THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post-Conviction Relief

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2020-001398

Carnail M. Graham #304093,....................................... Petitioner,

vs.

State of South Carolina, ...Respondent.

SUPPLEMENTAL APPENDIX

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NOTICE OF APPEAL FROM A SENTENCE IMPOSED BY THE COURT OF GENERAL SESSIONS

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Case No. 2012-GS-26-03077

The State of South Carolina, Respondent,

v.

Carnail Marchindla Graham, Appellant.

NOTICE OF APPEAL

FILED
HORRY COUNTY
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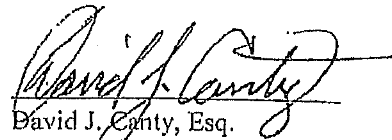
MELANIE HUGGINS-WARD
CLERK OF COURT

Carnail Marchindla Graham appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Steven H. John on October 20, 2014.

October 27, 2014



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARNAIL MARCHINDLA GRAHAM,

APPELLANT

APPELLATE CASE NO. 2014-002336

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

STATEMENT OF THE CASE

A Horry County Grand Jury indicated Appellant at the July 26, 2012 term of General Sessions for the offense of murder. R. 932. His case was called to trial on October 13, 2014 before the Honorable Steven H. John, and a jury. R. 1. He was tried jointly with his co-defendant, Thomas Booker James. R. 1. Assistant Solicitors Nancy R. Livesay and Martin S. Spratlin represented the state, and David J. Canty represented Appellant. Bobby G. Frederick represented James. R. 1.

On October 20, 2014, the jury found Appellant guilty. R. 921, l. 22 – 922, l. 14. He was sentenced by Judge John to thirty-two years' imprisonment. R. 928, l. 17 – 929, l. 11.

This appeal follows.

STATEMENT OF FACTS

During the early morning hours of November 8, 2011, two men forcibly entered the mobile home shared by Keia Pertelle, her boyfriend Rodney ("Splurge") McElveen, and her cousin Carlton Dontrell Watts. McElveen was a well-known cocaine dealer and it was believed the intruders were searching for drugs and money. During the course of the burglary and attempted armed robbery, Pertelle was shot and killed. It was disputed during trial whether one of the armed intruders shot Pertelle or whether the fatal shot was inflicted by McElveen, who discharged his .357 Magnum revolver five times during the encounter.

The intruders entered through the front door of the two bedroom mobile home located off of Brown Swamp Road in Conway around three o'clock in the morning. Pertelle was laying on the couch in the living room at the front of the house. McElveen was sleeping in the bedroom he shared with Pertelle and Watts was in his room at the opposite end of the home near the rear of the residence. Watts testified he was laying on his bed listening to music and likely dozed off when he was suddenly awakened by a "big boom" followed by three or four gunshots. He immediately "jumped up" off the bed and "rolled under it" in an effort to hide from the intruders. While he was hiding under the bed, he heard two or three more gunshots, then Pertelle scream, "Splurge, Splurge, they're breaking in." After Pertelle screamed, Watts said he heard another two gunshots go off and the intruders yelling, "Where is it? Where is it? We're not playing. Where is it?"[1] Eventually, it got "real quiet" except for the noise from the home alarm system. Watts testified that he waited several minutes while all was quiet before he fled out the back door of the home. He ran to a man

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[1] Watts testified that he did not recognize the voices of the two intruders. R. 99, ll. 18-24; R. 101, ll. 16-18. However, he knew both Appellant and James and had gone to school with one of them, although he never specified which one. R. 98, ll. 5-9.

and a woman who were standing outside near the trailer. They told Watts they heard the gunshots and had already called the police. R. 63, l. 23 – 65, l. 13.

Law enforcement arrived shortly thereafter. Watts testified that one of the officers who responded asked him where the shooting occurred and he pointed to the mobile home he shared with McElveen and Pertelle. Watts also told the officer that two people (McElveen and Pertelle) were still inside. With guns drawn, officers demanded whoever was in the house to come out with their hands up. R. 66, ll. 1-13; R. 103, ll. 12-23. Two or three minutes passed while the officers continued to demand whoever was in the house to come out with their hands up. Eventually, McElveen came out of the home through the backdoor with his hands in the air and informed the police that Pertelle had been shot.[2] R. 66, ll. 14-19; R. 142, l. 18 – 144, l. 5.

After entering the home and conducting a "protective sweep," the officers found Pertelle lying on top of the bed located in bedroom she shared with McElveen. She was deceased and had blood on her left chest region. R. 144, l. 6 – 146, l. 15.

David Grissett, who lived in the mobile home park where the burglary occurred, testified that around two or three o'clock in the morning on November 8, 2011, he saw a brown van parked at the end of a road in his neighborhood. The van eventually moved, travelled two streets over, and then returned and parked in the same spot at the end of the street. Grissett testified that he had lived in the neighborhood for over a year and had never seen this van before. He found it suspicious. After the van parked a second time, he called his neighbor, Conswella, because the van was parked in front of her home, and a few other

[2] On cross-examination of Watts, Appellant's counsel suggested it took McElveen several minutes to come out of the home because he was destroying drug evidence. See R 103, l. 1 – 104, l. 15.

neighbors to inform them about the presence of the van. Shortly after speaking with his neighbors, he heard numerous gunshots and "a bunch of commotion" coming from Pertelle and McElveen's home. He then saw two people running towards the van, which moved to pick them up. The two people jumped inside the van and it fled the neighborhood. Grissett immediately called 911 and reported the incident. R.117, l. 17 – 120, l. 17. He was unable to clearly see the two people who jumped in the van because it was dark and the neighborhood did not have any street lights. R. 125, ll. 7-23.

A patrol officer who was responding to the scene shortly after the 911 call was made spotted the van driving in the opposite direction. The officer turned around and attempted to pursue the van, but the driver of the van successfully evaded the officer.[3]

The brown van, which was later identified as a Chevrolet Astro, was located several hours later parked in Tiffany Oliver's yard. Oliver called law enforcement after discovering the van in her yard around 6:45 am because she did not know who it belonged to and did not want it parked in her yard. She testified that the van was not parked there when she went to bed the night before and that her boyfriend did not mention seeing the van when he left for work around 5:00 am. It was parked on the side of her house near a wooded area. R. 176, l. 25 – 180, l. 3.

Officers eventually responded to Oliver's home and towed the van to the police department where it was then processed. Numerous latent fingerprints were lifted from the exterior and interior of the vehicle. R. 202, ll. 19-23; R. 209, l. 14-17. While some of the lifted prints could not be identified, several were found to match Thomas Booker James,

[3] Grissett provided a description of the van when he called 911. Dispatch presumably conveyed the description to the patrol officers.

Keir Lamont Johnson, Letitia Tasha Freshley, and Markel Hasheem Rush. R. 223, l. 11 – 224, l. 15. Appellant's fingerprints were not found anywhere on the van. R. 236, ll. 2-6.

The van belonged to Tiara Brown, who was Keir Johnson's girlfriend at the time.[4] R. 508, ll. 3-7. At Johnson's direction, Brown called the police and reported the van stolen sometime during the morning following the burglary. As a result, Johnson was arrested for "driving without permission with intention to deprive" based on Brown's report. R. 497, l. 22 – 498, l. 12. Law enforcement interviewed Johnson at length that morning, but he denied any involvement in the burglary and shooting. Instead, he claimed the brown van had been stolen from him the night before. R. 558, l. 21 – 559, l. 7. He posted bond on the vehicle charge the next day, November 9, 2011. R. 497, l. 22 – 498, l. 12. Within a few weeks, Johnson was arrested again and charged with Pertelle's murder. He continued to deny any involvement. After sitting in jail for five or six months, Johnson changed his story and gave a statement to the police on April 24, 2012 implicating Appellant and James in the burglary and murder. R. 561, l. 12 – 562, l. 6. The assistant solicitor subsequently consented to a low bond being set for Johnson on the murder charge and, as a result, Johnson was released from jail shortly after giving this new statement. R. 613, l. 13 – 614, l. 7.

