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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
Honorable Gary E. Clary, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY DUBOSE TERRY,

Appellant.

FINAL BRIEF OF RESPONDENT

CHARLES M. CONDÓN
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

105 S. Lake Drive
Lexington, SC 29072
(803) 359-8352

ATTORNEYS FOR RESPONDENT.

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge properly refuse to allow Appellant to introduce his custodial statement to police under Rule 804(3), SCRE?

II.

Whether Appellant's claim that the trial judge erroneously ordered disclosure of Appellant's records from Charter Rivers Hospital to the State is procedurally barred from review on appeal because Appellant did not avail himself of the trial judge's offer to review any statements he made *in camera*; he did not proffer the records; and because Appellant did not object at trial to any question asked by the State on the ground that it was based upon confidential information contained in these records?

III.

Did the trial judge properly limit the scope of Appellant's cross-examination of State's witness Scottie Frier, by refusing to allow him to elicit that he had given a statement to police?

IV.

Did the trial judge abuse his discretion by allowing the State to introduce a photograph of the victim (State's Exhibit 55) in the sentencing phase of Appellant's trial?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Appellant at the July, 1995 term of court for murder, burglary in the first degree, criminal sexual conduct in the first degree and malicious injury to telephone system. The State thereafter timely served a Notice of Intent to Seek the Death Penalty as well as a Notice of Evidence in Aggravation of Punishment. Following Motions hearings on May 28, August 22,¹ September 3 and September 8, 1997, before the Honorable Gary E. Clary, Appellant was tried by Judge Clary and a jury on September 15-21, 1997. On September 18, 1997, the jury found Appellant guilty of all charges.

Following Appellant's exercise of his statutory right to a twenty-four hour waiting period, the sentencing phase was held on September 19-21, 1997. The State relied upon the statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree. S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 1997). The trial judge charged the jury on the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6) & (7).² The jury found the presence of both alleged statutory aggravating circumstances and recommended a sentence of death. Finding that the evidence presented warranted imposition of the death penalty, and that its imposition was not the result of prejudice, passion or any other arbitrary factor, Judge Clary imposed the sentence of death for murder. He also sentenced Appellant to life imprisonment for burglary in the first degree, to thirty years

¹ See Argument II, *infra*.

² With respect to the last mitigating circumstance, the trial judge did not charge on Appellant's age but on his mentality.

imprisonment for criminal sexual conduct in the first degree and to ten years imprisonment for malicious injury to a telephone system. Each of these sentences was imposed consecutive to the sentence for murder. (R. pp. 2128-2130).

A timely Notice of Appeal was served and filed. This appeal follows.

STATEMENT OF FACTS

The State's guilt phase evidence reasonably tended to show that in May, 1994, Urai Jackson lived alone at 3148 Buckeye Drive in West Columbia, South Carolina. She and her husband had divorced in 1974 and she was not romantically involved with anyone at the time of her murder. In fact, her daughter, Samantha A. Jackson, testified her mother was "a loner" and did not have any close acquaintances with whom she kept in touch frequently, other than speaking to her neighbors. (R. pp. 1526-1528; p. 1536).

Samantha had maintained very frequent contact with her mother. She frequently assisted with her mother's finances and often did her laundry at her mother's house on the weekends. Samantha first met Appellant in 1986 or 1987. He was dating her best friend at the time, Diane Gibson, who lived across the street from her mother. Appellant lived with Diane for some period of time, but Samantha lost contact with Diane in 1993. Appellant was not living across the street from Urai Jackson at the time of the murder, and he only knew her "in a passing type sense." (R. pp. 1528-1530).

On Saturday, May 29, 1994, Samantha called her mother and left a message on Urai's answering machine for Urai to call her back. However, Urai did not call her back. On Sunday, Samantha called her mother several times. She did not get an answer and the answer machine did not pick up. Still, Samantha was not worried because it was the Memorial Day weekend and her mother frequently went to Lake Murray on holidays.³ When Samantha could not reach her mother on Tuesday, May 31, 1994, however, she became concerned. She drove to her mother's house and noticed that the outdoor light

³ She always went alone.

was on even though it was the middle of the day. This was very odd because Urai was an early riser and would not have left the light on after she awakened. As Samantha approached the house, she noticed that the carport door was ajar and there was "glass everywhere." Inside, the kitchen was in disarray and there was garbage on the floor. Again, this was unusual. Samantha walked into the hall and living room area and saw her mother lying on the floor, dead. She tried to call 911 but could not get a dial tone. Therefore, she immediately ran out of the house and called 911 from a neighbor's residence. A Lexington County Deputy Sheriff arrived on the scene several minutes later. (R. pp. 1529-1535).

Officers responding to the scene indicated that the glass pane on the carport door window nearest to the doorknob had been broken out from the exterior of the house. The officers corroborated that the kitchen area was in disarray but the rest of the house appeared to be reasonably neat. Also, the victim was lying in the area described by Samantha. She had either a T-shirt or gown across part of her body, but her breasts and her genitalia were exposed. Also, her legs were spread and her left leg was up at an angle with the bottom of her foot on the floor. (R. pp. 1284-1298; pp. 1308-1309; pp. 1332-1336; pp. 1342-1343; pp. 1353-1358; pp. 1419-1922).

Samantha Jackson testified her mother kept a number of items around the house for protection, including the bottom of a two-piece pool cue. While officers found the top portion of the pool cue, the bottom portion was never recovered. Outside the house, the officers discovered the telephone lines had been pulled from the telephone box. A latent fingerprint matching Appellant's right ring finger was lifted from the telephone box. (R.

pp. 1309-1312; pp. 1330-1332; pp. 1336-1337; pp. 1343-1344; pp. 1356-1357; pp. 1430-1437; pp. 1534-1535).⁴

Dr. John Carter, the forensic pathologist who performed the autopsy on the victim, testified that he found at least four, and possibly more, blunt trauma wounds where a blunt, heavy, club-like object hit the victim just above and behind her right ear. These blows were struck with sufficient force to split the scalp and crush the skull bone, thereby exposing some brain tissue behind the right ear. These blows would have likely caused immediate unconsciousness and would have quickly resulted in death. Also, there were a number of superficial lacerations which may have occurred when she was falling. The appearance of the wounds he found indicated that she was struck from behind and possibly from above and behind with a blunt instrument. He also found two blunt trauma lacerations on the top of the victim's shoulder which appeared to have been caused by the same instrument. At least two "slap-type injuries" in different directions on the side of the victim's right upper arm were defensive wounds, as were the wounds to the left forearm. These wounds were consistent with State's Exhibit 13, but Dr. Carter opined that the head injuries were more likely caused by a heavier instrument, such as a club or a baseball bat which had a rounded end. Also, he explained that the victim's thumb was "almost smashed" and opined this could have been a defensive injury or it could have been caused by the perpetrator stomping on her thumb. (R. pp. 1464-1470). Dr. Carter, who had visited the scene, opined that the position in which the victim's body was found was

⁴ A latent fingerprint from one of two beer cans found in the victim's sink did not match either the victim or Appellant; but, it was impossible to determine when the print was left and it could have been left by anyone who handled the beer can. (R. p. 1442; pp. 1460-1461).

consistent with having been sexually assaulted. At autopsy, he took swabs from the posterior portion of the victim's mouth, the rectum and the vaginal canal. Internally, he found a reasonable amount of mucoid fluid in the vaginal canal. (R. pp. 1471-1473; pp. 1478-1480).

Subsequent testing by SLED's forensic serology and DNA laboratory revealed the presence of semen in the vaginal wash and the rectum swab. A blood standard from Appellant showed that he had ABO blood type "group A and the secreter status is non-secreter, Lewis A positive." (R. pp. 1488-1491). Appellant's DNA profile matched the DNA extracted from the semen found on the vaginal wash and the anal swab. "[T]he probability of selecting an unrelated individual at random from the population having a DNA profile matching [these items] . . . is approximately one in one hundred ten billion blacks and one in thirty-three billion Caucasian." (R. pp. 1493-1498).

In the sentencing phase, the State introduced two statements that Appellant had given to police, in an obvious effort to avoid prosecution for murder (State's Exhibits 67-68; see Arguments I and III, infra). Also, the State presented Dr. Carter, who testified in greater detail as to his autopsy findings (see Argument IV, infra), as well as further forensic evidence explaining how the crimes took place, such as a videotape of the crime scene and blood spatter testimony (R. pp. 1820-1835; State's Exhibit 66), evidence concerning Appellant's violent and lawless character (R. pp. 1610-1662; pp. 1669-1717; pp. 1727-1775) and a limited amount of victim impact evidence. (R. pp. 1848-1859).

ARGUMENT

I.

The trial judge properly refused to allow Appellant to introduce his custodial statement to police under Rule 804(3), SCRE.

