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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2020-000135

THE STATE,

Respondent,

v.

DIANTE JA QUAN ROGERS,

Petitioner.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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An out of court statement admitted for its truth is hearsay. There is an exception for statements by a witness who persists in a refusal to testify despite a court order to do so. Rogers never procured a court order to compel a recalcitrant witness to testify, and the hearsay statement was not of a type admissible even when unavailability is established. Did the trial court abuse its discretion by excluding the statement?

II.

Evidence may be excluded if it risks confusing the issues, and extrinsic evidence is not admissible for impeachment purposes to prove specific instances of prior conduct. Rogers offered a gas station surveillance photo to prove a State's witness lied to police when he claimed to have heard from a third party that Rogers admitted to committing an unrelated gas station robbery. Did the court abuse its discretion by excluding extrinsic evidence about this collateral matter?

STATEMENT OF THE CASE

A Florence County grand jury indicted Appellant Diante Rogers for Murder, Kidnapping, Carjacking, Discharging a Firearm into an Occupied Vehicle, Criminal Conspiracy, and Possession of a Weapon during the Commission of a Violent Crime. He proceeded to jury trial on January 17–20, 2020, before the honorable Thomas A. Russo, Circuit Court Judge. He was convicted on all counts and sentenced to life imprisonment for murder and concurrent sentences of 30, 30, 10, 5 and 5 years on the respective remaining charges. (Tr.p.527–28). In this direct appeal, he challenges two of the court's evidentiary rulings.

FACTS

On the afternoon of August 28, 2017, Katherine Wilson was shot in the chest in an attempted carjacking in Timmonsville. She died from her injuries six weeks later. (Tr.p.186–88). She was 88 years old. (Tr.p.188).

Raheem Simon witnessed the shooting from a distance. He heard gunshots from his front yard near the corner of Byrd Street and Kershaw Street. (Tr.p.170–71). He "started panicking because it was right there" where he lived. (Tr.p.172). He saw Wilson's gray Impala "speed up" and go straight. (Tr.p.173). He then saw a BMW turn onto his road and "zoom" by. (Tr.p.172–73). He saw four people in the BMW. (Tr.p.172). They all looked at him as they fled the scene. (Tr.p.172).

Bert White was driving on Kershaw Street when he saw a BMW with a paper tag stopped in the middle of the road. (Tr.p.105). He saw two young black males come out of the woods and get into the car. (Tr.p.107). He testified "one of them was kind of tall and the other one was a little bit shorter." (Tr.p.107). He had never seen them before even though he knew "most all the kids in town" because he had operated a convenience store there for 30 years. (Tr.p.107). He testified they "jumped in the car and the car sped off." (Tr.p.108). He followed the BMW and saw it turn left onto Highway 76. (Tr.p.109). He took down the license plate number and provided it to law enforcement. (Tr.p.108–09).

Timmonsville police officer Andrew Legette responded to a call of shots fired near the corner of Byrd Street and Kershaw Street. (Tr.p.85). As he arrived, he received a second report of a victim with a gunshot wound at a house on Gregory

Street. (Tr.p.85). He responded to Gregory Street and stayed until another officer arrived, then returned to Byrd and Kershaw. There, he encountered and briefly spoke with Raheem Simon and Jonathon Boone[1] and identified them as witnesses. (Tr.p.86). He returned to Gregory Street where he observed Ms. Wilson's car riddled with bullet holes. (Tr.p.87). The front driver's side window was shattered and Ms. Wilson was seated in the driver's seat with a wound to her left shoulder. (Tr.p.87–88).

The owner of the home on Gregory Street, Linwood Timmons, testified that Ms. Wilson drove into his yard blowing her car horn. Wilson told him she had been at a stop sign when "two young men" approached her car and one of them pulled out a gun. (Tr.p.71; 82). She explained she heard shots and fled to Timmons' house. (Tr.p.71).

Police located four bullet holes in Wilson's car. They were in the trunk, back passenger window, front driver window, and back panel above the gas tank. (Tr.p.137). Mark Strickland with the Timmonsville Police Department was the lead investigator on the case. He went to the hospital to speak with Ms. Wilson. He explained: "It took a while because she was being seen by the doctors. She was very confused when I got there. She didn't know who had shot her, didn't know actually where it come from or anything." (Tr.p.215). Ms. Wilson was never able to identify the person that shot her.

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[1] Boone was not called as a witness at trial.

Investigator Strickland went to the corner of Byrd and Kershaw and discovered five shell casings on the ground. (Tr.p.219). SLED agent Chad Smith later analyzed the shell casings and determined they were all fired from the same gun. (Tr.p.206). He explained the bullets were fired by a gun in the ".38 caliber" category, which includes a range of bullet sizes from 9mm to .45. (Tr.p.207). The gun was never recovered. (Tr.p.167).

Strickland ran the tag number provided by Bert White and learned the BMW was registered to a Stephanie Rogers of Mullins. (Tr.p.220). He obtained her phone number from the DMV. (Tr.p.221). When he called, Rogers' boyfriend, Alfred Lamar, answered the phone. (Tr.p.221). Lamar confirmed that he drove a white BMW. (Tr.p.221). Stephanie Rogers and Lamar agreed to speak with police, and when they arrived at the police station Lamar was driving the BMW. (Tr.p.222). Rogers and Lamar gave police conflicting information. (Tr.p.223). When confronted with the inconsistencies, Lamar agreed to cooperate and speak truthfully with police. (Tr.p.223).