While out on bond on the murder charge, Johnson was arrested again in April 2013 for first degree burglary and first degree assault and battery. Both of these charges were dismissed by the assistant solicitor before Appellant's trial. Moreover, Johnson also had pending charges from 2009 for armed robbery and possession of a weapon during the

[4] Many of the witnesses and relevant individuals in the case have nicknames and are referred to by their nickname throughout the record. For example, Johnson is frequently referred to as "Bootsie," Appellant is referred to as "Dubba," and James is referred to as "Cutty." As mentioned above, Rodney McElveen was frequently referred to as "Splurge."

commission of a violent crime.[5] These two charges were dismissed by the assistant solicitor twenty days after Johnson gave his statement in April 2012 implicating Appellant and James in the burglary and murder. R. 598, l. 17 – 599, l. 24; R. 614, l. 8 – 615, l. 6.

Johnson testified against Appellant and James at trial. He claimed Appellant called him during the early morning hours of November 8, 2011 and asked Johnson to take him to purchase drugs. Johnson said he picked up both Appellant and James in the brown van, and at Appellant's direction, drove to McElveen's mobile home. He parked at the end of the dirt road behind McElveen's home, and Appellant and James allegedly got out of the van and went into the house. Johnson continued to maintain that he thought Appellant and James were going to buy drugs. He testified he saw a man watching the van so he circled the block one time and came back to the same spot at the end of the road where he parked again. He eventually saw Appellant and James running towards the van. They allegedly got inside and told Johnson to go. Johnson turned left out of the neighborhood and saw a Horry County patrol car pass by him. The patrol car swerved around and started to follow Johnson, but he was able to get away. R. 485, l. 5 – 486, l. 12; R. 491, l. 7 – 496, l. 9.

Johnson claimed that when they were fleeing the scene, Appellant said, "I think I just killed the bitch. I think I just killed her." He later maintained Appellant said, "I think I just killed that motherfucker. I think I just killed that motherfucker." R. 496, l. 10 – 497, l. 1. Johnson also claimed Appellant threw a gun out the window.[6] He eventually parked the

[5] Johnson was out on bond on his 2009 charges at the time of the burglary and attempted armed robbery in this case.

[6] When prompted by the solicitor with a leading question that was subsequently objected to by Appellant's counsel, Johnson said "both guns" were thrown out the window, but he did not clarify who threw the second gun out the window or who had possession of the second gun. Presumably, Johnson was suggesting that James possessed the second firearm. However, this testimony was never properly explained. R. 497, ll. 4-5.

van in someone's yard, but he could not remember where. Johnson said he then parted ways with Appellant and James, who walked into the wooded area near where he parked the van. Johnson eventually got a ride to his grandmother's house from a Mike Pyatt. R. 497, ll. 2-21.

Investigator John ("Robbie") Caulder with the Horry County Police Department processed the scene after a search warrant was obtained for the mobile home. He testified there was damage to the front door of the home including entry marks from a fired bullet. R. 254, ll. 4-25. He collected two bullet fragments from the front door, multiple bullet fragments from a kitchen cabinet, and a fired bullet from underneath the couch in the living room. In the hallway leading to the bedroom where Pertelle's body was discovered, Caulder observed marks in the floor where a fired bullet had struck and went through the floor, but this bullet was never located. R. 256, l. 25 – 257, l. 23.

In the closet of the bedroom where Pertelle's body was found, Caulder discovered a "Perry Ellis bag with handles." Inside the bag was a .44 caliber Ruger Redhawk revolver with a trigger lock, a box of Remington .357 rounds, two glass measuring cups, a spoon and fork, and two clear plastic bags containing an off-white substance, presumably cocaine. Also in the closet was an SKS rifle and an SKS magazine with eight live rounds. R. 264, l. 10 – 265, l. 1. Additionally, about two weeks after the burglary, a third firearm was discovered inside the house and turned over to law enforcement. Pertelle's father was breaking down the bed where Pertelle's body was found and discovered a handgun in between some pull out drawers on the bed and the mattress. Caulder admitted that he had not looked under the mattress when he was processing the scene and thus did not discover this weapon. This firearm was a .357 Magnum revolver. R. 267, ll. 17-22; R. 297, l. 20 –

298, l. 14. It was undisputed at trial that McElveen had fired this weapon five times during the burglary.

Dr. Edward Proctor, the forensic pathologist who conducted the autopsy, testified Pertelle died from a single gunshot wound to the left chest. The bullet struck her aorta, lung, and vertebral column and was recovered lodged in her back. R. 159, l. 11 – 162, l. 9. The injury caused massive bleeding, which ultimately lead to her death. R. 168, ll. 11-16. Dr. Proctor testified Pertelle would have lost consciousness sometime between a few seconds after she was shot and approximately a minute later and would have been completely deceased within several minutes. R. 163, ll. 12-24. When questioned by Appellant's counsel, Proctor opined that it is unlikely Pertelle would have been able to run thirty to thirty-five feet and jump over an obstacle after she was shot due to the nature of her injury.[7] R. 172, ll. 6-12.

James Green of the South Carolina Law Enforcement Division, who was qualified as an expert in firearm identification and examination, testified that he examined the evidence submitted by the Horry County Police Department in this case. Specifically, he examined the .357 Magnum revolver that was fired by McElveen during the burglary, the five fired cartridge cases that were removed from the .357 Magnum revolver, the fired bullet and bullet fragments collected from the mobile home by Investigator Caulder, and the projectile recovered from Pertelle's body during autopsy. R. 353, l. 15 – 355, l. 2.

[7] Presumably, the purpose of this question was to challenge the state's theory of the case that Pertelle was shot by one the of intruders in the living room located at the front of the mobile home, which was approximately thirty feet from the bedroom where her body was located. The defense argued that it was more likely Pertelle was shot by McElveen, who fired his .357 Magnum revolver five times from the bedroom, as she was running down the hall to the bedroom in an effort to escape from the intruders.

Green testified that State's Exhibit Nos. 67, 68, 69, and 71 (which were the fired bullet and bullet fragments collected from the mobile home) account for a total of five separate fired bullets and that, in his expert opinion, all five of those fired bullets were fired by the .357 Magnum revolver used by McElveen during the burglary. James maintained that the .357 Magnum was a "five-shot revolver," meaning it had five chambers inside the cylinder and could only fire five bullets before the shooter would be forced to reload. R. 355, l. 14 – 362, l. 7. Based on this testimony, the state suggested that all five bullets that could have been fired by the .357 Magnum revolver were accounted for and thus McElveen could not be responsible for shooting Pertelle.

Green further explained that State's Exhibit No. 67 also contained two additional fired bullet fragments recovered from the home, but these fragments were too damaged for him to identity or determine the caliber. Lastly, Green testified about the projectile that was recovered from Pertelle's body, which was marked as State's Exhibit No. 70. He maintained that this bullet "was most consistent with bullets loaded in some .357 Magnum caliber cartridges," meaning it was the correct caliber bullet for use in the .357 Magnum revolver fired by McElveen. However, he claimed that the bullet recovered from Pertelle's body could not have been fired by the .357 Magnum revolver fired by McElveen because the lands and grooves on the bullet did not match the test fired bullets from the .357 Magnum revolver. He concluded there was no possible way for the .357 Magnum revolver to have fired the bullet collected from Pertelle's body. R. 362, l. 8 – 363, l. 10.

