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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2020-000556

THE STATE, ...RESPONDENT,

v.

BRANDON CHRISTOPHER GRAYER, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Where the State's case rested primarily on the testimony of two testifying co-defendants, did the trial court err in refusing to allow appellant to cross-examine these witnesses on the potential sentences, including mandatory minimum sentences, they faced for murder charges?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court's error of limiting the scope of the co-defendants' cross-examination was harmless when the Appellant had ample opportunity to otherwise show the potential bias of his co-defendants, the State made sure the jury knew the co-defendants were also charged with and would be tried for murder, other unrestricted testimony established the same material facts, and the co-defendants' testimony was corroborated by independent evidence and not contradicted by other witnesses.

STATEMENT OF THE CASE

Appellant was indicted at the April 2019 and November 2019 terms of the grand jury for Charleston County for murder, 2019-GS-10-05441, attempted murder, 2019-GS-10-05440, burglary in the first degree, 2019-GS-10-02027, kidnapping, 2019-GS-10-02028, and possession of a weapon during the commission of a violent crime, 2019-GS-10-01772. Tr. 1, Tr. 20, line 20 to Tr. 22, line 3. The case was prosecuted by Assistant Solicitors Anne Williams and Jordan Smith and the Appellant was represented by Chad Shelton, Esquire, and Joseph Kaiser, Esquire. Tr. 1. On March 9, 2020, Appellant proceeded to trial by jury pursuant to which Appellant was found guilty of murder, attempted murder, and possession of a weapon during the commission of a violent crime. Tr. 648, line 13 to Tr. 649, line 10. He was sentenced by the Honorable Kristi F. Curtis on March 12, 2020 to a total of 35 years imprisonment: 30 years for murder, 15 concurrent years for attempted murder, and five consecutive years for possession of a weapon during the commission of a violent crime. Tr. 1, Tr. 666, lines 13-20. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Brandon "G Baby" Grayer ("Appellant") was shot in the upper left side of his chest and shoulder around 1:30PM on September 23, 2016. Tr. 82, lines 3-4, Tr. 85, lines 2-16, Tr. 289, lines 1-15. He went to the hospital and his arm was placed into a sling, but he refused to cooperate with any investigation by law enforcement and he left the hospital after only three hours. Tr. 83, lines 17-22, Tr. 85, lines 2-16, Tr. 243, lines 5-6. After leaving, the Appellant attempted to figure out who had shot him, eventually locating a picture of a red Nissan Altima on Marquise Bryant's (attempted murder victim) Facebook page that looked like the vehicle he had seen earlier that day on Bailey Drive that the shooter fled in. Tr. 344, line 3 to Tr. 345, line 8.

The Appellant then gathered five of his friends and the group hatched a plan to search for and kill Bryant in retaliation. Tr. 257, lines 1-25, Tr. 379, lines 23-24. They drove in two separate vehicles: a Lincoln Navigator and a black pickup truck. Tr. 251, line 13 to Tr. 254, line 13. Antoine "Fat Boi" Gill ("co-defendant") drove Randall Myers, Nathan Burnett, and the Appellant in the Navigator and Maurice Washington ("co-defendant") followed in the pickup with Vinny Robinson in the passenger's seat. Tr. 252, line 2 to Tr. 254, line 13. The two vehicles pulled onto Hassell Avenue, a dead-end street, around 11:00PM and saw Bryant. Tr. 345, line 24 to Tr. 352, line 18. The Appellant, Randall Myers, and Nathan Burnett all shot at Bryant, but caught a nearby group of neighbors who were outside at a clambake (getting ready to play checkers) in the crossfire. Tr. 253, line 2 to Tr. 266, line 25.

The neighbors began to shoot back in self-defense, and Ivan Greene, a long-time, elderly member of the neighborhood, was killed by one of the Appellant's group's bullets. Tr. 104, lines 16-20, Tr. 263, lines 1-24. The Appellant and his friends then fled the scene, wrecking the Navigator into a utility pole and then into the black pickup. Tr. 100, lines 3-13, Tr. 502, lines 20-25. At least three of the men fled on foot to a trailer that was behind Hassell Avenue and held the

owner, Pinero Gambrell, hostage inside. Tr. 304, line 1 to Tr. 306, line 13. They hid there for almost two hours and took Gambrell's phone until the other two men could pick them up. Tr. 305, line 7 to Tr. 308, line 25. Gambrell's cell phone, various hats, and bloody clothing belonging to Randall Myers were found in the trailer that implicated the Appellant's co-defendants in the kidnapping and robbery. Tr. 314, line 5 to Tr. 315, line 1, Tr. 470, lines 16-21.