Prior to enactment of the South Carolina Rules of Evidence, this Court consistently held that a criminal defendant could not introduce out-of-court and self-serving hearsay statements which he may have made to others. State v. South, 285 S.C. 529, 331 S.E. 775 (1985); State v. Sweet, 270 S.C. 97, ___, 240 S.E.2d 648, 649 (1978); State v. Atchison, 268 S.C. 588, ___, 235 S.E.2d 294, 296-297 (1977). Appellant ignores this well-settled precedent and maintains that his March 24, 1995, custodial statement to police was admissible as a statement against interest under Rule 804(3), SCRE, because he allegedly was unavailable as a witness since he exercised his right not to testify, and because his statement was one against penal interest. The State submits Appellant's claim is frivolous because Appellant was not an "unavailable" witness under Rule 804; his statement was little more than an effort to exonerate himself from capital murder; and his statement was not sufficiently corroborated by other evidence sufficient to permit its introduction.

At the State's request, the trial judge held a pre-trial Jackson v. Denno⁵ hearing to determine the admissibility of Appellant's January 17, 1995, non-custodial statement, as well as his March 24, 1995, statement given following his arrest for the victim's murder. At the conclusion of this hearing, the trial judge ruled that both statements were

⁵ See Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964).

admissible. (R. pp. 1133-1195). Appellant specifically objected to introduction of his March 24, 1995, statement because the State allegedly had failed to prove a knowing and voluntary waiver of his Miranda⁶ rights, since he was ill at the time he made the statement and he had been sick several days previously. (R. p. 1191, l. 20 - p. 1192, l. 8).

Investigator Scotty Frier, of the Lexington County Sheriff's Department, was one of the two officers to whom Appellant had made the statements. Before presenting his testimony, the State informed the trial judge *in camera* that it had decided not to introduce Appellant's March 24 statement. The State also moved *in limine* to prohibit Appellant from introducing any evidence concerning the statement. (R. pp. 1373-1380). The State explained that:

The State's position is that [the statement] . . . is inculpatory to a certain extent, [but] exculpatory in the grand scheme of things; that is, as to aggravating circumstances and actually attempts to move the charge of murder to voluntary manslaughter and no criminal sexual conduct and no burglary.

We are not required to elicit it and they can't elicit it under the rules as they are now.

(R. p. 1375, ll. 10-17).

Following a recess, Appellant argued that the statement would be admissible under Rule 804(b)(3) as a statement against his penal interest. He also claimed that the statement was admissible as a matter of due process and cited Chambers v. Mississippi, 410 U.S. 204, 93 S. Ct. 1038 (1973) and Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150 (1979).

⁶ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

He further argued that the statement "contains sufficient indicia reliability to take it outside of the hearsay exception. . . ." (R. p. 1377, l. 14 - p. 1379, l. 11).

The State responded by noting that Appellant's opening statement suggested to the jury that Appellant had given a false confession. Moreover, the State had not elicited evidence of any statements. Specifically, it did not introduce evidence of the statement denying involvement out of fairness to Appellant because "we didn't want to be in the position of appearing overbearing in regard to statements made by the defendant." However, the State noted that its trial strategy not to introduce Appellant's statements did not effect Appellant's ability to assert a defense. (R. p. 1379, l. 12 - p. 1380, l. 12). Although the trial judge questioned whether Appellant was unavailable, he took the matter under advisement overnight. (R. p. 1380, l. 16 - p. 1382, l. 14).

The following morning, the trial judge ruled that the statement was inadmissible under Rule 804(b)(3) because, although Appellant's assertion of his Fifth Amendment right not to testify may make him unavailable as a witness for the State,⁷ this did not allow him to introduce a statement the State did not introduce in its case-in-chief in order to circumvent the requirement that he could not present his own statements unless he testified. (R. p. 1386, l. 4 - p. 1387, l. 10). The trial judge also ruled that Appellant would be unable to elicit evidence that he had given a statement to police. (R. p. 1387, l. 16 - p. 1389, l. 16. See also Argument III, infra). Based on this ruling, no evidence was presented to the guilt phase jury concerning either statement Appellant had given to

⁷ The trial judge apparently agreed with the State's position (R. pp. 1373-1374) that any statement of Appellant which it chose to admit was admissible under Rule 801(d)(2). (See R. p. 1386, l. 4 - p. 1387, l. 10).

police. However, the State introduced both statements in the sentencing phase of his trial. (R. pp. 1810-1819; State's Exhibits 67-68).

Initially, the State submits Appellant's argument is procedurally barred. In support of his position, he claims that he would have been entitled to a manslaughter instruction if his statement had been introduced. Yet, he did not raise this argument in the lower court. Indeed, he did not make any argument of why he felt this statement should be introduced other than to argue it was admissible. Under these circumstances, his present argument is procedurally barred under this Court's decision in State v. Bailey, 29 S.C. 1, 377 S.E.2d 581 (1989) (party may not assert different ground in support of argument on appeal from the ground(s) asserted at trial). Alternatively, this argument is wholly without merit.

The statement was clearly inadmissible under South, Sweet and Atchison, *supra*.⁸ Nor did adoption of the South Carolina Rules of evidence change this well reasoned precedent. Under Rule 804(b)(3), SCRE, an out-of-court statement which "was at the time of its making so far contrary to the declarant's pecuniary . . . interest . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." If the statement is offered to exculpate the defendant, then it is "not admissible unless the corroborating circumstances clearly indicate the trustworthiness

⁸ Appellant's cavalier disregard is especially troubling in light of the fact this Court adopted Rule 804(a) as the standard for determining whether a witness was "unavailable" for purposes of admitting prior testimony against penal interest in Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (Riddle III). Therefore, it would appear the prior precedent is controlling.

of the statement." Id.; State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992) (adopting Rule 804(b)(3) as S.C. rule prior to new rules of evidence).

Although Rule 804(a)(1), SCRE, defines an "unavailable" witness to include situations in which the declarant is exempted from testifying concerning the subject matter of the declarant's statement by a ruling of the trial judge on the ground of privilege, the last paragraph of Rule 804(a)(5), SCRE, specifically provides that:

A declarant is not unavailable as a witness if [the] exemption, refusal, claim of lack of memory, inability, or absences due to the procurement . . . of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Rule 804 prevents the proponent of evidence proffered thereunder from creating the condition of unavailability and then benefitting therefrom. It was designed to ensure access to testimony where a desired witness becomes unavailable through no fault or wrongdoing of the testimony's proponent. United States v. Kimball, 15 F.3d 54, 55-56 (5th Cir. 1994), cert. denied, 513 U.S. 999 (1994). In Kimball, the Court held that the defendant had created his own unavailability by invoking his Sixth Amendment privilege against self-incrimination. Therefore, the Court held that he was not unavailable for purposes of admitting his prior testimony under Rule 804(b)(1), FRE. Id. A number of other state and federal courts have reached an identical conclusion with respect to their counterpart to Rule 804(a), FRE. United States v. Peterson, 100 F.3d 7, 13-14 (2nd Cir. 1996) (defendant who invokes Fifth Amendment privilege is not unavailable to himself; rather, he creates his own unavailability and may not admit prior testimony under Rule 804(b)(1)); United States v. Bennett, 539 F.2d 45 (10th Cir. 1976) (rejecting defendant's claim that he was unavailable witness because he invoked his Fifth Amendment privilege

against self-incrimination and did not testify; thus, prior testimony was not admissible under Rule 804(b)(1)); De La Beckwith v. State, 707 S.2d 547, 586 (Miss. 1997) (same); Davis v. State, 961 S.W.2d 156, 156-57 (Tex. Ct. Cr. App. 1998) (en banc) ("By invoking his Fifth Amendment privilege, appellant procured this exemption for the purpose of preventing himself from testifying as a witness. And appellant was the proponent of his prior testimony. Therefore, under the plain language of the rule, appellant was not unavailable" for purposes of admitting the testimony under Rule 804(b)); Castro v. State, 914 S.W.2d 159, 163 (Tex. Ct. App. 1995); see also People v. Cruz, 70 Cal. Rptr. 603, 607 n. 6, 264 Cal. App. 350, 356 n. 6 (Cal. App. 1968) (dicta).⁹

This interpretation of Rule 804(a) is consistent with both this Court's decisions in South, Atchison and Sweet, supra, as well as with the admonition by the United States Supreme Court in Fitzpatrick v. United States, 178 U.S. 304, 315, 20 S. Ct. 944, 948-49 (1990) that "[w]hile no inference of guilt can be drawn from [the defendant's] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those

⁹ While most of these decisions deal with efforts by a defendant to introduce his prior sworn testimony under Rule 804(b)(1), they are still clearly applicable because each analyzes whether the defendant was "unavailable under Rule 804, and an admission against interest under Rule 804(b)(3) clearly recognizes that the declarant be "unavailable." Doctor, supra. See also State v. Anders, 331 S.C. 474, ___, 503 S.E.2d 443, 444 (1998); State v. McKnight, 321 S.C. 230, 467 S.E.2d 919 (1996). Moreover, although unpublished opinions by federal Circuit Courts of Appeals are not binding precedent, the State would note that the Fourth Circuit Court of Appeals reached the same result in United States v. Cucci, 4 F.3d 986, 1993 WL 343175 (4th Cir. 1993) (unpublished) (district court properly refused to allow defendant's daughter to testify, pursuant to Rule 804(b)(3), FRE, concerning statements explaining why defendant, convicted of conspiracy to distribute more than five hundred grams of cocaine and other crimes, had over \$40,000.00 in his possession, including \$27,000.00 of marked funds, because defendant was not unavailable as witness).

facts." In this regard, the defendant is treated as any other witness. This "is a basic rule of our adversary system, Kimball, 15 F.3d at 56; and, Appellant has not offered any sound reason why this Court should abandon it.