Howard Parker, who has known both Appellant and James since childhood, testified that he saw Keir Johnson driving the brown Astro van on two occasions the night that Pertelle was killed. He first saw the van at a gas station in downtown Conway around 11:00

pm. Johnson was standing outside the van and there were several people inside the van, but Parker did not recognize them. Parker later saw the van sometime between 1:00 am and 2:00 am parked outside Billy Freshley's house. He claimed when he saw the van the second time there were three people inside. According to Parker, Johnson was driving and James was the front seat passenger. However, while he could see the silhouette of a third person in the back of the van, Parker was unable to identify this individual. R. 400, l. 17 – 405, l. 8. He described the individual as approximately five feet, four inches in height.[8] R. 424, ll. 13-17.

When Parker saw the van the second time, he was sitting outside Billy Freshley's house in a parked car with Terry Bease, who Parker hung out with most of that night. On cross-examination, Parker denied telling law enforcement that Bease set up the burglary and attempted armed robbery with Lavena Jackson, who was Pertelle's cousin. He further denied telling the police that Lavena Jackson called Bease that night while they were in the parked car and told him that McElveen ("Splurge") would be a good target to rob and that she had seen McElveen bring cocaine and money into the mobile home earlier that night.[9] He also denied telling the police that Bease passed this information on to Billy Freshley.

[8] On cross-examination, Parker testified that Appellant is six feet, two inches tall. R. 438, ll. 18-21.

[9] Carlton Watts, who lived in the mobile home with Pertelle and McElveen, testified that Lavena Jackson visited their home the night Pertelle was killed. R. 97, ll. 5-14. Moreover, Bease admitted that he spoke to Jackson that night and his telephone records confirm this communication. R. 392, l. 22 – 393, l. 16. The testimony from Watts and Bease corroborates the statement Parker gave to law enforcement in December 2011 indicating that Jackson told Bease she had seen McElveen bring cocaine and money into the mobile home the night of the burglary and that Jackson and Bease planned the attempted armed robbery together.

Parker claimed that if he told the police this information he was either lying or speculating because he had no way of knowing such information. R. 418, l. 24 – 423, l. 25.

Sedieka McClam, who admitted he was currently incarcerated on federal drug charges at Williamsburg Correctional Institution and has numerous prior convictions involving drugs, claimed he had information about this case.[10] R. 645, l. 15 – 646, l. 15. He testified that sometime during the middle of December 2011 he met a woman at Third Avenue Bar and Grill and the two exchanged telephone numbers. He contacted this woman the next day and she invited him to her apartment at Huckabee Heights in Conway. McClam claimed when he arrived at the apartment the woman told him "she had a friend that was in the kitchen by the name of Dubba."[11] McClam testified that he "smoked a couple of blunts, blunts of reefer" in the living room with the woman and the man supposedly named Dubba. He claimed he had never seen Dubba before, but described him as a black male, six feet two inches in height, and about two hundred and twenty pounds with tattoos on his arms.

According to McClam, while the three were smoking marijuana, Dubba received a telephone call and McClam was able to overhear Dubba's conversation with the person on the other end. McClam claimed Dubba began talking about the burglary and attempted armed robbery at McElveen and Pertelle's home. Specifically, Dubba allegedly said that

[10] On cross-examination, McClam clarified that his prior record consisted of convictions in 2004 for distribution of crack cocaine and failure to stop for a blue light, and in 2011 for possession with intent to distribute a controlled substance ("pills") and possession of a stolen weapon. These were his state convictions. He also had federal convictions for possession with intent to distribute marijuana, cocaine, and crack cocaine, along with unlawful possession of a firearm. These federal convictions were the reason for his incarceration at the time of Appellant's trial. R. 654, l. 16 – 655, l. 22.

[11] As noted above, Dubba was supposedly Appellant's nickname.

"he was sorry for what happened to Keia [Pertelle]" and "[t]hat he panicked when he went through the door and just started shooting." R. 646, l. 16 – 648, l. 22. He also allegedly said the incident happened in "Brown Swamp." R. 649, ll. 18-20.

McClam eventually wrote a letter to the solicitor's office detailing the information he supposedly had pertaining to this case. He admitted he wrote the letter "because in federal prison if you cooperate with the government, the federal government or state, they will give you time back." R. 648, ll. 23-25; R. 651, ll. 1-8. He explained he was arrested by federal authorities on January 3, 2012, shortly after he allegedly overheard this conversation and that he has been continually incarcerated since. R. 651, l. 13 – 652, l. 2.

On cross-examination, McClam testified that if a federal inmate gives the government information during what is called a "debriefing" he or she can receive a "downward departure," or "time cut," and if the inmate testifies at a trial, even after being sentenced, the inmate can receive a second or even "bigger" downward departure. McClam admitted he was hoping to receive a downward departure because of his testimony against Appellant at trial. R. 656, l. 12 – 658, l. 10.

Counsel for James went through with McClam the letter he wrote to the solicitor in more detail. In this letter, McClam told the solicitor that when Dubba answered the telephone he said, "What's going on, Cutty?"[12] Dubba then allegedly went on to say that "they never should have went to Brown Swamp," that "he panicked when he went through the front door and saw Keia [Pertelle] jump up, and he started shooting," that "he didn't mean to shoot his gun six or seven times," and that "they went to rob Keia's boyfriend, Splurge." R. 660, l. 3 – 663, l. 12. McClam also wrote in the letter that after Dubba talked

[12] As noted above, Cutty is supposedly the nickname for Thomas Booker James.

to Cutty about the details of the burglary and shooting, he allegedly "asked Cutty to tell Lil Bootsie to come pick him up in about an hour" and that eventually a blue Chevrolet Astro van pulled up outside and Dubba left.[13] According to McClam's letter, he watched Dubba get inside the blue Astro van with Cutty and Bootsie, who was driving, and the three drove away. R. 663, l. 13 – 664, l. 17.

McClam admitted he did not know Johnson ("Bootsie") was in jail in the middle of December 2011 and that Johnson never drove the Astro van after the morning Pertelle was shot and killed, meaning what McClam claimed he saw was impossible. R. 665, l. 4 – 666, l. 18; R. 668, ll. 18-24. He also testified he did not think it was unusual that Appellant ("Dubba") would tell James ("Cutty") all the details of the burglary and shooting over the telephone when James was allegedly the only other person who was present in the mobile home during the shooting. R. 669, l. 17 – 671, l. 8.

Kachief Spain, another federal inmate, testified he was currently incarcerated for unlawful possession of a firearm and that he also had prior convictions for second degree burglary, armed robbery, and strong armed robbery. He claimed he learned information about this case while he was housed at J. Reuben Long, which is the local detention center in Horry County, before being moved to federal prison. Spain testified he overheard a conversation between Appellant and a man named Ace Graham. He claimed Appellant had a manila folder, presumably containing his discovery materials, and told Graham that law enforcement "don't got nothing on me, bro, they don't got nothing on me, I'm good." Graham supposedly asked Appellant what happened and Appellant allegedly told Graham, "[W]e got to the house, kicked the door in, we kicked the door in, the alarm went on, Keia

[13] Again, there was testimony that Bootsie was Keir Johnson's nickname.

[Pertelle] was on the couch, she jumped up, started running, screaming for Splurge. Everything happened so fast, he just started shooting. She seen his face. He started shooting, you know, he didn't have a choice because she seen him." Spain said at this point he thought he had heard enough of the conversation and walked away. R. 680, l. 22 – 685, l. 5.

On cross-examination, Spain admitted when he spoke to an investigator with the solicitor's office he provided significantly more detail about what he overheard Appellant allegedly tell Graham. He told the investigator that Appellant allegedly said Pertelle was on the couch sleeping, that she heard Appellant come in the home, that she was running down the hall, that Appellant started shooting, and that Pertelle was screaming Splurge's name. Spain denied telling the officers about a blue Astro van or that there were eight people in the van. However, he was later impeached with the statement he had given the investigator and admitted to telling the investigator these things. R. 690, l. 3 – 692, l. 9.