During his second statement, Lamar became emotional and started crying. (Tr.p.223). He gave a longer, revised statement to police. Among other information, he told them that the BMW had been struck by a bullet during the incident. Police checked the car's bumper and discovered a bullet hole. (Tr.p.223). Based on their conversation, Strickland arrested Lamar that night and charged him with attempted murder. (Tr.p.226).

As a result of the investigation, four people were charged with Wilson's murder. They were: 1) **Alfred Lamar** (AKA "A.J." or "Fredo"); 2) **Diante Rogers** (AKA "Little Bill"); 3) **Javarius Smith** (AKA "Gooney"); and 4) **Juwan Smith**. The State elected to try Diante Rogers alone. At trial, Alfred Lamar and Juwan Smith testified for the State. Javarius Smith was not called as a witness by either side.

Lamar admitted that he drove the BMW during the carjacking. He explained the group of four drove from Mullins to Timmonsville to give a ride to Juwan Smith's younger cousin, Inglique McKay. (Tr.p.245). Lamar testified he believed they were only going to Timmonsville to take McKay home. (Tr.p.249). Following directions from Diante Rogers and Javarius Smith, Lamar drove the group to a "couple places" in Timmonsville where they obtained two guns. (Tr.p.249–50). They went to "Oh Joe's" tire shop where Javarius spoke to an associate. (Tr.p.251). Shortly thereafter, someone brought a small caliber gun to the car and passed it through the window to Javarius Smith.[2] (Tr.p.251). They made another stop and obtained another gun from a person named "Pawn." (Tr.p.264; 319). At some point, they dropped off McKay. (Tr.p.249).

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[2] The State corroborated this information with testimony from Matthew Self, an EMS worker who helped treat Ms. Wilson. Coincidentally, he was at the tire shop earlier that day and encountered the white BMW. "A black gentleman got out of the vehicle, approached the gentleman that was filling up my tire. I'm not sure what they were talking about and then he got back in the vehicle." (Tr.p.118). According to Self, the person was "16 or 17" years old and skinny. (Tr.p.119). During his cross-examination of Lamar, defense counsel elicited testimony that Lamar previously told police that McKay procured two guns at the tire shop. (Tr.p.298).

Lamar testified that after dropping off Mckay, the group was seated in the BMW as follows: Javarius Smith was in passenger's seat; Diante Rogers was in the rear passenger seat; and Juwan Smith was in the rear driver's side seat. (Tr.p.252). Lamar testified that he was roughly six feet tall, and that Javarius Smith was six feet, six inches tall. (Tr.p.252).

Lamar then explained what happened during the attempted carjacking. Diante and Javarius saw Wilson's Impala and told Lamar to "cut her off." (Tr.p.253–54). Lamar sped around the car and pulled diagonally in front of it. (Tr.p.254). Diante and Javarius got out of the car and pointed their guns at Wilson through her car window. (Tr.p.255). Lamar could see Wilson from where he was sitting in the driver's seat. (Tr.p.259). Diante was closest to Wilson. (Tr.p.260). He pointed his gun directly at "her upper body." (Tr.p.260). Javarius was "a little behind him." (Tr.p.260). Lamar saw "the shot go off from Diante's gun . . . ." (Tr.p.255). He never saw Javarius point his gun. (Tr.p.260). Lamar testified "it happened pretty quickly. . . . I didn't hear any discussion of what was going to happen." (Tr.p.261).

Lamar then explained what happened after Diante Rogers shot Wilson: "I got scared and I took off. I just left and as I was leaving, the lady pulled out behind me and I seen her turning right and I kept going, but as I was going . . . Juwan told me something bad would happen to me if I did not turn around. So I turned around and the guys were in the way of the street . . . and I stopped and they got in." (Tr.p.255). Lamar thought he heard one or two shots. (Tr.p.255).

Lamar testified that after he picked up Smith and Rogers, the group left Timmonsville and went to a Walmart in Florence. (Tr.p.258). Rogers got out and stole a truck from the parking lot, and he and Javarius Smith rode back to Mullins in the stolen truck. (Tr.p.258; 301). Lamar followed them back to Mullins and then went to the coffee shop where his girlfriend worked. (Tr.p.303).

Juwan Smith's testimony was largely consistent with Lamar's. He agreed they went to Timmonsville to drop off his cousin. Once in Timmonsville, Javarius suggested they go see "Pawn" to "get some guns." (Tr.p.340). He agreed that Lamar was the driver, that he was seated in the rear driver's side seat, Rogers was in the rear passenger's seat, and Javarius was in the front passenger's seat because he was the tallest. (Tr.p.335–36). He agreed that it was Rogers' idea to steal Ms. Wilson's car. (Tr.p.344). He also agreed that Rogers and Javarius Smith exited the car to carry out the carjacking, and that Rogers shot Ms. Wilson. (Tr.p.344). He confirmed that Lamar "took off" after Rogers shot Wilson. (Tr.p.347). He further testified that Javarius threw his gun away on the way out of Timmonsville. (Tr.p.348). He claimed Rogers warned him not to say anything about what happened. (Tr.p.348). He denied threatening Lamar that "something bad" would happen if he did not turn around to pick up Javarius Smith and Rogers. (Tr.p.348).