A second problem with Appellant's position is that the March 24, 1995, statement did not "so far tend [] to subject [him] to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE; Doctor, *supra*. See also Williamson v. United States, 512 U.S. 594, 603, 114 S. Ct. 2431, ____ (1994) ("whether statement is self-serving or not can only be determined by viewing it in context"); 5 J. B. Weinstein & Margaret Berger, Weinstein's Evidence § 804.06[5](b) (2d ed. 1998). Although it constitutes a confession to a crime and so is technically "against interest" under 804(b)(3), in actuality, the principal and perhaps only function of the statement was to support a defense for Appellant to the more serious charge of murder while in the commission of burglary and criminal sexual conduct in the first degree. Thus, when looked at in its totality, the statement is truly one for Appellant's penal interest (as the declarant) instead of against it. Id. See also United States v. Hooks, 848 F.2d 785, 796-797 (7th Cir. 1988) (co-defendants' transcribed statements to prosecutor in presence of their attorney were self-serving in light of possible indictment). Cf. United States v. Evans, 635 F.2d 1124, 1126 (4th Cir. 1980) (while noting that such a statement may not satisfy the declaration against interest exception to the hearsay rule, Court did not have to reach issue).

Indeed, this is why the State chose not to introduce Appellant's statement and why it moved *in limine* to prevent him from eliciting evidence concerning the statement through cross-examination of the State's witnesses. A review of Investigator Frier's *in camera* and

subsequent testimony before the jury clearly supports this position. In the January 17, 1995, statement, Appellant was not in custody even though he was a suspect and was given his Miranda warnings before making his statement. He admitted that he had been to Dianne Gibson's former residence¹⁰ on Buckeye Drive on the weekend the victim was killed, to visit Gibson's brother. However, he maintained that he was not in the neighborhood by himself that weekend. Also, he admitted he had been in the victim's home to visit her son on a previous occasion but denied being there alone with the victim, at any time. (R. pp. 1150-1151; pp. 1811-1813; State's Exhibit 67).

Yet, when he gave his March 24 statement, he was formally advised that he had been arrested for the burglary of the victim's home as well as her rape and murder. He was also advised that there was a problem with some of the samples that law enforcement had taken from him matching evidence at the crime scene. At this point, Appellant gave a statement in which he admitted breaking into the house but denied the intent to commit a crime therein because he allegedly had been engaged in an ongoing affair with the victim. He subsequently had consensual intercourse with the victim and claimed, as he was leaving, she struck him from behind. Only then did he lose his temper and strike her -- picking up the nearest object he could find and beating her with it -- because he had a bad temper. He did not remember pulling the telephone lines and he claimed he could not remember what he had done with the object he used to beat the victim. (R. pp. 1156-1171; pp. 1814-1818; State's Exhibit 68).

¹⁰ He was living with Gibson at the time, but he told officers that they were not living there at the time of the murder.

Therefore, when Appellant's statement is viewed in its entirety and in the context of a charge of capital murder, it is clear that it was not a statement against interest but one in his interest. Id. See also Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998) (letter written by tax agent for railway company, in an effort to avoid payment of taxes, was statement in interest to avoid payment of property taxes, rather than statement against interest; hence, it was inadmissible as statement against interest).¹¹

Another flaw in Appellant's argument is that his statement was not clearly corroborated by other evidence indicating the trustworthiness of his statement. Under Rule 804(b)(3), SCRE, such corroboration is a prerequisite to admitting an out-of-court declaration which implicates the declarant and exculpates the accused. Id.; Doctor, 306 S.C. at 529-530, 413 S.E.2d at 38; State v. Forney, 321 S.C. 353, 359, 468 S.E.2d 641, 644 (1996); McKnight, 321 S.C. at 234, 467 S.E.2d at 921. Here, Appellant's March 24 statement was not made spontaneously nor promptly after the crimes in question. Rather, it came almost a year later and only after Appellant was arrested for the murder and other crimes, and only after he was confronted with physical evidence found at the scene that conflicted with his prior denial of involvement. Under these circumstances, he had a very strong ulterior motive to fabricate a story to minimize his potential culpability for the crimes which he committed. See Evans, supra, People v. Maerling, 46 N.Y.2d at 300-301, 413 N.Y.S.2d at 323, 385 N.E.2d at 1252; Hooks, 848 F.2d at 796-797

¹¹ Appellant relies upon People v. Maerling, 46 N.Y.2d 289, 413 N.Y.S.2d 316, 385 N.E.2d 1245 (Ct. App. 1978) in support of his argument. While his reliance is procedurally barred because he did not present this authority to the trial judge, the State submits that Maerling is consistent with Evans, Hooks and the other authority cited herein because the Court in Maerling found that the out-of-court declaration was not against penal interest and was not admissible.

("considering the circumstances under which unsworn testimony was given, it is more likely than not that . . . [declarants] had motive to testify falsely. No other factors in those circumstances rendered the statements reliable"). Moreover, Appellant's statement was not corroborated by evidence presented in the guilt phase. Samantha Jackson unequivocally testified that her mother was "a loner" who did not have any close acquaintances "other than the neighbors she saw every day." Also, her mother did not date and was not romantically involved with any man. (R. p. 1527, l. 18 - p. 1528, l. 2; p. 1536, ll. 6-16). More importantly, she specifically testified that her mother only "probably knew [Appellant] in a passing type sense." (R. p. 1535, l. 25 - p. 1536, l. 2).

Thus, her testimony cuts at the very heart of Appellant's statement and refutes, beyond cavil, his suggestion that her mother was romantically involved with him. Of equal importance, the victim was found lying on her back, with her legs spread and one slightly bent. Also, her breasts and genitalia were exposed. (See Statement of Facts, supra). Dr. Carter, the pathologist who performed the autopsy and had visited the scene, clearly testified that "a deceased individual on their back with one or both legs lifted up, cocked back, there was also a small trace of fluid externally on the public hairs that appeared very similar to semen, both of those findings are very characteristic of sexual activity or sexual assault at the time." (R. pp. 1472-1473).¹² The State's evidence also showed that

¹² On appeal, Appellant asserts that Dr. Carter's testimony corroborates his statement. (Initial Brief of Appellant at p. 11). While the above discussion clearly reveals that his argument is predicated upon a misunderstanding or a misrepresentation of Dr. Carter's testimony, the State would note that he did not make the same argument in the lower court. Therefore, his reliance upon any portion of Dr. Carter's testimony is procedurally barred under this Court's decision in State v. Bailey, supra (party may not assert one ground in support of argument at trial and different argument on appeal). Appellant likewise did not argue in the lower court that his reliance on the trial judge's ruling at the

Appellant's fingerprint was found on the telephone box and that the wires leading to the telephone box had been pulled from it so as to disconnect the phone. (Statement of Facts, supra). The only reasonable inference from this evidence is that Appellant intended to commit a crime when he broke into the victim's house. Evans, 635 F.2d at 1126-1127.

Appellant did not introduce any evidence in the guilt phase which would have corroborated his statement. Therefore, there was insufficient evidence to corroborate the reliability of his statement, and thereby guarantee its trustworthiness. Id; Forney, McKnight and Doctor, supra. Contra Riddle III, supra. As a result, the trial judge properly refused to allow Appellant to present the jury with his custodial statement under Rule 804(b)(3), SCRE, and without subjecting himself to cross-examination. Id.