During his case in chief, Appellant presented an alibi defense. Nakeema Crooms, who is the mother of Appellant's two children, testified that she was living with Appellant in November 2011. She explained that Appellant was at home sleeping all night with their three year old daughter. R. 804, l. 6 – 805, l. 23.

For reasons unknown, Rodney ("Splurge") McElveen did not testify at trial even though he was present in the mobile home during the burglary and shooting and presumably should have been a main witness in the case.

After deliberating for nearly seven hours, the jury found both Appellant and James guilty of murder. R. 921, l. 22 – 922, l. 14.

ARGUMENT

The court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury.

Pretrial Motion

Before the start of trial, Appellant's counsel requested the trial court conduct a pretrial hearing to ascertain the reliability of the testimony of several informants "under relaxed rules of evidence for the purpose of the Court itself adducing the viability of [their] testimony."[14] R. 122, ll. 2-6. Counsel explained, "[T]here is a growing trend in this country since the advent of DNA and the discovery of exonerated convicted defendants on death row and serving life sentences, certain patterns have emerged in the false convictions, and one of them are erroneous eyewitness identifications. And another is what is referred to as the compensated informant." R. 119, ll. 10-16.

Counsel for James joined Appellant's motion and made further arguments in support of the motion. He explained that "[i]n a couple of states, judge, not South Carolina, there is a rule that you cannot convict somebody or even put the witness on the stand if it is uncorroborated jailhouse informant testimony. I believe that's a rule in maybe three states now." R. 124, ll. 7-19. Counsel for James argued the court should conduct a preliminary reliability hearing and that, if there was no corroboration of the jailhouse informants'

[14] While Appellant's counsel never specified, he presumably was referring to Keir Johnson, Sedieka McClam, and Kachief Spain, who were all informants who testified against Appellant at trial and clearly had a conflict of interest in that they sought leniency in exchange for their testimony. However, counsel's arguments to the court focused almost exclusively on Johnson.

testimony, then their testimony should be excluded. R. 125, ll. 5-9.

Court's Ruling

The court denied Appellant's motion indicating it would follow the law in South Carolina, which does not require the court conduct a preliminary reliability hearing before a jailhouse informant may testify. R. 125, ll. 10-12. During his ruling, Judge John stated, "We're not conducting any kind of preliminary hearings here, okay. That's not what we're about. We're about a trial. You are going to have [a] full and complete opportunity to cross-examine all the witnesses." R. 121, ll. 2-6. He further stated defense counsel would be able to examine the witnesses about matters that could affect their credibility and believability, but he refused to conduct any pretrial hearings on the reliability of their testimony. R. 122, ll. 7-11.

Discussion

The trial court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants. Moreover, the court erred by failing to make a determination that the testimony of each of these witnesses was reliable and corroborated before they were allowed to testify before the jury.

"Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials. Snitches are deeply unreliable witnesses. Many are con artists, congenital liars, and practiced fraudsters. As compensated witnesses, all snitches have deep conflicts of interest. What is worse, jailhouse snitch testimony as a class is not only the least credible type of evidence, but it is among the most persuasive to jurors because jailhouse informants typically allege to have personally heard defendants confess

their guilt to the crimes charged." Russell D. Covey, Abolishing Jailhouse Snitch Testimony, 49 Wake Forest L. Rev. 1375, 1375 (2014). "Research studies demonstrate that jurors are simply ill equipped to evaluate the credibility of jailhouse informant testimony and consistently give such testimony far more weight than is due even if they are aware of the incentives jailhouse snitches receive or expect in exchange for their testimony." Id.

"The practice of using jailhouse snitches in serious criminal cases is . . . a major cause of error in the criminal justice system." Id. at 1378 (citing Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 6-7 (2009)). "Although it had long been apparent that jailhouse snitch testimony was sometimes extremely unreliable, the strong link between jailhouse snitches and wrongful convictions has only become clear recently thanks to the still-breaking wave of DNA exonerations." Id. (citing Natapoff at 7). "Analysis of the causes of wrongful convictions in these cases reveals that jailhouse snitches have been involved in a surprisingly large percentage of known wrongful convictions—twenty-one-percent—according to Innocence Project founders . . ." Id. (citing Jim Dwyer et al., Actual Innocence: Five Days to Execution and other Dispatches From the Wrongly Convicted 246 (2000)).

As a result of the inherent unreliability of jailhouse informants, the Illinois legislature enacted a statute in 2003 requiring the trial court in all capital cases to conduct a pretrial hearing to determine whether the testimony of an informant is reliable before the informant may testify before the jury. See 725 Ill. Comp. Stat. Ann. § 5/115-21 (2003). The statute indicates that if the prosecution fails to show by a preponderance of the evidence

that the informant's testimony is reliable, the trial court shall not allow the testimony to be heard at trial. Id.

According to the Second District Appellate Court of Illinois, during such pretrial hearings, the prosecutor may and should present information as to what steps he or she took to ascertain the reliability and veracity of the claims made by the informant or informants. See People v. Rivera, 962 N.E.2d 53, 64 (Ill. App. Ct. 2011). "When a witness has hopes of a reward from the prosecution, the testimony should not be accepted unless it carries with it an absolute conviction of its truth." Id. (citing People v. Hermens, 125 N.E.2d 500, 505 (Ill. 1955)). Without a pretrial reliability hearing, it is "left to adversarial examination by defense counsel to test the truthfulness of and the motivations behind the jailhouse informants' testimony." Id.

Moreover, the state of Texas has enacted legislation requiring a jailhouse informant's testimony be corroborated before he or she may testify before a jury "in recognition that incarcerated individuals have an incentive to provide information against other incarcerated individuals." Phillips v. State, 463 S.W.3d 59, 66 (Tex. Crim. App. 2015); See Tex. Crim. Proc. Code Ann. art. § 38.075. Article 38.075(a) of the Texas Code of Criminal Procedure states:

> "A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed."

Tex. Crim. Proc. Code Ann. art. § 38.075.

According to the Court of Criminal Appeals of Texas, "Article 38.075's legislative history recognizes that '[t]he veracity of an in-custody informant's statement can be highly suspect,' and that '[t]he testimony of [an] in-custody informant' should be corroborated by at least one other piece of evidence." Phillips, 463 S.W.3d at 66 (alterations in original) (internal citations omitted).

Texas also has a separate statute that requires "accomplice-witness testimony . . . be corroborated because it is inherently unreliable due to the strong likelihood of finger-pointing." Phillips, 463 S.W.3d at 66 (internal citations omitted); See Tex. Crim. Proc. Code Ann. art. § 38.14. Article 38.14 of the Texas Code of Criminal Procedure states:

> "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

Tex. Crim. Proc. Code Ann. art. § 38.14.

As the Court of Criminal Appeals of Texas recognized, "[t]he testimony of an accomplice witness is untrustworthy, and it should be received, viewed, and acted on with caution." Phillips, 463 S.W.3d at 66 (internal citations omitted). Under Article 38.14, "the test as to the sufficiency of the corroboration is to eliminate from consideration the evidence of the accomplice witness and then to examine the evidence of other witnesses with the view to ascertain if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the crime." Phillips, 463 S.W.3d at 66 (citing Edwards v. State, 427 S.W.2d 629 (Tex. Crim. App. 1968)) (internal quotation marks omitted).