ARGUMENT

I. The trial court correctly excluded an out-of-court statement suggesting third-party guilt because the statement was hearsay and failed to satisfy the requirements of Rule 804's exception for an unavailable witness.

The trial court correctly excluded an out-of-court statement suggesting third-party guilt because the statement was hearsay and failed to meet the elements of Rule 804's exception related to an unavailable witness. Rogers failed to establish the witness was unavailable under Rule 804(a), and the statement was not of a type made admissible under Rule 804(b) even when a witness is unavailable. This Court should affirm.

A. Standard of review.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). The appellate court may affirm any ruling, order, decision or judgment upon any ground appearing in the record. Rule 220(c), SCACR.

B. Relevant facts.

During Rogers' presentation of his defense, defense counsel informed the trial court that he intended to call Victor Cooper as a witness. He alleged Cooper had been incarcerated at the same facility as State's witness Juwan Smith. (Tr.p.383).

Defense counsel claimed that, while incarcerated, Cooper overheard Smith take the blame for shooting Katherine Wilson. (Tr.p.383).

Defense counsel further told the court he believed Cooper's "intention would be to remain silent if he were called to testify." (Tr.p.383). He sought a ruling on whether he would be able to introduce the substance of Cooper's purported statement through the police officers who spoke with Cooper concerning the alleged admission. The trial court indicated he would not admit the testimony because the State would not be able to cross-examine Cooper regarding the substance of the statement and circumstances in which he allegedly overheard it. (Tr.p.384–85).

Rogers called Cooper as a witness. When defense counsel attempted to elicit testimony regarding Cooper's alleged statement to police that he had heard Smith admit to the shooting, Cooper responded: "I would like to remain silent." (Tr.p.387). When defense counsel pressed further, Cooper repeated the same response. (Tr.p.388). When defense counsel continued to question Cooper, the trial court instructed him that he was not to repeat Cooper's alleged statement in the form of a question because that would be the same as "putting the statement in." (Tr.p.388). Rogers did not request that the trial court order Cooper to testify.

C. Discussion.

"The common-law tradition is one of live testimony in court subject to adversarial testing . . . ." Crawford v. Washington, 541 U.S. 36, 43 (2004) (discussing history of common law hearsay rule requiring adversarial confrontation). There are three conditions under which witnesses ordinarily are

required to testify: oath, personal presence at trial, and cross-examination. See 2 Robert P. Mosteller et al., McCormick On Evidence, § 245 (8th ed.) (citing California v. Green, 399 U.S. 149, 153 (1970)). The rule against hearsay promotes reliability through "exploration of weaknesses in the witness' perception, memory, and narration of the matters asserted within the statements." United States v. Mathis, 559 F.2d 294, 299 (5th Cir. 1977).

The rule against hearsay is codified in Article VIII of the South Carolina Rules of Evidence. Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Rule 802 provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

1. The statement was inadmissible hearsay within hearsay.

The trial court correctly excluded the Cooper's alleged statement because it was hearsay. More accurately, it was hearsay within hearsay—Smith's alleged admission within Cooper's statement to police. While Rogers laid a foundation to admit Smith's alleged admission as a prior inconsistent statement by giving Smith an opportunity to admit or deny the making the statement during cross-examination, the statement was nonetheless inadmissible because it was embedded within yet another hearsay statement. "Hearsay included within hearsay is not excluded under the hearsay rule *if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules*". Rule 805, SCRE

(emphasis added); see also State v. Prather, 429 S.C. 583, 610, 840 S.E.2d 551, 565 (2020) ("Victim's statement to Becknell was hearsay, and Becknell's statement to law enforcement was hearsay. Hearsay included within hearsay is not necessarily inadmissible; such may be admitted if each part of the combined statements satisfies an exception to the hearsay rule. . . . Even if Victim's statement to Becknell [fit within a hearsay exception], Becknell's statement to law enforcement clearly does not fall within either exception."). Accordingly, Smith's alleged confession was admissible only if properly introduced in court through a competent third-party witness. It was inadmissible in this case because it was imbedded within hearsay.

Rogers claims Cooper's testimony was admissible because "[t]he State would be free to cross-examine its lead investigator, Strickland, on the taking of Cooper's statement just as defendants cross-examine police officers who testify regarding the fruits of their investigation." Brief of Appellant at 10. There are two major problems with this argument. First, Investigator Strickland is not the declarant; Cooper is. It would be pointless to cross-examine Strickland to test the veracity of Cooper's statement. If this was the case, there would be no point in having a hearsay rule. See Crawford v. Washington, 541 U.S. 36, 51 (2004) (discussing infamous hearsay-laden trial of Sir Walter Raleigh and noting "Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court"). Surely Officer Strickland parroting back his recollection of Cooper's statement would not render the statement any more reliable. This procedure would not afford the State

the opportunity for cross-examination, nor would it afford the jury an opportunity to judge Cooper's truthfulness by observing his courtroom demeanor.