Thus, Appellant's custodial statement clearly was nothing more than self-serving hearsay, given at a time when he had an extremely strong motive to lie about what had happened to the victim. It was wholly unsupported by any guilt phase evidence and, indeed, is refuted by his prior, non-custodial statement, in which he denied being involved in Urai Jackson's death in any manner.¹³ "If such evidence w[as] admissible, the door

Jackson v. Denno hearing "was cynically exploited by the solicitor" (Initial Brief of Appellant at p. 13) or that he was "entitled to a fair determination of his culpability during the guilt stage without regard to the penalty stage" (Initial Brief of Appellant at p. 9). Further, he did not argue in the lower court that the trial judge's ruling "allowed the state to manipulate the trial process." Hence, these spurious arguments, which are factually untrue, are likewise procedurally barred under Bailey.

¹³ Appellant contends the trial judge's ruling unfairly allowed the prosecution to introduce evidence which he was prevented from presenting. Assuming this argument is not barred under Bailey, it is without merit and ignores that the State may introduce the statement of an accused as an admission of a party opponent under Rule 801(d)(2), SCRE, which does not require proof of the declarant's unavailability or even that the statement was made under circumstances supporting its trustworthiness and reliability.

would be thrown open to obvious abuse; an accused could create evidence for himself by making exculpatory statements for subsequent use at his trial." People v. Abeyta, 728 P.2d 327, 331 (Colo. Ct. App. 1986); South, *supra*.

Likewise, there is no merit to his claim that the trial judge's ruling denied him due process, by denying him his right to present a complete defense under Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973). In Chambers, the prosecution had not called a witness who confessed to the crime. Thus, Chambers was forced to call the person as a defense witness, but was precluded from impeaching the witness under state law. Under these circumstances, the United States Supreme Court found that application of the hearsay rule violated the defendant's constitutional rights. 410 U.S. at 302, 93 S. Ct. at 1049.

Unlike the situation presented to the Court in Chambers, here, the trial judge's ruling did not deny Appellant his right to present a complete defense. To the contrary, *he* was the sole individual in control of whether or not he testified and presented the jury with his contention that the killing was the result of voluntary manslaughter. However, he chose not to testify. As thoroughly discussed, this was his constitutional right, but it did not make him "unavailable" as a witness. Kimball and Peterson, *supra*. Because he had the right to present the jury with this evidence but chose not to do so, there is no violation of due process. Contra Chambers, *supra*.

Finally, Appellant cannot show any conceivable prejudice resulting from the trial judge's ruling. His primary complaint seems to be that he would have been entitled to a manslaughter instruction if the statement had been introduced. Even if this argument is procedurally barred under Bailey, *supra*, since it was not presented below (R. pp. 1377-

1379),¹⁴ his claim is meritless because he had the ability to testify and present evidence which supported a manslaughter instruction and otherwise negated the charges of burglary and criminal sexual conduct in the first degree. Having chosen not to do so, he cannot show any conceivable prejudice resulting from his own actions. Also, the State did not introduce Appellant's January 17, 1995, statement (State's Exhibit 67), in which he denied having been alone with the victim at any time prior to the murder. Obviously, had the State introduced this statement, Appellant's conviction would have been a foregone conclusion since it was in direct conflict with the physical evidence connecting him with the offenses.

Thus, the State did not present a misleading picture to the jury concerning what Appellant had told law enforcement. Rather, the State merely chose not to introduce a piece of evidence which it had a right not to introduce. State v. Weaver, 265 S.C. 130, 217 S.E.2d 31 (1975) (state not required to call every person as a witness who may potentially give evidence in its favor). Additionally, Appellant seeks to show prejudice from the fact that defense counsel mentioned Appellant's custodial statement in counsel's opening statement to the jury in the guilt phase. However, a review of counsel's comments clearly shows that counsel was anticipating that the statement would be introduced at some point during either phase of the trial and was merely trying to establish for the jury Appellant's position that his statement was *untrue*; but that for reasons

¹⁴ The only reference to whether the statement might support a manslaughter instruction was made by the State. (R. p. 1375).

peculiar to Appellant's personality, he confessed anyhow. (See R. pp. 1283-1284).¹⁵

Thus, his reliance on counsel's statement is a red herring.

Finally, the trial judge fully instructed the jury that the State had the burden of proving each offense charged beyond a reasonable doubt; the presumption of innocence and the fact the jury could not consider Appellant's decision not to testify "under any circumstances or any manner whatsoever" because this decision "does not create any inference against him." Further, the trial judge fully and properly instructed the jury on the elements of the various crimes charged. (R. p. 1562, l. 19 - p. 1584, l. 15). He also instructed the jury that they had to base their verdict upon the evidence presented at trial. (R. p. 1546, ll. 6-17; see also judge's opening remarks to petit jury, R. pp. 1269-1276).

¹⁵ In pertinent part, counsel told the jury that

I would submit to you . . . that for whatever reason if you ask Gary Wright, he will admit to just about anything. They have a confession. They have that statement. Parts of which they don't even believe. . . You may understand by the end of this case that Gary is different. That he is somebody that will confess to a crime that he didn't commit. But because he is different, ladies and gentlemen, doesn't make him guilty.

(R. p. 1284, ll. 7-15). In counsel's closing argument in the guilt phase, counsel vigorously asserted that the State had not met its burden of proof and that Appellant was not guilty of the crimes charged. (R. pp. 1556-1562). In the sentencing phase, Appellant presented evidence showing why he was "different," including evidence of substance abuse and organic brain damage. (R. pp. 1863-1894; pp. 1900-1931; pp. 1941-1986; pp. 1994-2043; pp. 2055-2065). Based upon this evidence, counsel argued to the sentencing phase jury that Appellant argued that "[y]esterday, we had a chance to put up evidence before you for the first time and with that evidence, we explained to you why Gary is the way he is; why this crime happened and why your verdicts in this phase of this trial should be a sentence of life imprisonment." (R. p. 2092, ll. 17-22). Counsel further argued that Appellant suffered from organic brain damage, that "his brain is defective" and that he was operating under a mental and emotional disturbance at the time of the commission of the offense. (R. pp. 2092-2102).

Based upon this record, Appellant cannot show any conceivable abuse of discretion, and the trial judge's ruling must be affirmed.

II.

Appellant's claim that the trial judge erroneously ordered disclosure of Appellant's records from Charter Rivers Hospital to the State is procedurally barred from review on appeal because Appellant did not avail himself of the trial judge's offer to review any statements he made *in camera*; he did not proffer the records; and because Appellant did not object at trial to any question asked by the State on the ground that it was based upon confidential information contained in these records.

Appellant's next contention is the trial judge erroneously ordered disclosure of Appellant's records from his 1994 commitment to Charter Rivers Hospital for alcohol abuse and anger management. Appellant maintains these records were confidential under S.C. Code Ann. § 19-11-95 (Supp. 1997). The State submits that his argument is procedurally barred because (1) he did not take advantage of the trial judge's offer to review any of his statements *in camera* before disclosing them to the State, (2) he never thereafter proffered the records, and (3) he did not object to any question asked by the State on cross-examination on the grounds that the State's question was based upon supposedly confidential information that should not have been disclosed under § 19-11-95.

The State filed a Request For Discovery on August 4, 1997, in which it asked Appellant to disclose "copies of all records, books, papers, documents, . . . results or reports of physical or mental examinations and tests relating thereto, scientific tests, examinations or experiments, and any other facts, data or tests, which any witness for the Defendant intends to rely upon and testify in more informing opinions or inferences

therefrom. . . ." (R. pp. 2197A-2197B).¹⁶ It subsequently moved to specifically discover Appellant's records from Charter Rivers Hospital. The trial judge held a hearing on the State's motion on August 22, 1997. (R. pp. 2132-2144).

The State informed the trial judge that it had become aware, through information provided by a citizen witness, that Appellant had been admitted to Charter Rivers Hospital in 1994 for the two-fold purpose of anger management (or anger control) and substance abuse. The State noted that 1994 was the same year in which the offense occurred, and it emphasized that this was a capital case. Therefore, this type of evidence would be relevant and probative as to Appellant's character, and "it clearly would be evidence that would be admitted in some form or fashion in the defense[']s case in chief." Moreover, the State asserted that the information it sought was not protected from disclosure from Rule 5(b)(2), SCrimP, because the records it sought were scientific and medical reports. (R. p. 2133, l. 12 - p. 2135, l. 14).