Here, the trial court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the claims made by Johnson, McClam, and Spain before allowing them to testify before the jury. All three had an inherent conflict of interest and an undisputable incentive to lie. Both McClam and Spain were serving federal prison sentences and admitted they were testifying against Appellant in hope of receiving a reduced sentence or "downward departure." See R. 656, l. 12 – 658, l. 10 and R. 699, ll. 10-18. Johnson, on the other hand, was charged with murder in connection with this case, and was the only individual the police had any evidence against until Johnson gave the statement in April 2012 implicating Appellant and James. Johnson was highly motivated to lie and to reduce his own role in the burglary, attempted armed robbery, and shooting in order to avoid a lengthy prison sentence.

If the trial court would have properly conducted a pretrial hearing as Appellant's counsel requested, it would have determined that the testimony of Johnson, McClam, and Spain was not only unreliable, but also uncorroborated and, as a result, would have excluded their testimony at trial. The unreliability of McClam's testimony is blatantly obvious. McClam claimed in the letter he wrote to the assistant solicitor and during his testimony at trial that he witnessed Johnson pick up Appellant from an apartment complex in Conway in the middle of December 2011 in the brown Astro van. However, this claim was impossible since Johnson had already been arrested for murder by the middle of December and was incarcerated at that time. He also never drove the brown Astro van after the morning of the burglary and shooting. Moreover, as defense counsel suggested through his cross-examination of McClam, it is extremely unlikely that Appellant would discuss all the

specific details of the burglary and shooting over the telephone about a month after the incident happened with the only other alleged perpetrator.

The testimony of Spain was also inherently unreliable. Unsurprisingly, the details he gave regarding Appellant's alleged confession are strikingly similar to the details provided by McClam. Interestingly, both McClam and Spain mistakenly said that Astro van was blue in the letters they wrote to the solicitor's office. Moreover, the details Spain, as well as McClam, provided could have easily been discovered through other sources such as Appellant's discovery materials.

Lastly, Johnson's testimony implicating Appellant in the burglary, attempted armed robbery, and shooting was not only uncorroborated, but also wholly unreliable. Johnson, who was a self-admitted liar, had given numerous false statements to law enforcement before he implicated Appellant and James in the burglary five or six months after his arrest. Moreover, Johnson was highly motivated to lie and cooperate with the state in order to reduce his own role in the burglary and shooting and his exposure to prison time. The state had significant evidence against Johnson. In fact, he was the only person in which the state had any evidence against before he implicated Appellant and James. Additionally, none of his claims against Appellant were corroborated. For example, law enforcement was never able to locate the firearm Appellant allegedly threw out the window while fleeing the scene. No other witnesses claimed to see Appellant traveling in the van that morning nor were Appellant's fingerprints found on the van when it was processed by law enforcement. Furthermore, there were no telephone records that connected Appellant to the area where the burglary and shooting occurred or indicated Appellant had been in contact with Johnson that morning.

Without the testimony of Johnson, McClam, and Spain it is extremely unlikely Appellant would have been convicted of murder. There was absolutely no evidence against Appellant besides the testimony of these three informants. Notably, there was no physical evidence connecting Appellant to the brown Astro van or to the mobile home where the burglary and shooting occurred. While Howard Parker testified he saw Johnson and James in the brown van sometime between 1:00 am and 2:00 am on the morning of the shooting, he indicated he did not recognize the third individual in the back of the van and that this individual was significantly shorter than Appellant. Parker was also impeached with the statement he gave law enforcement in December 2011 where he maintained that Terry Bease and Lavena Jackson had planned the robbery and perhaps Billy Freshley was involved. At no point during his interview in December 2011, which was before Johnson implicated Appellant and James, did Parker indicate that Appellant and James were involved in the burglary and attempted armed robbery. Moreover, there were no telephone records that connected Appellant to the area where the burglary and shooting occurred or indicated he had been in contact with Johnson or James that morning.

Based on the inherent unreliability of the claims made by Johnson, McClam, and Spain and the trial court's failure to conduct a pretrial reliability hearing to determine whether the testimony of each of these witnesses was reliable and corroborated before they testified before the jury, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court to reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Susan B. Hackett for
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARNAIL MARCHINDLA GRAHAM,

APPELLANT

APPELLATE CASE NO. 2014-002336

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of February, 2016.

Susan B. Hackett for
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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 26th day of February, 2016.

____________________ (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

ORIGINAL

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Honorable Steven H. John, Circuit Court Judge

THE STATE,

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v.

CARNAIL MARCHINDLA GRAHAM,

Appellant

Appellate Case No. 2014-002336.

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

I. Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Did the trial court err by denying Petitioner's motion for a preliminary hearing for the purpose of determining the reliability of three State's witnesses where Appellant was afforded a full and fair opportunity to address these witnesses' reliability through cross-examination?

STATEMENT OF THE CASE

Appellant Carnail Graham was indicted by the Horry County Grand Jury for the November 8, 2011, murder of victim Shaquille Shontay (Keia) Pertelle. (R. pp. 932 – 933). David J. Canty, Esq., represented Graham at a jury trial beginning with jury selection on October 13, 2014, and continuing for four days. (R. p. 1). Graham was jointly tried with co-defendant Thomas Booker James, who was represented by Bobby G. Frederick, Esq. The Honorable Steven H. John presided, and Nancy Livesay of the Fifteenth Circuit Solicitors Office prosecuted the case. (R. p. 1).

A jury convicted Graham of the murder charge, and Judge John sentenced Graham to thirty-two years' imprisonment with credit for time served. (R. p. 929, lines 6-11). This appeal follows. (R. p. 930 – 931).

STATEMENT OF FACTS

Keia Pertelle died of a gunshot wound to the chest sustained when intruders invaded her mobile home located outside of Conway. (R. p. 143, line 3 – p. 145, line 24; R. p. 160, lines 1-24). The shooter was standing over two feet away. (R. p. 165, lines 8-14). The first officer who responded to the scene located Pertelle in her residence's front bedroom, deceased on the bed. (R. p. 145, lines 16-24). In the living room, investigators found a comforter half thrown from the couch to the floor, indicating that someone leapt from the couch in a hurry. (R. p. 281, lines 10-21). The bullet was retrieved from Pertelle's back during autopsy and collected as evidence. (R. p. 263, lines 9-25).

Prior to the invasion, Pertelle's roommate Carlton Watts last saw her watching television on the couch. (R. p. 68, lines 1-17). Watts testified at trial that he was asleep at the time of the invasion. He initially heard a few gunshots, causing him to roll to the floor and hide underneath his bed. (R. p. 61, line 16 – p. 64, line 17). Watts could not identify the intruders, but heard them screaming "where it's at, we're not playing, where it's at," and saw two pairs of sneakers pass by his bed. (R. p. 72, line 24 – p. 73, line 15). The third resident and the victim's boyfriend, known by the nickname Splurge, shared the victim's bedroom. (R. p. 61, lines 21-23; R. p. 108, lines 16-18). Splurge was also at the house that night, and remained inside until law enforcement arrived on scene and demanded he exit. (R. p. 63, lines 15-20; R. p. 66, lines 7-22). At the time of the invasion, the victim screamed out to Splurge, who was in their bedroom at the time of the break-in. (R. p. 71, line 19 – p. 72, line 3). Splurge did not testify at trial.

A neighbor, David Grissett, heard the gunfire and commotion occurring in Pertelle and Watts' mobile home, then witnessed two people run from the residence and

leave in a van. (R. p. 119, line 19 – p. 120, line 10). Grissett called 911. (R. p. 120, lines 11-14). Grissett actually noticed the getaway van slightly earlier, finding its presence suspicious. He had never seen it before, but watched it circle his street, park at the end, then drive two streets over and return again to park at the end of the road. This occurred around two in the morning. (R. p. 117, line 17 – p. 119, line 17). The road on which Grissett and Pertelle lived dead-ended and had no street lights. (R. p. 124, lines 14-25).