Second, his analogy to officer testimony concerning the "fruits of their investigations" implies police officers are free to repeat hearsay statements gathered in the course of their investigations. Of course, they are not. Police officers, just like any other witness, are prohibited from repeating out-of-court statements unless they are not admitted for their truth or fall within an exception to the hearsay rules. Rogers fails to address these glaring flaws in his argument and fails to even cite the applicable hearsay rules. Cooper's alleged statement was rank hearsay not within any exception. The trial court properly excluded it.

2. Rogers failed to establish the witness was unavailable under Rule 804(a), and the purported statement was not of a type admissible under Rule 804(b) even if Cooper was unavailable.

Rule 804, SCRE, provides a hearsay exception for certain types of hearsay testimony if a witness is unavailable to testify in court. The rule first defines "unavailability" and then lists certain types of hearsay statements that may be admitted if the proponent establishes witness unavailability. Rogers failed to establish either element.

First, Rogers failed to establish Cooper was "unavailable" as a witness. Rule 804 lists several scenarios under which a witness may be deemed "unavailable." One such scenario exists when a witness "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so

. . . ." Rule 804(a)(2), SCRE. By its plain terms, the rule requires: 1) a court order to testify; and 2) the witness's persistent refusal to do so despite the order.

Rogers failed to establish Cooper was unavailable because he did not procure a court order to compel Cooper's testimony. See United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980) (explaining witness was not unavailable under Federal version of Rule 804 because "the court never ordered him to testify, which is an essential requisite to the invocation of Rule 804(a)(2)"); United States v. Zappola, 646 F.2d 48, 54 (2d Cir. 1981) (explaining "[t]he procedure that should have been followed by the court when faced with Marano's refusal to testify was (1) the issuance of an order, outside the presence of the jury, directing him to testify and (2) a warning that continued refusal to testify despite the court's order would be punishable by contempt"); United States v. MacCloskey, 682 F.2d 468, 478 n.17 (4th Cir. 1982) (noting "if the judge had ordered Edwards to testify, and she then refused, she would have been unavailable under Rule 804(a)(2)"); State v. Linton, 145 N.C. App. 639, 646–47, 551 S.E.2d 572, 577 (2001) ("We agree with the rule set forth in Zappola and Oliver that an order from the trial court is an essential component in a declaration of unavailability under Rule 804(a)(2). Therefore, we conclude that the trial court erred in declaring K unavailable without first giving the required order to testify."); Sapp v. Commonwealth, 263 Va. 415, 425, 559 S.E.2d 645, 650 (2002) ("At a bare minimum, refusal to testify should be met with an order from the trial court directing the witness to testify."); Jennings v. Maynard, 946 F.2d 1502, 1505 (10th Cir. 1991) (explaining "Rule 804(a)(2) normally

require[s] the court to order a witness to testify before a finding of unavailability is made"); Fowler v. State, 829 N.E.2d 459, 468 (Ind. 2005) ("It is clear, however, that the Rule's requirement of a court order is a necessary prerequisite to a finding of unavailability of a recalcitrant witness under Rule 804.").

The record reveals no legitimate privilege that would excuse Cooper's refusal to testify. As Rogers admits in his brief, Cooper could not claim the protections of the Fifth Amendment because he was not implicated by Smith's alleged confession. Brief of Appellant at 10. On the witness stand, Cooper stated only that he would "like to remain silent." (Tr.p.387–88). He never flatly refused to testify, and Rogers did not attempt to have the trial court exert any judicial pressure to compel his testimony, much less order him to do so under threat of contempt. Oliver, 626 F.2d at 261 (explaining it is "always possible that a recalcitrant witness who does not respond to judicial pressure will testify when ordered to do so rather than face contempt proceedings for refusal to obey the court's order"). Accordingly, Rogers failed to establish Cooper's unavailability under Rule 804(a)(2) SCRE.

Furthermore, even if Cooper had been properly established as an unavailable witness, his testimony still is not of a type admissible under Rule 804(b). Rule 804(b), SCRE, provides that four types of statements are admissible when the declarant is unavailable: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; (4) statement of personal of family history. Cooper's testimony does not fit into any of these categories.

The purported statement was not a statement against Cooper's interest. It was allegedly a confession by Smith, and did not implicate Cooper in any way. Likewise, it was not former testimony. This exception requires that the statement was "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Rule 804(b)(1), SCRE.

Cooper's alleged statement was not "former testimony" for several reasons. First, it was not made at a "proceeding." While the exact context is unclear because Rogers did not proffer the officer's testimony, it is obvious that it did not occur at a legal proceeding such as a trial or preliminary hearing. Accordingly, it does not carry the indicia of reliability typically associated a legal proceeding because it was not made in a formal setting under oath or affirmation. California v. Green, 399 U.S. 149, 158 (1970) (explaining in-court testimony promotes reliability by "impressing [the witness] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury").