The State further argued that the information it sought may be relevant to the guilt phase of the trial because Appellant had given a statement following his arrest, in which he claimed that he became involved in an altercation with the victim; that he picked up something heavy; and that he continued to strike her with this object because he had "a real bad temper." (R. p. 2135, l. 20 - p. 2136, l. 7). Appellant opposed the motion and claimed that the records sought by the State were privileged under § 19-11-95, which allegedly prohibits its mental health care providers from revealing confidences of patients who were treated for mental illness or emotional conditions. He further claimed the State

¹⁶ This was part of a number of reciprocal discovery requests filed by the State to which Appellant had not responded. (See R. pp. 2134-2135).

had not shown the records were "necessary to its litigation," and asserted that "they want to . . . obtain these records in an attempt to go on a fishing expedition so that they can develop information that . . . at this time the[y] are quite vague about." Appellant also asserted the State was trying to circumvent Rule 5 and obtain material which was not otherwise discoverable. In support of his position, Appellant relied upon this Court's decision in State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988), in which the Court held that the defense was not entitled to a witness' psychiatric records; and that under the Court's decision in McMakin v. Bruce Hospital System, 318 S.C. 15, 455 S.E.2d 693 (1995), the good cause requirement for requiring disclosure was not satisfied simply by the fact that the information the State was seeking would be helpful to it. Also, he argued that the State had other means for developing the type of evidence which it was seeking, such as citizen witnesses; and he asserted the State was trying to have rights granted to it that Appellant would not have if he was the moving party. Finally, he asserted the State was trying to obtain information that was not disclosable under State law and may not be disclosable under federal law.¹⁷ (R. p. 2137, l. 10 - p. 2139, l. 15).

The State responded by noting that the only reason they were being vague was because they were only aware of Appellant's admission to Charter Rivers, and there was no other way for them to develop the type of information requested without Appellant's records from that facility. (R. p. 8, l. 19 - p. 9, l. 2). The trial judge overruled Appellant's objection. He noted that S.C. Code Ann. § 44-22-100 (Supp. 1997) provides

¹⁷ He admitted he did not know whether Charter Rivers received federal assistance and was subject to federal statutes and regulations governing mental health and substance abuse records. (R. p. 2139, ll. 10-15). See 42 U.S.C. § 290dd-1; 42 C.F.R. § 2.63.

that a trial court may order the disclosure of confidential information, if necessary, for the conduct of proceedings before it, and he noted that the provision of the Code of Federal Regulations involved in McMakin would specifically allow for disclosure of confidential information upon good cause shown. He further found that the information requested was both relevant and probative in a capital case and ruled that it was discoverable. (R. p. 2140, l. 6 - p. 2141, l. 12). However, he specifically advised Appellant that:

If there are any concerns from the defense in regards to any statements that were made by the Defendant, if you have any knowledge of that, then you need to, if you want me to review those in-camera before they are finally released to the State, then I would consider that.

(R. p. 2141, ll. 15-20).

The trial judge issued an Order ordering the release of these records on this same date. In the Order, the trial judge specifically found that the records were relevant and probative, and that they were not forbidden by Rule 5(b)(2). He further found, pursuant to § 44-22-100, that the information sought was necessary for the prosecution of the case and required disclosure of the records. Additionally, he specifically found that good cause for release of the information had been shown; that there were no other means available for obtaining the requested information; and that the public need to know outweighed any privacy interest of Appellant. (R. p. 2145).

The record is silent as to whether Appellant availed himself of the trial judge's offer to conduct an *in camera* review of any potentially confidential or privileged statements Appellant may have made which were contained in those records, even though he was obviously aware that he planned to present four experts in the sentencing phase who had specifically relied upon these records in arriving at conclusions which he offered

in mitigation of sentence. (R. pp. 1947-1948; pp 1955-1959; pp. 1969-1970; pp. 1979-1982; pp. 1985-1986; pp. 1999-2000; pp. 2003-2005; p. 2010; pp. 2013-2014; pp. 2018-2023; pp. 2029-2030; p. 2032; pp. 2036-2043; pp. 2054-2064).

He also did not thereafter proffer the records at issue. So, it is possible that he may have been successful in having some records suppressed. At any rate, it is impossible for this Court to review the propriety of the judge's ruling in the absence of a proffer since use of the records were introduced at trial. Moreover, Appellant did not object to any question propounded by the prosecution on cross-examination of either his wife (Lou Ann Terry) or his social worker (Janet Vogelsang) on the ground that the question relied upon confidential information which had been wrongfully obtained in violation of § 19-11-95. (R. pp. 1936-1940; pp. 1988-1992).

As a result, the State submits that his argument is procedurally barred. See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant waived mistrial motion based on Solicitor's closing argument where he refused trial judge's offer of curative instruction; State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (defendant waived claim that disciplinary records from his incarceration, including drawing implying he was "woman killer," were improperly admitted at sentencing phase of capital murder trial where trial judge specifically ordered defense counsel and State to search records before their distribution to jury and remove prejudicial or irrelevant items, and record did not indicate that this was done or that counsel ever specifically objected to drawing); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (defendant's *in limine* objection was insufficient to preserve issue for appeal where objection was not reviewed at trial); see State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979) (in absence of proffer of evidence

that is subject of trial judge's ruling, there is nothing for Court to review on appeal).¹⁸ Appellant's argument is also procedurally barred by his failure to interpose any objection to the State's cross-examination of witnesses based upon information contained in his Charter Rivers records. Whipple, supra; State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (contemporary in subjection required to preserve error for appellate review).

Even assuming *arguendo* that the Court does not find Appellant's argument is procedurally barred, however, the State submits the substance of his claim is totally meritless because he cannot show a prejudicial abuse of discretion resulting from the trial judge's ruling. Section 19-11-95 provides, in part, that "[e]xcept when permitted or required by statutory or other law, a provider knowingly may not reveal a confidence of his patient." § 19-11-95(b)(1).¹⁹ However, § 19-11-95(D)(1) specifically provides that: "**[a] provider shall reveal confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding. . . .**" (Emphasis added).

¹⁸ In particular, there is no way to determine whether any or most of the material sought by the prosecution was not privileged.

¹⁹ A provider is defined under § 19-11-95(A)(1) as a person licensed under the provisions of either Chapter 55 or Chapter 75 of Title 40 of the Code who "enters a relationship with a patient to provide diagnosis, counseling, or treatment of a mental illness or emotional condition." While Appellant did not introduce evidence on this point at the pre-trial hearing, it appears that Charter Rivers falls within this definition.

The State submits the trial judge did not err by rejecting Appellant's contention that § 19-11-95 barred discovery of records in light of this provision.²⁰ In McMakin, this Court construed the good cause requirement of § 44-22-100 as requiring -- consistent with 42 U.S.C. § 290dd-1 -- that "disclosure [of the records] must be necessary to the truth-finding function of the court. Necessity does not hinge on whether the information is shown to be helpful to the party seeking disclosure; rather, the inquiry is whether disclosure is the only means of obtaining information relevant to the proceeding before the court." 318 S.C. at 19, 455 S.E.2d at 695. However, a lesser showing should be required under § 19-11-95(D)(1) because § 19-11-95(D)(1) merely requires that Appellant's "care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in the proceeding," as opposed to a showing of necessity. Also, in McMakin, the Court held that § 44-22-100(B) requires proof, consistent with federal law, that other ways of obtaining the information are not available and would not be effective; and that the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services. 318 S.C. at 18-19, 455 S.E.2d at 694-695. No such requirement is contained in § 19-11-95(D)(1).

As a result, the State submits that the good cause requirement under § 19-11-95 is less than that required under § 44-22-100 or 42 U.S.C. § 290dd-2 and 42 C.F.R. §

²⁰ Appellant does not make any claim the trial judge erroneously ordered discovery pursuant to § 44-22-100, which was specifically relied upon in the trial judge's order. (R. p. 2145). Therefore, no argument is properly before the Court as to whether that section barred discovery of the records at issue. As a result, no argument concerning the trial judge's ruling in that regard is properly before the Court. Bailey, supra.

2.64(d). Indeed, the standard set forth in § 19-11-95(D)(1) seems to contemplate a mere showing of relevancy. Therefore, a showing by the State that the records sought (1) were generated the same year in which Appellant committed the crime; (2) would be relevant to the issues presented in the sentencing proceeding of his capital trial, in which his emotional condition (if not mental illness) was reasonably at issue; (3) that the information in the records being sought was not available to the State through any other sources; and, (4) the records being sought were not excluded from discovery under Rule 5(b), SCrimP, constituted a sufficient showing to allow the State to discover these records.