On scene, law enforcement documented entry marks from a fired bullet in the front door jamb. (R. p. 254, lines 1-16). The front door frame showed additional signs of forced entry. (R. p. 259, line 12 – p. 260, line 9). They found a disheveled bedroom and collected fired bullets from the kitchen cabinets, the doorway from the kitchen to the living room, and from under the living room couch. (R. p. 256, lines 2-24). Another bullet hole punctured the television, and yet another punctured the hallway floor. (R. p. 256, line 25 – p. 257, line 20). Various bullet jackets and fragments were collected from the scene as well. (R. p. 275, line 18 – p. 276, line 25). In addition to the absence of any shell casings on scene, the types of jackets and bullet fragments recovered signaled to law enforcement that a revolver was most likely used in the home. (R. p. 277, lines 1-25). Investigators also collected two handguns, a .357 Taurus revolver and a .44 Redhawk Ruger, and one SK 7.62 assault rifle from the mobile home. (R. p. 267, lines 10-25).

In regards to the projectiles taken from the crime scene, SLED's firearm and toolmark examiner determined that three projectile fragments, State's exhibits 68, 69 and 71, and a complete fired bullet, State's exhibit 67, derived from a revolver recovered

from the crime scene.[1] (R. p. 357, line 13 – p. 362, line 7). But, the examiner determined that the bullet recovered from the victim's body during autopsy did not derive from any firearm recovered from the crime scene, and that the fatal bullet was a .357 caliber shot from an unrecovered revolver. (R. p. 362, line 8 – p. 364, line 7). A match was never made between the victim's bullet and any gun. (R. p. 381, line 6 – p. 382, line 10).

Between six and seven the morning following the murder, Tiffany Oliver noticed a champagne colored van with tinted windows parked near a tree line behind her mobile home. (R. p. 178, line 16 – p. 180, line 4). Oliver called the police in response to the van's discovery because she did not know who it belonged to and she wanted it removed. (R. p. 177, lines 3-11). She did not live on the same street as the victim.[2] (R. p. 176, lines 10-12). When law enforcement fingerprinted the van in the course of their homicide investigation, they identified the creators of thirteen total fingerprints, but none matched Appellant. And, no prints taken from the driver's side of the van contained sufficient ridge detail to be matched to any individual. The matches obtained where to Thomas Booker James, Keir Lamont Johnson, Letitia Tasha Freshley, and Markel Hasheem Rush. (R. p. 223, line 5 – p. 224, line 25; R. p. 236, lines 1-6). It was also determined during the course of investigation that the van belonged to Kier Lamont Johnson's ex-girlfriend, Tiara Brown. (R. p. 508, lines 3-7). Johnson was locally known as "Bootsie." (R. p. 401, lines 5-13).

Howard Parker, a lifelong friend of both Appellant and the victim, testified at trial

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[1] It can be inferred that the bullets matching the revolver recovered from the crime scene were fired by Splurge in defense of the home invasion.
[2] Oliver testified at trial that she knew both Appellant and the victim through Appellant's girlfriend, to whom Oliver was related. (R. p. 189, line 6 – p. 190, line 15).

that he recognized that Bootise drove that van around town. (R. p. 400, line 17 – p. 402, line 5). Parker saw Bootsie in the van twice the night of the murder. (R. p. 402, lines 6-8). The first was at a gas station around 11:00 PM. (R. p. 402, lines 9-25). The second time Parker saw the van, it was after midnight, and the van arrived at a house where Parker was with friends. (R. p. 403, line 1 – p. 404, line 6). Two more people exited the house and got inside the van before it left. (R. p. 428, lines 1-24). On both occasions, Parker noticed, but could not identify, other individuals already inside the van. (R. p. 402, lines 9-22; R. p. 404, lines 7-23). Parker did identify Appellant's co-defendant at trial as one of the other occupants. (R. p. 404, line 24 – p. 405, line 6).

Bootsie implicated Appellant Carnail Graham, also known as "Dubba." (R. p. 44, line 7). At trial, Bootsie explained how Appellant called him from co-defendant Thomas Booker James, "Cutty's" phone and asked for a ride to buy some drugs on the night of the murder. (R. p. 485, lines 18-19; R. p. 488, line 16 – p. 489, line 7). Bootsie picked up Appellant and Cutty, and they parked on a back road by Splurge and the victim's mobile home. Bootsie testified that the spoke to a neighbor in the trailer park while Appellant and Cutty went inside Splurge's trailer. Then they got back in Bootsie's van and Bootsie drove away at his passengers' direction. (R. p. 485, line 18 – p. 486, line 8). As they left the scene, a Horry County police officer "swerved around" to follow them, and Appellant urged Bootsie to make a getaway. At that point, Bootsie parked the van in "somebody's backyard" and all three men took off into the woods. (R. p. 486, lines 9-15). It was during their getaway that Appellant expressed to his cohorts that he thought he "just killed that mother------." (R. p. 496, lines 17-24). Bootsie recalled Appellant and Cutty wearing blue latex gloves that they discarded in the woods; they did not wear masks. (R. p. 585, lines

1-21). Bootsie also testified that Appellant threw two guns out of the van window. (R. p. 497, lines 1-5; R. p. 539, lines 1-25).

Bootsie later asked his girlfriend to call the police and report the van stolen—he falsely explained to law enforcement that he was robbed of the van while at a gas station. (R. p. 497, line 22 – p. 498, line 6; R. p. 553, line 23 – p. 556, line 4). The instruction to report the van stolen appeared to be one of Johnson's initial strategies in speaking to law enforcement about his involvement in the victim's murder. (R. p. 497, line 22 – p. 498, line 15). Bootsie incurred a charge for driving without permission with intention to deprive, and made bond the following day. (R. p. 498, lines 7-12). Bootsie later incurred a murder charge for his involvement in Pertelle's death. In addition to other charges, the murder charge remained pending at the time of Appellant's trial. (R. p. 498, lines 13-21; R. p. 529, line 21 – p. 531, line 21). Bootsie also admitted that he previously gave false statements to law enforcement out of fear, but that he also provided them a truthful version of events after hiring a lawyer. (R. p. 498, line 22 – p. 501, line 23; R. p. 507, lines 3-12). Additionally, Bootsie testified that Appellant had Bootsie's and Cutty's names tattooed on his body. (R. p. 483, line 21 – p. 484, line 14).

The State called a former assistant solicitor to testify about the extent and disposition of Bootsie's past charges: he acquired a charge for burglary first and assault and battery first in April 2013, which the State dismissed for reasons unrelated to the present victim's murder. (R. p. 598, line 2 – p. 599, line 24).

A federal inmate, Sedieka McClam, corroborated Bootsie's testimony as to the murder. McClam testified that he met Appellant at a female acquaintance's home in Conway. (R. p. 647, lines 3-23). Appellant had a phone conversation in front of McClam

in which Appellant apologized "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (R. p. 648, lines 4-17). This occurred in January 2011. McClam subsequently wrote this information in a letter to the solicitor's office. (R. p. 648, lines 18-25). More information from the letter was divulged during McClaim's cross-examination. McClam recalled Appellant stating "they went to rob Keia's boyfriend, Splurge," and that "he didn't mean to shoot his gun six or seven times[.]"(R. p. 663, lines 4-25). The letter also referenced Appellant stating that after the shooting, he got in the side door of a van driven away by Bootsie. (R. p. 664, lines 1-17).

McClam was arrested for his federal charges shortly after overhearing the phone conversation, and testified at trial that he "wrote the letter because in federal prison if you cooperate with the government," they may reduce your time served, but that he had no contact with Appellant since the night he overheard him on the phone. (R. p. 651, lines 1-25). At the time of trial, McClam had yet to receive any downward sentencing departure. (R. p. 658, lines 1-5).