Likewise, the State did not have a chance to cross-examine Cooper to test the truth and reliability of the statement. Rogers complains at length in his brief that the trial court based its ruling on Crawford v. Washington, a confrontation clause case. Of course, the Sixth Amendment right of confrontation applies only to a

criminal defendant. But Crawford recognizes that the confrontation clause rests on hearsay principles, the centerpiece of which is the "crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). "[I]t is only in the examination and cross-examination, that the knave can be detected, errors of fact exposed, or false imaginations expunged, and the whole narration of a witness reduced down to its measure of exact truth and legal application to the particular case before the court." State v. Campbell, 30 S.C.L. 124, 126 (S.C. App. L. 1844) (cited by the Crawford court). Because prosecutors never had a chance to cross-examine Cooper regarding the alleged statement he overheard, Rogers cannot satisfy this element of Rule 804(b).

Cooper's purported statement was rank hearsay. Rogers sought to admit a prisoner's out-of-court statement made without oath, without cross-examination, and without an opportunity for the fact-finding jury to observe his demeanor. To do so would have eviscerated the hearsay rule, the "most characteristic rule of the Anglo-American Law of Evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure." 2 Robert P. Mosteller et al., McCormick On Evidence, § 244 (8th ed.). The trial judge correctly excluded the evidence. This Court should affirm.

II. The trial court correctly excluded a gas station surveillance photo from an unrelated armed robbery because it had low probative value, would have confused the issues at trial, and was improper impeachment evidence under the rules of evidence.

Rogers next argues the trial court erred by excluding a surveillance photo showing an armed robbery that occurred at a gas station in Mullins on the night Ms. Wilson was shot. Rogers offered the photo in an attempt to prove Juwan Smith was the person that robbed the gas station. Rogers asserted this would show Smith lied to police by "inference" when he told them he heard from a neighbor that Rogers admitted to committing the robbery. The issue is not preserved for review because Rogers failed to make the photo part of the record, foreclosing a meaningful prejudice analysis. Even if preserved, the trial court correctly excluded the photograph because it had little probative value and would have confused the true issue at trial: whether Rogers was guilty of Wilson's murder. Furthermore, the photo was improper impeachment evidence under Article VI of the rules of evidence. This Court should affirm.

A. Standard of review.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). The appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a

manifest abuse of discretion." State v. Fuller, 425 S.C. 468, 476, 822 S.E.2d 910, 914 (Ct. App. 2019). "[C]onsiderable latitude and discretion should be allowed the trial [court] in determining the admissibility of impeaching testimony." State v. Williams, 409 S.C. 455, 468, 761 S.E.2d 770, 777 (Ct. App. 2014). The appellate court may affirm any ruling, order, decision or judgment upon any ground appearing in the record. Rule 220(c), SCACR.

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Collins, 409 S.C. at 534, 763 S.E.2d at 28. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Daise, 421 S.C. 442, 464, 807 S.E.2d 710, 721 (Ct. App. 2017). "A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Williams, 409 S.C. at 464, 761 S.E.2d at 775.

B. Relevant facts.

Following the State's direct examination of Juwan Smith, Rogers requested an in camera hearing to determine the admissibility of extrinsic evidence to impeach Smith's testimony. Rogers explained his intent to introduce a photograph from a surveillance camera at a gas station in Mullins where an armed robbery occurred on the same day of the killing of Ms. Wilson. Defense counsel intended to

offer the picture to show that Smith lied to police by "inference" when he claimed to have heard from a neighbor that Rogers admitted to committing the robbery. (Tr.p.360–61).

The alleged lie in question, Smith's statement to Investigator Strickland at the Florence County jail, was later made a court's exhibit. (Court's Exhibit #2). In the interview, Smith told police he heard from a neighbor that Rogers had admitted to the robbery, and that he had tried to "smoke the clerk." (Court's Exhibit #2 around 5:45). Defense counsel asserted that Smith's statement raised an "inference that [Smith] wasn't involved in that." (Tr.p.360–61). According to defense counsel, the surveillance picture from the convenience store showed that the robber's clothing and appearance actually resembled Juwan Smith. (Tr.p.359). Defense counsel offered the surveillance still to show that Smith was "the one in the video. . . ." (Tr.p.362). Accordingly, the only fact Rogers attempted to prove by introducing the photograph was that Smith lied by "inference" about being involved in an unconnected armed robbery because Smith's statement suggested he had no "personal knowledge of it." (Tr.p.360).

The trial court agreed to allow Rogers to inquire into Smith's statement to police implicating Rogers in the robbery through hearsay. The trial court reasoned evidence of Smith's alleged false statement to police could be relevant to assess Smith's credibility in general, and that defense counsel could inquire of the Mullins officer whether Smith's statement was borne out by his investigation. (Tr.p.361–62). However, the trial court refused to allow defense counsel to introduce the

photograph itself, reasoning that to do so would be akin to asking the jury to determine who actually committed the robbery. The court explained:

> [T]he endgame is that you would then be asking this jury not only to decide this case, but then to decide an armed robbery case based on a photograph . . . with no other evidence or testimony involving that case . . . to basically solve that case. And I think it lends tremendous confusion here and is asking them to do something that I don't think they're in a position to do. And I think you can still accomplish your purpose of impeaching the witness through Officer Bethea.

(Tr.p.362).