However, assuming the Court applies the standard set forth in McMakin, the trial judge's ruling still must be affirmed. "[T]he sole function of the jury during the sentencing phase of trial is to select a penalty based upon the circumstances of the crime and the characteristics of the individual defendant." State v. George, 323 S.C. 496, 514, 476 S.E.2d 903, 914 (1996), cert. denied, 117 S. Ct. 1261 (1997). See also Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Obviously, medical information concerning Appellant's mental condition at a time which is in reasonably close proximity to the time of the offense was very probative of the sentencing phase jury's determination. Also, under McMakin, disclosure of these records was the only means of obtaining information relevant to the proceeding before the court, since Appellant bore no burden of proof and the State did not have any other means of obtaining this information to present to the sentencing phase jury. Thus, it was necessary to the truth-finding function of the court under McMakin, 318 S.C. at 19-20, 455 S.E.2d at 695; State Board of Medical Examiners v. Fenwick Hall, Inc., 308 S.C. 477, 479-480, 419 S.E.2d 222, 223-224 (1992) (disclosure of doctor's substance abuse treatment records was only way for

Board to obtain information): The fact the staff at Charter Rivers diagnosed and/or treated any mental condition or substance problem Appellant had at the time should alone be sufficient to establish that disclosure is necessary to the conduct of the sentencing phase. McMakin, supra. See also Mulholland v. Dietz Co., 896 F. Supp. 179 (E.D. Pa. 1994) (personal injury plaintiff's medical records were subject to disclosure where plaintiff admitted having alcohol and drug problems at time of accident and receiving treatment shortly thereafter and defendants alleged plaintiff at fault with respect to injuries received); Napoleoni v. Union Hospital of the Bronx, 207 A.D.2d 660, 616 N.Y.S.2d 38 (N.Y. A.D. 1994) (treatment records pertaining to mother's substance abuse contemporaneous with her pregnancy were discoverable in her medical malpractice action alleging negligent prenatal care, labor and delivery of baby); O'Boyle v. Jensen, 150 F.R.D. 519 (M.D. Pa. 1993) (good cause existed for disclosure of arrestee's medical records in § 1983 action to recover damages for arrestee's death because possibility existed that death resulted from pre-existing condition related to alcohol or substance abuse); Maxwell v. Hobart Corp., 576 N.E.2d 268 (Ill. Ct. App. 1991).

Additionally, even though § 19-11-95(D)(1) does not require a finding that the public interest and need for disclosure outweighs the potential injury to Appellant, the physician-patient relationship and the treatment services, contra 42 C.F.R. § 2.64(d), it is clear that the public interest and need for disclosure is great, given the nature of the determination the sentencing jury was required to make. Also, Appellant was no longer being treated at Charter Rivers. See State v. Bright, 683 A.2d 1055 (Del. 1996) (absent evidence defendant was receiving treatment for drug or alcohol abuse, federal confidentiality statutes which protect patient records maintained in connection with

federally assisted substance abuse treatment programs, did not apply to preclude defendant's psychiatrist at Veterans Administration Hospital from disclosing treatment records). Further, it cannot be seriously contested that others would be discouraged from seeking necessary treatment if they were aware that any such confidential information may be disclosed in the course of the capital sentencing proceeding where their mental and emotional state at the time of a murder would be at issue).

Nor can Appellant show any conceivable prejudice resulting from the trial judge's ruling. It is clear that at least some of the records at issue would have been discoverable because they would not have involved any confidences within the meaning of § 19-11-95(A)(3).²¹ In Re Marvin M., 48 Conn. App. 563, 711 A.2d 756 (Conn. Ct. App. 1998) (records from substance abuse treatment facilities and psychiatric facilities which did not disclose confidential communications and only showed whether parents had complied with order to refrain from substance abuse were admissible under 42 U.S.C. § 290dd-2 upon showing of good cause); Ley v. Blose, 698 N.E.2d 381 (Ind. Ct. App. 1998) (medical records of physician's treatment for alcohol abuse not protected even though mental health records protected); State v. Brown, 376 N.W.2d 451 (Minn. App. 1985), review denied (counselor's direct personal observations are not "record" within meaning of federal statute providing patient records of federally-assisted or regulated drug abuse prevention programs may not be disclosed to initiate or substantiate criminal charges or to conduct

²¹ Again, it is impossible to determine the full extent of the disclosure, including what, if any, records may have been privileged, based upon the present record since Appellant did not proffer the records after the trial judge ordered their disclosure to the State; and, the record is silent as to whether he took advantage of the trial judge's offer to review *in camera* any statements Appellant thought should not have been disclosed.

investigation, even if observations are reduced to writing or testified to in court); State v. White, 169 Conn. 223, 363 A.2d 143 (1975), cert. denied, 423 U.S. 1025 (1975) (observation concerning person undergoing drug treatment is not elevated to a "confidential record" within meaning of confidentiality statute even though observation was placed on paper and sent to patient's probation officer).

Also, Appellant relies upon the State's cross-examination of Lou Ann Terry in support of his claim of prejudice. As discussed, however, he did not object to any question asked by the State on the grounds that it involved confidential information which should not have been disclosed. Further, the record clearly demonstrates that Appellant's mother, Patricia Terry, testified that Appellant went to Charter Rivers following his arrest for an incident occurring at the home of Dianne Gibson; and she stated that this was the first time Appellant had gotten mental health treatment in his life. (R. p. 1894, ll. 1-17).

Moreover, it is clear that Lou Ann Terry's subsequent testimony concerning her efforts to have Appellant admitted to Charter Rivers Hospital, as a condition of release for the offense involving Dianne Gibson, was unsolicited and unresponsive to the State's question. Indeed, the State's question simply asked her whether she was aware that Appellant had gotten money from Dianne Gibson and another paramour "ostensibly to buy diapers and baby food for your children" but spent it on crack cocaine. (R. p. 1935, l. 25 - p. 1936, l. 13). It was only after she made this unsolicited comment that the State's cross-examination complained of by Appellant on appeal took place.

Of greater importance and as discussed, Appellant presented four expert witnesses in his case in mitigation. Each of these witnesses relied upon the records at Charter Rivers Hospital in reaching his or her conclusions. The first of these experts was his social

worker, Jan Vogelsang. She testified that she reviewed his records from Charter Rivers Hospital with whom she is affiliated. She also testified to the diagnoses he received at Charter Rivers Hospital and opined that his behavior at Charter Rivers was consistent with his behavior from age thirteen to the time of the offense, as was the history of his violent behavior. She likewise testified that someone who was not a neurologist noted that there was actually something abnormal about Appellant's brain scan and opined that "this is one thing that is different that we know about [Appellant] and that combined with drug use which would certainly intensify any brain abnormality and then all these other factors certainly would place him at high-risk to end up in serious trouble." (R. pp. 1943-1944; pp. 1947-1948; pp. 1955-1959; pp. 1969-1986).

Similarly, Robert Deysach, a clinical neuropsychologist (R. pp. 1994-2014), Dr. David Bachman, a behavioral neurologist (R. pp. 2015-2037) and Dr. Donna Schwartz-Watts, a forensic psychiatrist (R. pp. 2038-2043; pp. 2054-2064) clearly relied upon the Charter Rivers Hospital records in reaching their conclusion that Appellant had organic brain damage but would be adaptable to life in prison. Clearly, the State had the right to discover all of the Charter Rivers Hospital records relied upon by Ms. Vogelsang and the other experts prior to cross-examination of Ms. Vogelsang. Rule 705, SCRE ("expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may, in any event, be required to disclose the underlying facts or data on cross-examination"). Because the State would have had the right to discover this information prior to its cross-examination of Vogelsang, Appellant cannot show any conceivable prejudice resulting from the trial judge's pre-trial ruling.

In support of his position, Appellant relies upon this Court's decision in Parker, supra. In Parker, the defense was attempting to raise the speculative inference that the witness was guilty based, in part, on psychiatric records, even though there was no evidence that the witness had committed the offense. Here, however, Appellant's mental health in the year 1994 was clearly going to be an issue in the sentencing phase of his trial. He also was obviously aware of this regardless of whether he was willing to admit so at the August 22, 1997, motions hearing.

Finally, Appellant's remaining arguments were not raised to the trial judge and are procedurally barred under Bailey, supra. However, Respondent submits that Appellant's suggestion that the State used his Charter Rivers Hospital records as grounds to impose the death penalty is, at best, misleading and is clearly belied by the extent to which his experts relied on these records in his case in mitigation. Because he cannot show a prejudicial abuse of discretion, the trial judge's ruling must be affirmed. Yet, even if the trial judge abused his discretion, the appropriate remedy would be a fine instead of suppression of the evidence, and the judge's ruling must be affirmed. State v. Bright, 683 A.2d 1055 (Del. Super. Ct. 1996).

III.

The trial judge properly limited the scope of Appellant's cross-examination of State's witness Scottie Frier, by refusing to allow him to elicit that he had given a statement to police.

As discussed in Argument I, supra, Appellant asked that he be allowed to elicit the fact he had given a statement even though the trial judge ruled the statement itself was inadmissible. However, the trial judge ruled that there could be no mention of the statement if the State did not introduce it. (R. p. 1387, l. 16 - p. 1389, l. 16). Appellant now claims he was prejudiced because this limitation of his cross-examination prevented him from eliciting evidence that he had cooperated with police. However, this argument is procedurally barred on direct appeal because Appellant never presented the trial judge with any contention that the trial judge's ruling prevented him from introducing evidence he had cooperated with police. See Bailey, supra.²² Alternatively, the State submits this argument is wholly without merit because evidence he had "cooperated" with police by giving a statement was not relevant to the issues before the guilt phase jury and would have been confusing; he introduced other evidence showing that he cooperated with police despite this ruling; and, he cannot show any prejudice since this statement was introduced in the sentencing phase of his trial.