Additional corroboration came from another federal inmate, Kachief Spain, who testified that when he was housed one pod over from Appellant in the Horry County detention center. (R. p. 681, lines 1-18). Spain met Appellant in the early 1990's. (R. p. 682, lines 21-25). Spain testified that he witnessed Appellant come to the recreation field and call one of Spain's podmates, Ace Graham, to a door situated "maybe five feet" from where Spain was standing at the time. (R. p. 681, lines 19-25). Spain witnessed Appellant slide the discovery in Appellant's case through the door to Graham and explain to Graham that "they [the State]" did not have any evidence on him. (R. p. 682, lines 1-8; R. p. 685, lines 1-5). According to Spain, Appellant told Graham what happened:

> We got to the house, kicked the door in, we kicked the door in, the alarm went on. Keia was on the couch, she jumped up, started running, screaming for Splurge. Everything happened so fast, he just started shooting. She seen his face. He started shooting, you know, he didn't have a choice because she seen him.

(R. p. 682, lines 9-17). Spain's cross-examination expounded upon additional details that he initially divulged to the State's investigator: that Appellant stated he went in the front door, that there were eight people in the van, and that Appellant and co-defendant Cutty "put a gun to Lil Bootsie's head and told him not to tell[.]"[3] (R. p. 692, lines 4-16).

In his own case-in-chief, Appellant presented the mother of his children, Nakeema Crooms, who testified that she lived with Appellant at the time of the murder. According to Crooms, Appellant was at home that night, asleep with their three-year-old daughter. (R. p. 804, line 8 – p. 805, line 23).

Through expert testimony on cell-phone tracking and electronic communications, Appellant also established that his cell phone remained silent during the time in which the home invasion and murder occurred, with the exception of two calls at 2:16 and 2:18 AM, and two more at 6:24 and 6:28 AM. The calls that were made registered from the same central Conway cell site. (R. p. 760, line 15 – p. 763, line 24). The same expert witness also testified that Bootsie's phone made and received a total of 28 calls in an area northwest of Conway, the direction of the crime scene, around the time of the home invasion and murder. (R. p. 752, line 1 – p. 756, line 14; R. p. 771, lines 18-22).

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[3] A discrepancy arises through both McClam and Spain's testimony as to the color of the van. These inmates testify that the van connected to Bootsie and Appellant was blue. (R. p. 663, lines 19-23; R. p. 692, lines 1-3). But direct evidence, and Bootsie's testimony, establishes that the van was tan or brown. (R. p. 246, line 3 – p. 247, line 5). Spain later testifies that he does not recall the color of the van, that it was either blue or brown. (R. p. 672, lines 19-21).

ARGUMENT

I. The trial court did not err in denying Appellant's motion for a preliminary reliability hearing regarding jailhouse informant testimony because the witnesses were available for cross-examination.

How the Issue Arose

Anticipating the State to present jailhouse informant testimony, Appellant's trial counsel, Mr. Canty, moved for an *in limine* reliability hearing with relaxed rules of evidence "for the purpose of producing evidence against [Appellant], the motive [the witnesses] may have to lie, the difficulty of disproving [the witnesses'] testimony, [the witnesses'] relationship to [Appellant] and for the State to provide any corroboration that they may have to his account." (R. p. 2, line 2 – p. 3, line 10). Mr. Canty sought for the trial court to itself adduce the viability of informant testimony. (R. p. 5, lines 2-6).

The trial court denied the motion. (R. p. 5, lines 7-11). In so denying, the trial court pointed out that any statements made by the jailhouse witnesses, and related inconsistencies, are ripe for cross-examination and that counsel would "have [a] full and complete opportunity to cross-examine all the witnesses" including any admissible excerpts from the witnesses' criminal records. (R. p. 3, line 17 – p. 4, line 8). The trial court gave counsel leeway to ask the informants in a limited fashion about whether they had been charged with any crimes, or received a bond on any pending charge, between the time of Appellant's arrest and trial. (R. p. 4, lines 9-21). The trial court so ruled in order for the jury "to be able to judge the credibility and believability and anything that might tend to give them an insight as to the purposes of [the informants'] testimony." (R. p. 4, line 22 – p. 5, line 1). The trial court did not foreclose the possibility of conducting an *in limine* hearing prior to an informant's testimony on matters related to his or her

criminal history. (R. p. 5, lines 12-19).

Standard of Review

"A trial judge has broad discretion in supervising cross-examination with regard to bias or prejudice," *Norris v. Ferre*, 315 S.C. 179, 182, 432 S.E.2d 491, 493 (Ct. App. 1993), and "in ruling on the admissibility of the testimony." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion," which "occurs when the trial court's ruling is based on an error law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (internal quotations omitted).

Cross-examination provides the appropriate trial vehicle for exploring and impugning jailhouse informant, and co-defendant, testimony

The trial court committed no error in denying Appellant's motion because South Carolina does not follow the rule adopted by the jurisdictions cited by Appellant. A trial court is not required to find corroborating evidence before allowing a jailhouse informant to testify on the State's behalf.[4] (*See* Br. of Appellant, p. 23-25). The proper method of impugning a jailhouse informant's credibility, as with any other witness, is through cross-examination. "[T]he Confrontation Clause 'guarantees only an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *State v. Stokes*, 381 S.C. 390, 401-02, 673

[4] In contrast, a preliminary finding of corroboration would be required regarding the admissibility of an exculpatory, out-of-court statement made by an unavailable declarant. *State v. Cope*, 405 S.C. 317, 342-43, 748 S.E.2d 914, 207 (2013).

S.E.2d 434, 439-40 (2009) (quoting *United States v. Owens,* 484 U.S. 554, 559, 108 S.Ct. 838, 842 (1988) (internal quotation marks and citations omitted) (emphasis in original)). "Indeed, the opponent's opportunity for cross-examination has been deemed the 'main and essential purpose of confrontation.'" *Id.* at 402, 673 S.E.2d at 440 (quoting *Delaware v. Fensterer,* 474 U.S. 15, 19–20, 106 S.Ct. 292, 294 (1985) (internal quotation marks and citation omitted)).

Where there exists a "substantial possibility [a jailhouse informant] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case," that witness' pending charges are probative on the issue of bias and therefore admissible on cross-examination. *State v. Sims*, 348 S.C. 16, 25-26, 558 S.E.2d 518, 523 (2002) (citing Rule 608(c), SCRE ("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")). "'Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.'" *State v. Pipkin,* 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting *United States v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 469 (1984)). This rule of evidence "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" *State v. Jones,* 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting *State v. Brewington,* 267 S.C. 97, 226 S.E.2d 249 (1976)). *Jones,* akin to *State v. Sims*, *supra*, held that a murder defendant should be allowed to cross-examine his alleged accomplice,

whose credibility was found to be "the central issue" in the case, about past dealings between the accomplice and the office prosecuting the defendant for the purpose of exposing any bias. *Jones* at 570-71, 541 S.E.2d at 817-18.

Considering the tools available for Appellant to point out the informants' potential prejudices, the trial court correctly denied Appellant's request for a preliminary reliability hearing with "relaxed rules of evidence for the purpose of producing evidence against [him]." (R. p. 3, lines 2-6). The rules of evidence and procedure do not work to prevent either (1) the State from calling jailhouse informants to testify without first conducting a preliminary hearing as to the reliability of their proposed testimony, (2) Appellant's thorough cross-examination of those witnesses in reply, (3) Appellant's ability to call his own witnesses to further discredit the informants' testimony, or (4) to argue against those witnesses' credibility in closing argument. The toolbox of rules with which Appellant must work before the jury does not afford a windfall to question these witnesses *in limine* under oath and under "relaxed rules of evidence" to garner information otherwise gleaned from discovery and pre-trial witness interviews. Trial counsel has other means available to acquaint himself with potential trial testimony prior to the calling of the case for trial.