Rogers questioned Smith regarding his statement during cross-examination. He asked Smith whether he told Investigator Strickland that he heard Rogers committed the robbery. Smith admitted that he had "gotten word" that Rogers admitted to committing the robbery, but denied telling Investigator Strickland he had only gotten $40, or that Rogers "tried to smoke the clerk." (Tr.p.374–75).

During the presentation of his case, Rogers called Investigator Strickland. Through Strickland, Rogers introduced evidence that: 1) Smith did claim to have heard that Rogers admitted to the robbery; 2) that Smith said he heard Rogers only got $40; and 3) that Smith said he heard that Rogers admitted to trying to "smoke the clerk." (Tr.p.391–406).

Rogers also called Officer Bobby Bethea. Bethea investigated the gas station armed robbery case. Bethea testified he investigated Rogers for the robbery but determined that Rogers was not the person who used a firearm during the robbery. (Tr.p.408). He did not say that he determined Rogers was not involved, and did not give any more information about the result of his investigation.

C. Error preservation.

Rogers failed to preserve this issue for review. Rogers' argument rests on the premise that Juwan Smith committed the gas station robbery. The only evidence Rogers cited as proof of this fact was the gas station surveillance photo, but Rogers failed to make the photograph part of the record. This Court is left with defense counsel's mere assertion that the person in the photo resembled Smith. Because he did not proffer the photograph, Rogers has failed to create a sufficient record to enable appellate review. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (noting that appellant has the burden of establishing a sufficient record and declining to address the merits of a claim when facts underlying the claim are not included in the record); State v. Mitchell, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998) (finding review of possible trial court error, in relation to a written statement discovered after jury deliberations began, foreclosed where the statement was not made part of the record because "Appellant never attempted to have the statement admitted").

Not only is this Court unable to substantively review the trial court's ruling, it is unable to assess whether Rogers suffered any prejudice as a result. See State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984) ("We are unable to determine from the record whether the testimony *was so material as to render its exclusion prejudicial.* Failure to make an offer of proof precludes the appellant from raising the issue on appeal.") (emphasis added). For the surveillance photo to be material (and for Rogers to suffer any prejudice from its exclusion), it would have to

be of such high quality to definitively prove to a jury that Juwan Smith committed the robbery. Anything less would only further confuse the issue. This is extremely unlikely because gas station surveillance systems are notoriously of poor quality; it is doubtful that *any* surveillance photo would be sufficient by itself to prove to a jury that any particular stranger was the person in the photograph. It is possible that this surveillance photo provided a crystal clear image; but this Court will never know because Rogers failed to make it an exhibit. Rogers's failure to proffer the photo forecloses a finding of prejudice.

Because Rogers did not make the surveillance photo a part of the record, this Court is unable to substantively review the lower court's ruling. Accordingly, the issue is not preserved for review. This Court should affirm.

D. Discussion.

Even if preserved, the trial court correctly excluded the photograph. The only purpose of introducing the photo was to prove that Smith committed an unrelated armed robbery. This is far more than the rules allow. The record supports the trial court's finding that admission of the photograph would confuse the issues and distract the jury from their true task: to determine whether Rogers was guilty of the murder of Katherine Wilson. This Court should affirm.

Several rules of evidence inform the analysis:

> **Rule 608, SCRE.** (b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired

into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. (c) Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Rule 611, SCRE. (b) A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

Rule 613, SCRE. (b) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 403, SCRE. Although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court based its decision on Rule 403. Evidence supports the trial court's finding that Rogers' attempt to show that Smith committed the gas station robbery would lend "tremendous confusion" to the actual issues at trial. (Tr.p.362). The facts of the armed robbery were not relevant to prove whether Rogers was guilty of murdering Katherine Wilson. Defense counsel admitted as much in his

closing argument when he admitted that the armed robbery was "not significant to this case" but was relevant to Smith's credibility because "[i]f you're going to be dishonest about these kinds of things, there's not much else you won't be dishonest about." (Tr.p.466–467).

There is a patent weakness in Rogers' argument: only by first proving his codefendant guilty of the armed robbery would that crime have any relevance to the murder charge. This would have led to a "trial within a trial," resulting in a confusing mess. See State v. Cottrell, 421 S.C. 622, 641, 809 S.E.2d 423, 434 (2017) (explaining trial court did not abuse its discretion by excluding defense evidence about an unrelated murder because the testimony "would have necessarily led to a 'trial within a trial' that would . . . confuse the issues and mislead the jury"); Vanover v. State, 433 S.C. 31, 856 S.E.2d 160, 165 (Ct. App. 2021), reh'g denied (Apr. 5, 2021) (citing Cottrell and noting "the trial court has discretion to exclude evidence if admitting the evidence would lead to a 'trial within a trial' that might confuse the issues and mislead the jury"); State v. Cope, 405 S.C. 317, 340, 748 S.E.2d 194, 206 (2013) (affirming exclusion of evidence of other crimes offered against codefendant under Rule 403); State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008) (explaining trial court properly excluded bad act evidence by third party because it was "not probative of any issue material to reaching a verdict" despite defense counsel's assertion it was relevant to witness credibility). Guilt of Katherine Wilson's murder should not have been premised on proof of an

unrelated crime. The trial court correctly found the evidence would confuse the issues at trial.