It is well settled that the scope of cross-examination is within the trial judge's discretion, and this Court will not interfere with his exercise thereof, absent a showing

²² Appellant also did not cite State v. Brown, 203 S.C. 169, 399 S.E.2d 593 (1991) or any of the other authorities cited in support of this argument. He likewise did not raise the scurrilous argument that the State was "sucker punching" defense counsel. Therefore, these arguments are not properly before the Court either. Id.

of prejudice by the complaining party. State v. Sherard, 303 S.C. 172, 174, 399 S.E.2d 595, 596 (1991). Likewise, "[t]he admissibility of evidence falls squarely within the sound discretion of the trial court." State v. Brown, Op. No. 2894 (S.C. Ct. App., filed October 26, 1998); State v. Sullivan, 277 S.C. 35, 288 S.E.2d 838 (1981). However, only relevant evidence is admissible. Levy v. Outdoor Resorts of South Carolina, 304 S.C. 427, 405 S.E.2d 387 (1991).

"Relevant evidence" is "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; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Moreover, Rule 403, SCRE, specifically provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Alexander, supra. Applying this criteria to the case at bar, it is clear the trial judge's ruling must be affirmed.

Appellant claims he was prejudiced by the judge's ruling because defense counsel had informed the jury in opening statement that Appellant had given a statement to police. (R. p. 1281, l. 16 - p. 1284, l. 15). He maintains this was prejudicial because it left the jury with the impression that Appellant did not cooperate with police and give a statement; and that defense counsel had relied upon the State's "obvious intention to introduce the statement." (Initial Brief of Appellant at p. 22).²³ However, the record does not indicate that the State ever informed Appellant it intended to introduce his statement in the guilt

²³ As with many of the other arguments raised on appeal, this appears to be a complaint about counsel's performance, which may only be addressed in PCR.

phase. Rather, the Jackson v. Denno hearing was merely held pre-trial, as is done in many cases. (R. pp. 1136-1195).

More importantly, that Appellant may have given a statement to police or that he supposedly "cooperated" with police simply were not relevant considerations for the guilt phase jury.²⁴ The issue before the guilt phase jury was whether or not Appellant was guilty of the crimes charged. His supposed "cooperation" with police, by giving a statement, did not constitute a defense to the charges of murder, burglary in the first degree or criminal sexual conduct in the first degree. As a result, this evidence was not relevant under Rule 401, SCRE. See Levy, supra.

Moreover, and even assuming *arguendo* that it might have some relevance to the charges before the guilt phase jury, clearly the trial judge did not abuse his discretion by refusing to allow Appellant to elicit the fact he had given a statement (even without going into its context) because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE, and Alexander, supra. If the judge had allowed Appellant to introduce this evidence, the jury would have been allowed to improperly speculate about what the statement may have contained, why the State had

²⁴ Appellant repeatedly asserts that he "cooperated." Yet, the State's evidence shows that he gave two statements. In the January 17, 1995, statement, he denied any involvement in the murder, and he denied ever being alone with the victim in her house. (State's Exhibit 67). This statement clearly was false and was refuted by the physical evidence found at the scene. (See Statement of the Facts, supra; Argument I, supra). In the March 24, 1995, statement, Appellant claimed he and the victim had been engaged in an ongoing affair, and that they had consensual intercourse the night of the killing. He thereafter killed her when she supposedly attacked him because he was trying to leave her residence. (State's Exhibit 68; Statement of Facts, supra; Argument I, supra). Therefore, this statement suggested that he did not commit any of the offenses with which he was charged. As a result, Appellant's suggestion of "cooperation" with police is extremely misleading, at best.

not introduced it, and whether or not it truly amounted to "cooperation" with law enforcement. Cf. State v. Robinson, 238 S.C. 140, ___, 119 S.E.2d 671, 681-684 (1961) (defendant not prejudiced by trial judge's decision to conduct preliminary examination as to voluntariness of confession in the presence of the jury, even though the State did not introduce confession into evidence, when the testimony was subsequently withdrawn and the jury was instructed to fully disregard the testimony concerning confession).

Indeed, the present argument appears to be little more than a clever ploy designed by defense counsel to force the State to introduce the March 24, 1995, self-serving hearsay statement without requiring Appellant to submit to cross-examination concerning the contents thereof. However, the State did not have any obligation to present this or any other piece of evidence. Weaver, supra. Even if the State did not introduce the substance of the statement itself, the probative value of this evidence would still be substantially outweighed by its prejudicial effect. If Appellant had suggested that the State had failed to offer the statement into evidence because it did not square with the State's theory of the case or for some other reason, then the State could have properly replied to such argument by explaining to the jury why it did not introduce Appellant's statement -- i.e., it was self-serving and unbelievable in light of the physical evidence, so the State was waiting on Appellant to testify and be subjected to cross-examination about the contents. See State v. Tiedt, 360 No. 594, 229 S.W.2d 582 (1950) (en banc) (where defendant introduced statement and subsequently argued to jury that it was "up to you" to determine why State failed to introduce the statement, defendant waived his right to non-reference to the defendant's failure to testify by prosecution and invited the State's reply that it thought defendant would testify and subject himself to cross-examination). Under these

circumstances, the State submits that the danger of unfair prejudice, the confusion of issues and potential misleading of the guilt phase jury was such that the trial judge properly excluded this evidence. Alexander, supra.

Nor can Appellant show any conceivable prejudice resulting from the trial judge's ruling. First, he had the opportunity to testify and inform the jury that he had given a statement. He could have likewise explained to the jury his version of what happened. (See Argument I, supra). He simply chose not to do so. Second, his reliance upon counsel's opening statement to the guilt phase jury is a misleading red herring for the reasons set forth in Argument I, supra.

Third, defense counsel presented the guilt phase jury with unchallenged evidence that Appellant cooperated with law enforcement during the course of the investigation by providing the officers with blood, saliva and pubic hair samples on January 17, 1995 (R. pp. 1362-1363; State's Exhibit 14), even though the officers, while informing him that they were investigating the victim's murder, did not tell him he was a suspect. According to the officers, Appellant told them he had been a neighbor; he knew the victim; he had been friends with her two children; and had been over to the victim's house. (R. p. 1364, l. 15 - p. 1366, l. 6; p. 1403, l. 3 - p. 1404, l. 12). Similarly, counsel elicited that Appellant had provided SLED Agent Steven Derrick with a clear set of his fingerprints. (R. p. 1459, ll. 17-25). In fact, Investigator H. E. "Bucky" Phillips, Jr., testified that Appellant "consented to anything [we] wanted" after being informed that the Sheriff's Department was investigating the victim's murder; and he described Appellant as "very cooperative." (R. p. 1371, ll. 10-22). Likewise, Investigator Scottie Frier described

Appellant as "very cooperative" and "pleasant to deal with" even though he was aware the officers were investigating Urai Jackson's murder. (R. p. 1404, ll. 4-22).

Moreover, defense counsel skillfully argued Appellant's cooperation with law enforcement in closing argument. (R. pp. 1560-1562). Thus, Appellant was not prejudiced by the trial judge's ruling because evidence he cooperated with law enforcement, by giving a statement he describes as a "confession," would have merely been cumulative to other evidence of his cooperation. State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983).

Also, the trial judge's jury instructions fully and appropriately charged the jury on the State's burden of proof; the presumption of innocence; the definition of "reasonable doubt;" and that the jury could not consider Appellant's failure to testify in any manner whatsoever. (R. p. 1562, l. 19 - p. 1569, l. 20; see also Argument I, supra). Further, the trial judge correctly charged the jury on each of the elements of the offenses charged. (R. pp. 1570-1584). In light of this jury instruction, Appellant cannot show any conceivable prejudice resulting from the trial judge's ruling.