This case is not unlike *Jones* and *Sims* in the manner and method in which defense counsel acted to impugn the State's witnesses. The record establishes that Appellant had a full and complete opportunity to confront the jailhouse witnesses regarding potential bias. Pre-trial, Appellant's counsel moved for the State to compel NCIC reports on the three jailhouse witnesses—Keir "Bootsie" Johnson, Sedieka McClam, and Kachief Spain. (R. p. 111, lines 4-10). The trial court granted the request,

ensuring that Appellant's counsel had these witnesses' NCIC reports the morning prior to their testimony. (R. p. 237, line 15 – p. 239, line 4). The trial court also conducted *in limine* hearing prior to jailhouse witness testimony to review and discuss the admissibility of each witness' criminal history pursuant to Rule 609, SCRE.

First, the trial court conducted an *in limine* hearing regarding defense counsel's proposed questioning of jailhouse witness and co-defendant Keir "Bootsie" Johnson. It became clear during this hearing that in order to highlight Bootsie's potential bias and prejudice to testify against Appellant, defense counsel would attempt to establish that it was not until six months after Bootsie was charged with the victim's murder that he made a statement implicating the Appellant and his co-defendant. (R. p. 447, line 2 – p. 456, line 21). Thereafter, Bootsie received a bond on his murder charge and had a pre-existing charges for burglary and possession of a firearm dismissed. The trial court also noted the admissibility of Bootsie's prior petit larceny conviction, excluded any magistrate court convictions, and reviewed the extent of questioning allowed on these topics. (R. p. 456, line 22 – p. 473, line 22). Bootsie was duly cross-examined on these points, as well as the total number of statements made to law enforcement, his admitted falsehoods in the first of those statements, and other marked details and inconsistencies divulged to law enforcement over the course of the investigation. (R. p. 505, line 15 – p. 595, line 12).

Second, the trial court took up the extent of jailhouse informant Sedieka McClaim's criminal history and whether he was subject to any pending federal proffer for a downward departure in sentencing at the time of Appellant's trial. (R. p. 633, line 2 – p. 638, line 5). In regards to any dismissed charges, counsel established that McClam did have charges dismissed, but the dismissal months prior to providing law enforcement

information on the present case. (R. p. 638, lines 6-25). Those charges were ruled inadmissible unless McClam interjected their existence through his own testimony. (R. p. 640, lines 18-22). As with Bootsie, the trial court allowed cross-examination regarding whether McClam "entered into any kind of arrangement, has some kind of understanding," or "hopes [for] some kind of leniency or reward from his testimony." (R. p. 640, line 3 – p. 641, line 7). As for admissible, impeachable convictions, the court green-lighted McClam's possession with intent to distribute of crack cocaine, failure to stop for a blue light, and possession of cocaine convictions which he incurred within ten years of Appellant's trial. (R. p. 642, line 1 – p. 643, line 20). Defense counsel also highlighted McClam's pending charge for possession with intent to distribute prescription drugs, along with two pending charges for possession of a stolen weapon. (R. p. 643, line 21 – p. 644, line 12). During his cross-examination, defense counsel additionally succeeded in discrediting McClam by exemplifying that although McClam testified as to witnessing Bootsie pick up Appellant from the location where McClam overheard the exculpatory phone conversation, Bootsie was actually incarcerated at that time.[5] (R. p. 662, line 10 – p. 666, line 18).

Lastly, Appellant's counsel was also able to cross-examine the final jailhouse witness, Kachief Spain, regarding the length of his current sentence and his potential to garner a sentence reduction in exchange for the information regarding Appellant's case. (R. p. 696, lines 16-25; R. p. 699, line 10 – p. 700, line 7). The State established at the

[5] The phone conversation was between Appellant and co-defendant Cutty. (R. p. 662, lines 10-14). McClam testified that as part of that phone conversation, Appellant asked Cutty to have "Lil Bootsie" pick him up from Appellant and McClam's location. (R. p. 663, lines 13-15).

outset of Spain's testimony that he was in the custody of the Edgefield Federal Corrections Institute on a possession of a firearm charge, and that he previously incurred charges for second degree burglary, strong arm robbery, and armed robbery. (R. p. 680, line 22 – p. 681, line 9). It appears that the trial court did not afford Spain's testimony an independent *in limine* hearing, but did review Spain's interactions with federal prosecutors in tandem with the *in limine* hearing on McClam's criminal history. (R. p. 634, line 15 – p. 637, line 20).

Appellant enjoyed leeway in cross-examining Bootsie, McClam, and Spain regarding inconsistencies in their prior statements to law enforcement and prior criminal records, including specific arrests and dispositions of bond incurred between Appellant's arrest and trial. A preliminary hearing to fetter out the witnesses' reliability, or a judicial determination of the same, is not necessary, because it is the jury's role to assign weight to the jailhouse informants' testimony. The jury must determine the effect, value, weight, and truth of the evidence presented at trial, including how the jailhouse informants came to know the facts about which they testified, an informant's motive for testifying, the presence or absence of corroborating evidence, and any other fact the jury may find relevant on the credibility issue. That role does not rest within the trial court. Appellant's motion was properly denied.[6]

[6] Respondent asserts that this issue does not lend itself to a traditional harmless error analysis. Regardless of whether the trial court granted the motion for a preliminary reliability hearing, the motion requested an improper judicial determination on the weight to be assigned to witness testimony, not whether their testimony was allowed. Respondent also notes that each jailhouse witness' testimony finds corroboration in the other jailhouse witnesses.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the Appellant's murder conviction.

Respectfully submitted,

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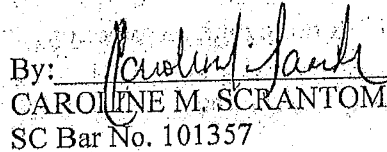
By: 
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ATTORNEY FOR RESPONDENT

February 23, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

Respondent,

v.

CARNAIL MARCHINDLA GRAHAM,

Appellant

Appellate Case No. 2014-002336.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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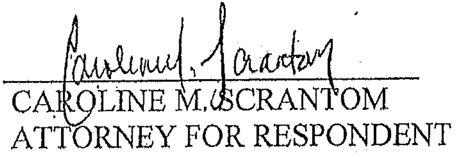

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ATTORNEY FOR RESPONDENT

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Appellant

Appellate Case No. 2014-002336.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Lara M. Caudy
SCCID/Division of Appellate Defense
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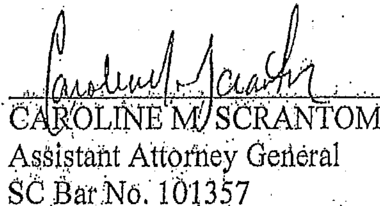
I further certify that all parties required by Rule to be served have been served.
This 23rd day of February, 2016



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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Carnail Marchindla Graham, Appellant.

Appellate Case No. 2014-002336

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2016-UP-437
Submitted September 1, 2016 – Filed October 19, 2016

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Caroline M. Scrantom, all of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous."); *State v. Vang*, 353 S.C. 78, 83-84, 577 S.E.2d 225, 227 (Ct. App. 2003) ("The admission or rejection of testimony is within the sound discretion of the trial [court] and will not be overturned absent a showing of abuse of discretion, legal error, and prejudice to the appellant."); *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) ("It is axiomatic that the credibility of the testimony of . . . witnesses is for the jury.").

AFFIRMED.[1]

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 08, 2016

The Honorable Melanie Huggins-Ward
PO Box 677
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REMITTITUR

Re: The State v. Carnail M. Graham
Lower Court Case No. 2012GS2603077
Appellate Case No. 2014-002336

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Lara Mary Caudy, Esquire
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