Not only did the photograph carry the potential for confusing the issues by creating a "trial within a trial," it had little probative value. As defense counsel noted, Smith never claimed to have "personal knowledge" of the robbery. (Tr.p.360, lines 24–25). He was merely repeating hearsay from an unidentified person. Regardless of who actually committed the robbery, Smith could have "gotten word" that Rogers admitted to the robbery. (Tr.p.404–06). See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (explaining one of the reasons why the improper admission of hearsay evidence was harmless was because the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge). This may explain defense counsel's carefully-worded argument that Smith's statement created an "inference" that he was not involved. (Tr.p.360). Finally, the very fact that the statement pertained to an unrelated crime shows that it had limited value in determining whether Rogers was guilty of murdering Ms. Wilson. Thus, not only was the statement a mere repetition of hearsay, it was not even pertinent to the charged crime. The probative value was low.

In addition to being confusing under Rule 403, the photo was inadmissible under Rules 608, 611, and 613. Each of these rules is relevant to certain parts of Rogers' cross-examination of Smith and presentation of his defense. Under Rule 611, Rogers was entitled to cross-examine Smith about "any matter relevant to any

issue in the case, including credibility." Rule 611(b), SCRE. The court rightly allowed a robust cross-examination of Smith about every issue relevant to the shooting, such as his obviously pertinent testimony that Rogers shot Ms. Wilson. (Tr.p.369–77).

Under Rule 613, Rogers was entitled to cross-examine Smith regarding prior inconsistent statements, and to introduce evidence of prior statements inconsistent with his testimony and material to the case. The trial court allowed Rogers to cross-examine Smith about prior statements that were inconsistent with his trial testimony. It also allowed Rogers to introduce extrinsic evidence to show inconsistencies in Smith's statement and his testimony on direct examination, such as his inconsistent statements concerning whether Smith told his mother about the incident in the immediate aftermath (Tr.p.373; 404), and whether Smith told police the car turned around in Timmonsville because they "couldn't get out of Timmonsville that way." (Tr.p.372; 404).

Under Rule 608, Rogers was entitled to attack the "character, conduct and bias" of a witness. The rule allows impeachment through opinion evidence about a witness's character for "truthfulness or untruthfulness," or through other evidence showing "bias, prejudice or any motive to misrepresent." Rule 608 (a) and (c), SCRE. Rogers had the opportunity to demonstrate Smith's obvious bias as a codefendant. The court correctly allowed him to question Alfred Lamar regarding his motivations to minimize his own conduct in hopes for a lenient sentence. (Tr.p.315–16). Defense counsel chose not to ask Smith those types of questions

(presumably because he had already made his point during his cross-examination of Lamar), but aggressively attacked his credibility in his closing argument. (Tr.p.459–70).

However, Rogers went much further than the rules allow when he attempted to introduce extrinsic evidence about the gas station robbery. On cross-examination, and without objection from the State, defense counsel asked Smith whether he had previously told police that he had "gotten word" that Rogers admitted to robbing the gas station. Smith admitted that he told Investigator Strickland about the hearsay statement pertaining to the robbery, but denied specific details, such as the dollar amount involved and whether Rogers "tried to smoke the clerk[.]" (Tr.p.374–75). Rogers then attempted to introduce several types of extrinsic evidence to impeach Smith about that testimony.

First, he introduced testimony from Investigator Strickland that Smith actually did make those specific statements pertaining to the armed robbery. (Tr.p.404). The State did not object, despite the fact that the statements pertained to a collateral matter. See Vanover, 433 S.C. 31, 856 S.E.2d at 166 ("Although a witness may generally be cross-examined on anything, even a collateral matter, as credibility is always an issue, extrinsic evidence of a prior inconsistent statement is not admissible if the prior statement concerns a collateral matter."); see also State v. Brock, 130 S.C. 252, 126 S.E. 28, 29 (1925) (explaining extrinsic evidence a prior inconsistent statement pertaining to a collateral matter is inadmissible even though "proof of the falsity of a witness' statement as to a collateral matter may tend as

strongly to impeach his credibility as if the statement related to a material issue of fact"). The court allowed Rogers to inquire about the armed robbery on cross-examination, but, because it was a collateral matter, Rogers should have been "stuck with [Smith's] answer." Vanover, 433 S.C. 31, 856 S.E.2d at 166. Accordingly, Rogers was able to exceed the boundaries of the rules of evidence by introducing extrinsic evidence to show the falsity of a statement pertaining to a collateral matter. He was able to elicit this testimony despite the fact that Smith admitted on the stand that he told police about Rogers' alleged confession. (Tr.p.372, lines 18–22). See Rule 613, SCRE (providing "if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible").