Finally, Appellant's claim of prejudice ignores that the prosecution did introduce his statements in the sentencing phase, where evidence concerning his supposed "cooperation" was relevant. (R. pp. 1811-1818; State's Exhibits 67 and 68). On cross-examination of Investigator Frier, Appellant established that he told Investigator Frier on several occasions that he did not remember certain aspects of the case, and that it was possible he truly did not remember these events. (R. p. 1818, l. 20 - p. 1819, l. 14). This cross-examination dove-tailed into Appellant's sentencing phase evidence of organic brain impairment and a history of substance abuse. Moreover, the trial judge's charge allowed

the jury to consider whether a statutory or non-statutory mitigating circumstance was supported by the evidence; and he repeatedly instructed the jury it could recommend a life sentence "for any reason or for no reason at all. This is what has traditionally been referred to as a recommendation of mercy. . . ." (R. pp. 2114-2117). Therefore, the sentencing jury was allowed to consider this evidence of "cooperation" by giving a "confession" as a reason for recommending a life sentence and there was no prejudice resulting from the judge's ruling. See Buchanan v. Angelone, ___ U.S. ___, 118 S. Ct. 757 (1998) (Eighth Amendment does not require jury be instructed on concept of mitigating evidence or on any particular mitigating circumstance(s); rather, Eighth Amendment only prevents jury from being precluded from consideration of mitigating evidence). Particularly where Appellant's proposed line of inquiry concerned an irrelevant matter would have been misleading (at best) and he could have presented the guilt phase jury with further evidence of his cooperation simply by testifying, he cannot show any conceivable prejudice and the judge's ruling must be affirmed.

IV.

The trial judge did not abuse his discretion by allowing the State to introduce a photograph of the victim (State's Exhibit 55) in the sentencing phase of Appellant's trial.

In the sentencing phase the trial judge allowed the prosecution to introduce one photograph of the victim at the crime scene, (State's Exhibit 53), as well as a photograph depicting the injuries to the victim's head (State's Exhibit 53), over Appellant's objection. Appellant stipulated that the victim's skull was crushed, so the State did not introduce a photograph (State's Exhibit 54 for I.D.) showing the full extent of that wound. (R. pp. 1792-1799).²⁵ On appeal, Appellant claims the trial judge erred by allowing the State to introduce State's Exhibit 55, which he characterizes as "gruesome," as well as "sickening and inflammatory." The State submits the trial judge did not abuse his discretion.

There was no error. In State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185-186 (1986), this Court held that:

In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation or aggravation. . . . In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. . . . The trial judge is still required to balance the prejudicial effect of the photographs against their probative value. However, in the sentencing phase, the scope of the probative value is much broader.

²⁵ Photographs of the injuries to the victim's upper and lower extremities (State's Exhibits 57-64) were admitted without objection. (R. pp. 1799-1804). A videotape of the crime scene was also admitted over objection. (R. pp. 1804-1809).

(Citations omitted). See also State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Shaw, 277 S.C. 194, 255 S.E.2d 799 (1979). As the Court has more recently made clear, the criteria for admissibility is not

that the photographs become inadmissible because they graphically depict a gruesome scene. Rather, the question is whether the photographs are unfairly prejudicial so as to outweigh the probative value. . . . To constitute unfair prejudice, the photographs must create a 'tenancy to suggest a decision on an improper basis, commonly, though not necessarily an emotional one.'

State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995).

Dr. John Carter, the pathologist, testified again in the sentencing phase and more fully explained his autopsy findings.²⁶ He used State's Exhibit 55 as well as State's Exhibits 53 and 57-64 to illustrate and corroborate his testimony. (R. pp. 1836-1848). With respect to the present issue, Dr. Carter found evidence of at least four (and possibly more) tracks of lacerations where the skin of victim's scalp was crushed and split open. The force from these blows was so severe that "the skull just behind the right ear was crushed and depressed in multiple pieces." Also, "[s]ome brain tissue was exposed and visible." State's Exhibit 55, which shows the victim's head and shoulders, was taken after the victim's hair had been shaved. It clearly depicts the wounds to the head, as well as wounds to the victim's shoulders. The latter were consistent with having been caused

²⁶ He testified in the guilt phase as well and his findings from that portion of the trial are discussed in the Statement of Facts, supra.

by State's Exhibit 13 (the top piece of a pool cue found at the scene) but the head injuries were caused by a heavier blunt object. (R. pp. 1842-1843. See also R. pp. 1836-1843).²⁷

Dr. Carter further opined that it would require "virtually maximum force . . . and an intent to kill" in order to inflict these injuries because a human skull and a club are two fairly strong objects. It would take a lot of force by a reasonably strong person to do that." (R. p. 1843). Based upon the physical evidence found at the scene – including a large pool of blood under the victim's head and another larger pool nearby, as well as the position of the victim's body when found – Dr. Carter opined that the victim was beaten while she was on her knees (or otherwise close to the floor) and her face was over where the first pool of blood was found. Then, she was rolled over and sexually assaulted. (R. pp. 1843-1848).

As with the photographs in Powers, Kornahrens and Shaw, supra, State's Exhibit 55 was probative of the circumstances of the crime and Appellant's character. Moreover, it was used to corroborate and illustrate Dr. Carter's sentencing phase testimony concerning his autopsy findings. Therefore, this photograph was admissible. Id. See also State v. Gardner, 505 S.E.2d 308 (S.C. 1998).

Further, the probative value of State's Exhibit 55 was not substantially outweighed by its prejudicial value. Franklin, supra. This photograph, along with the photograph from the crime scene (State's Exhibit 53) depicted the victim in substantially the same condition as Appellant left her: raped and lifeless, from a savage beating that crushed her skull. State's Exhibit 55, in particular, helped Dr. Carter illustrate the number, extent and

²⁷ The bottom portion of the pool cue, which victim had kept for self-defense, was never found. (Statement of Facts, supra).

to some degree the amount of force required to inflict the brutally vicious beating the victim received. Although her hair had been shaved before this photograph was taken, this was necessary in order to show these wounds to the jury. Also, Dr. Carter clearly testified the shaving took place at autopsy. Further, State's Exhibit 55 was taken before the victim's body had been altered in any other manner by other autopsy procedures. It thus depicts what Appellant did and nothing more. Powers, supra.

Indeed, this photograph depicts her head injuries more accurately than any testimony could hope to do. While it is unpleasant to view, murder is an ugly crime. Nevertheless, the prosecution is not required to sanitize a senseless and brutally malicious crime scene which a defendant has chosen to create, so as to make the crime appear less brutal than it truly is. Rather, this is precisely the type of evidence which is appropriate in the sentencing phase of a bifurcated capital trial. Kornahrens and Powers, supra.

Further, Appellant's characterizations of State's Exhibit 55 as "gruesome" and "sickening" were not raised below. Rather, counsel simply argued the photograph was inflammatory because it was an autopsy photograph and did not display the victim in substantially the same condition as Appellant left her since her head was shaved to display the wounds. (R. p. 1796, l. 13 - p. 1797, l. 21). Similarly, counsel argued the photograph was cumulative to other photographs and testimony but did not assert it was "gratuitous." Counsel also did not assert the photograph was inadmissible because it was not relevant to proving an aggravating circumstance. (Id). Therefore, these arguments are procedurally barred under Bailey, supra.

However, his suggestion that the photographs are inadmissible simply because they are gruesome has previously been rejected by this Court in Franklin, supra. Yet, the

present photographs are not the type of inflammatory photographs with which this Court was faced in State v. Patrick, 289 S.C. 301, 345 S.E.2d 381 (1986), or autopsy photographs of a victim's scalp which had been pulled away from the skull and the surgically opened vaginal cavity such as those introduced in State v. Middleton, 281 S.C. 21, 339 S.E.2d 692 (1986). Moreover, these photographs are not anymore graphic or gruesome than the testimony from the pathologist, or of the State's witnesses who saw the victim's body and the crime scene. Also, because the photographs are cumulative to this other evidence, as well as the videotape of the crime scene, Appellant was not prejudiced by their introduction. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987).²⁸

Finally, the Court has rejected the suggestion that a photograph of the victim, depicting her in substantially the same condition as the defendant left her, is inadmissible unless it is probative of statutory aggravating circumstance. Powers, supra.²⁹ Therefore, Appellant's argument is without merit and the trial judge's ruling must be affirmed.

²⁸ In fact, this photograph is not as gruesome as the photographs and videotape introduced in the non-capital case of State v. Kelly, 319 S.C. 173, 460 S.E.2d 368 (1995) (affirming introduction of videotape of crime scene and photographs of victim as relevant to establish crime scene).

²⁹ Also, Appellant's reliance upon Gardner for this proposition is further misplaced since the Court's decision in Gardner did not hold the photograph was admissible only to prove the statutory aggravation of physical torture. Rather, the Court held it was admissible as a crime scene photograph. Id.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 

WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

May 4, 1999.

WES

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
The Honorable Gary E. Clary, Circuit Court Judge

THE STATE,

Respondent,

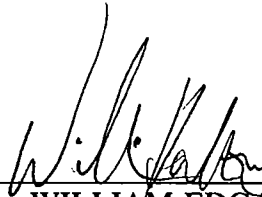
vs.

GARY DUBOSE TERRY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR
210(b).



WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

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PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201.

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

This 4th day of May, 1999.



WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT