left side, four times in his right back, two times in the left back, and four times in the right arm. (Tr. p. 336 line 4 – p. 337 line 18). Mr. Kenyon also had eight bullet fragments in his body. (Tr. p. 341 lines 15-17) She testified that Mr. Harrison had a total of nine gunshot wounds. (Tr. p. 349 lines 11-12) One to the back of the head that was superficial, two to the left side of the neck, one to the lower neck or upper back, four to the upper back, and one in the buttocks. (Tr. p. 347 line 13 – p. 349 line 10) Mr. Gressette was shot once in the back of the head at the base of the skull. (Tr. p. 351 line 3-4) Investigator Kevin McGowan testified that they found 26 spent .22 caliber shell casings. (Tr. p. 304 lines 12-14) This was the type of gun that the Appellant admitted to firing during the incident. (Tr. p. 777 lines 10-15) There were only three rounds found shot from another weapon, and there is no proof that these rounds were not shot earlier. Officer Chestnut who conducted the gunpowder residue test on the Appellant testified that he told her, "You'll find all kinds of powders on me. I

[2] Dr. Presnell actually performed the autopsy on victims Kenyon and Gressette and reviewed the records of the autopsy results of Mr. Harrison prior to her testimony. (Tr. p. 330 lines 21-23)

shot all of them motherfuckers." (Tr. p. 157 lines 14-15) The Appellant testified that Mr. Gressette threatened him with a gun. Investigator McGowan testified that this gun however, was found propped up in a corner and "didn't appear to be used." (Tr. p. 845 lines 5-9)

There was sufficient evidence provided by other than Mr. Mazyck revealing the multiple wounds suffered by the victims especially in the back and buttocks. This reveals there was no threat to the Appellant when he committed these murders. There was also the large amount of shell casings fired from the Appellant's gun, twenty-six in all compared to only 3 found from any other weapon. This reveals also the lack of any threat to the Appellant when act occurred.

There were sufficient evidence that disputed the testimony of the Appellant that this act occurred in self-defense. If any error existed in limiting the Appellant to ask any questions regarding any potential federal charges it must be considered harmless. This is due to the fact any limitations is overshadowed by the amount of mounting evidence that proves the Appellant's guilt even without the testimony of Mr. Mazyck.

The Appellant argues that the testimony of Mr. Mazyck was important to establish that he did not act in self-defense. Mr. Mazyck was not even present when the shooting occurred. Mr. Mazyck's testimony was just one of many testimonies that revealed that this was not an act of self-defense. The positioning of the gunshot wounds mostly in the back of the victims prove there was no deadly threat. The amount of shell casings found at the scene revealed that the victims were not a threat to the Appellant at the time this event occurred. Even the Appellant own words revealed there exist no malice. In the record, he stated "I shot all them motherfuckers," (Tr. p. 157 line 15) and "I don't give a fuck about Lance." (Tr. p. 830 lines 10-11) On cross-examination the Appellant admitted to shooting the Mr. Harrison and Mr. Kenyon nine times each in the back. (Tr. p. 778 lines 4--16). He then admitted to shooting a round into the wall near where Mr. Mazyck was sitting.

(Tr. p. 778 lines 20-25). There exist a plethora of evidence that reveals the guilt of the Appellant beyond a reasonable doubt. So if this court decides that the trial court's ruling in limiting the questioning of Mr. Mazyck was in violation of the confrontation clause, that error should be considered harmless.

CONCLUSION

The trial court made the proper decisions regarding this matter the Respondent respectfully request this court to affirm the decision of the trial court.

Respectfully submitted,

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March 2, 2020.

STATE OF SOUTH CAROLINA
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Appeal from Berkeley County
The Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

v.

ROBERT DAVID NOLEN,

Appellant.

Appellate Case No. 2019-000591

PROOF OF SERVICE

I, Tommy Evans, Jr., counsel for Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing two (2) copies of the same via U.S. postal service, postage paid, first class, and addressed to the attorney of record at:

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

This 2nd day of March, 2020.

Tommy Evans, Jr.
Assistant Attorney General
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ALAN WILSON
ATTORNEY GENERAL

March 2, 2020

The Honorable Jenny A. Kitchings
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Re: *The State v. Robert David Nolen*
Appeal from Berkeley County
Appellate Case No. 2019-000591

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Tommy Evans, Jr.
Assistant Attorney General

TE/brb
Enclosures
cc: Kathrine H. Hudgins, Esquire (w/two copies of encls.)
The Honorable Scarlet Wilson Solicitor 9th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)