Rogers went even further when he attempted to introduce the surveillance photo. This time, the court indicated it would not admit the photo. (Tr.p.362). The court correctly excluded the photo because Rule 608 does not allow a party to attack a witness's credibility with extrinsic evidence of specific instances of past conduct. See Mizell v. Glover, 351 S.C. 392, 401, 570 S.E.2d 176, 180 (2002) ("Essentially, Rule 608(b) allows specific instances of conduct to be inquired into on cross, but does not allow those instances of conduct to be proved by extrinsic evidence. Reading a jury interrogatory into the record is more than inquiry into past conduct; the purpose of doing so is to prove past conduct."). Rogers offered the photo to prove Smith actually committed the armed robbery. (Tr.p.361). Smith's alleged

commission of an armed robbery is undoubtedly a specific instance of "conduct" under Rule 608. See Id.

Rule 608 echoes the rationale of Rule 403: extrinsic evidence about tangential matters runs the danger of confusing the issues of trial and negatively affecting the truth-finding process. State v. Williams, 409 S.C. 455, 468, 761 S.E.2d 770, 777 (Ct. App. 2014) (explaining the "sole object of the rule against impeachment on collateral matters is to prevent confusion of issue and unfair surprise"). The robbery had nothing to do with the shooting; it was a collateral matter. Id. (explaining matters are collateral when they "afford no reasonable inference as to the principal matter in dispute" and affirming exclusion of impeachment evidence regarding prior false statement because it was "not directly relevant to the ultimate issue in the trial"). Accordingly, the photo was inadmissible under Rule 608.

Finally, Rogers was not prejudiced by the court's ruling. Because the photo had such little probative value, its exclusion did not affect the result of trial. See State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of the trial."). Rogers was able to effectively cross-examine Smith regarding the questionable aspects of his testimony and expose numerous inconsistent prior statements. Furthermore, Rogers was allowed to introduce more evidence than that to which he was entitled, including extrinsic evidence about Smith's prior statement regarding immaterial details about the gas station robbery. Through a reply witness, Rogers was able to establish that he did not attempt to shoot the clerk, thereby showing the falsity and unreliability

of Smith's purported repetition of hearsay in his statement to police. (Tr.p.408). The trial court correctly found Rogers was able to accomplish his purpose of impeaching Smith's credibility by other means. (Tr.p.362). Rogers suffered no prejudice. See State v. Beckham, 334 S.C. 302, 319, 513 S.E.2d 606, 614 (1999) (finding no prejudice in trial court's exclusion of impeachment evidence where it was not important to the case and the defendant "was permitted to extensively cross-examine" the witness).

Rogers claims the judge erred by "letting the jury hear half the story regarding the robbery and Juwan's attempt to pin it on Rogers." Brief of Appellant at 12. But it was Rogers who introduced the evidence about the armed robbery, not the State. Rogers chose to question Smith about the gas station robbery even though the trial court had already ruled that it would not admit the surveillance photo. (Tr.p.362). Rogers made the decision to introduce Smith's statement about the robbery merely in order to impeach Smith regarding the statement. The rules do not allow extrinsic evidence for that purpose. See State v. Mizell, 332 S.C. 273, 284, 504 S.E.2d 338, 344 (Ct. App. 1998) ("Impeachment of a witness's credibility by asking questions not relevant to the case in chief with a view of obtaining contradictory or inconsistent statements is limited to cross-examination of the witness sought to be impeached."). Defense counsel's line of questioning had the appearance of an attempt to make Smith look guilty of Wilson's murder based on his commission of a separate crime. See State v. Beckham, 334 S.C. 302, 318, 513 S.E.2d 606, 614 (1999) (noting trial court found impeachment evidence offered by

defendant was "nothing more than an attempt by appellant to inject third party guilt into the trial"). Having made a strategic decision to introduce evidence about an irrelevant collateral matter merely to impeach a witness's credibility, Rogers cannot now complain that he was not permitted to further exceed the rules of evidence by introducing extrinsic evidence of specific instances of conduct pertaining to the same collateral matter. See State v. Washington, 315 S.C. 108, 432 S.E.2d 448 (1992) ("An appellant cannot complain of prejudice from evidence he has brought before the jury.").

Rogers' attempt to prove Smith committed an unconnected armed robbery was rightly thwarted by the trial court. The surveillance photo would have been a confusing distraction that would not have helped the jury determine Rogers' guilt of the murder of Katherine Wilson. The photo was inadmissible under the rules of evidence and its admission did not reasonably affect the result of trial. This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm the conviction and sentence of the lower court.

Respectfully submitted,

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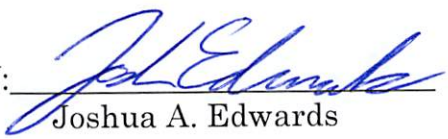
BY: 
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May 21, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
May 21 2021
SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case 2020-000135

THE STATE, Respondent,

v.

DIANTE JA QUAN ROGERS, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on David Alexander, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 21st day of May, 2021.

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Date:	Friday, May 21, 2021 2:28:00 PM
Attachments:	Rogers Diante - 2020-000135 - Initial Brief of Respondent (02584659xD2C78).PDF

Good afternoon, Mr. Alexander.
Attached to this email is the State's Initial Brief of Respondent and Desigantion of Matter the above criminal appeal. We will be filing this brief with the Court later today.
If you don't mind, please confirm your receipt of this email and the attachment by return email.
Thank you in advance for your cooperation.
Sincerely,
Anne A. Mueller, Legal Assistant to Joshua A. Edwards, Assistant Attorney General

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