The investigation that followed uncovered two handguns that had been left in the back seat of the Navigator (whose left rear window was shattered), and bullet holes on the front passenger window and driver's side window. Tr. 142, lines 9-16, Tr. 160, lines 6-24, Tr. 256, lines 9-25. Further, fingerprints matching the Appellant, Randall Myers, and Maurice Washington, were also found on the Navigator. Tr. 372, lines 6-18, Tr. 469, lines 18-21. A myriad of various cell phones were recovered from the Navigator whose phone records showed the path the men traveled that night. Tr. 469, line 22 to Tr. 470, line 7. Over 70 shell casings were recovered from the scene. Tr. 189, lines 22-25.

A mixture of Touch DNA was recovered off a Springfield .45 gun found in the backseat of the Navigator that matched two people: the Appellant and Randall Myers. Tr. 396, line 2 to Tr. 402, line 25, Tr. 430, line 6 to Tr. 434, line 25. Shell casings from this weapon were found at both the scene on Bailey Drive where the Appellant was shot and the scene where Ivan Greene was shot on Hassell Avenue, corroborating the testimony of the co-defendants. Tr. 584, lines 2-23, Tr. 589, lines 1-3. Stutter DNA was also found on the scene that matched Maurice Washington, Antoine Gill, and Nathan Burnett. Tr. 423, line 17 to Tr. 429, line 21.

The Appellant was recorded on a jail call talking to Randall Myers where Myers directly implicated himself in the crime. Tr. 228, line 10 to Tr. 231, line 20, Tr. 273, lines 9-23, Tr. 275, lines 4-8, Tr. 593, line 8 to Tr. 596, line 16. Phone records corroborated the testimony of both

Gill and Washington as to the route they took that night when fleeing the scene. Tr. 475, line 5 to Tr. 481, line 25. The Appellant also had the strongest motive to plan and execute the attempted murder of Marquis Bryant of the group because he believed Bryant had shot him earlier that day. Tr. 596, line 24 to Tr. 597, line 2. Independent witness testimony also put the Appellant at the scene as a shooter: Omar Lozano identified the Appellant from a photo that law enforcement provided him. Tr. 484, line 21 to Tr. 485, line 18.

The Appellant was indicted for the murder of Ivan Greene, the attempted murder of Marquise Bryant, possession of a weapon during the commission of a violent crime, and the kidnapping and burglary of Pinero Gambrell and his trailer. Tr. 619, line 23 to Tr. 620, line 6. Antoine Gill and Maurice Washington were also both charged with murder and the Appellant's jury was made aware of that. Tr. 73, lines 12-22, Tr. 290, lines 6-10, Tr. 361, line 1 to Tr. 362, line 22, Tr. 373, lines 3-10, Tr. 473, lines 18-22. Both Gill and Washington signed a proffer agreement with the State prior to the Appellant's trial on December 21, 2018 before implicating the Appellant in the crime, affirming neither were promised a lesser-sentence or leniency in exchange for their testimony. Tr. 78, lines 11-18, Tr. 122, lines 15-22, Tr. 204, lines 8-12, Tr. 279, lines 12-17, Tr. 294, lines 3-14, Tr. 299, line 25 to Tr. 300, line 7, Tr. 474, lines 11. Randall Myers went to trial from September 9-12, 2019 for voluntary manslaughter, kidnapping, burglary first degree, and possession of a weapon during the commission of a violent crime (2018-GS-10-00772 and 007730) but it ended in a hung jury. Tr. 662, lines 19-23. Antoine Gill and Maurice Washington testified against Myers at his trial. Tr. 662, lines 19-23.

The Appellant's trial was held from March 9-12, 2020 and both Gill and Washington also testified against him. Tr. 1, Tr. 232, line 16 to Tr. 303, line 4, Tr. 333, line 10 to Tr. 385, line 1. Gill and Washington both pled guilty without recommendation over a year after the Appellant

was convicted on June 16, 2021 and both received 10 years suspended to five years' probation. Public Index. Randall Myers eventually pled guilty to voluntary manslaughter and kidnapping on October 1, 2019 and got 20 years. Public Index. His burglary and possession of a weapon during the commission of a violent crime charges were nolle prossed the same day. Public Index.

STANDARD OF REVIEW

"As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion." *State v. Williams*, 432 S.C. 515, 521, 854 S.E.2d 166, 169 (Ct. App. 2021) (quoting *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). The appellate court only sits to review errors of law and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Butler*, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

ARGUMENT

The trial court's error of limiting the scope of the co-defendants' cross-examination was harmless because the Appellant had ample opportunity to otherwise show their potential bias, the State made sure the jury knew they were also charged with and would be tried for murder, other unrestricted testimony established the same material facts, and the testimony was corroborated by independent evidence and not contradicted by other witnesses. This Court should find the error was harmless beyond a reasonable doubt.

Appellant argues the trial court's error of not allowing the jury to hear the possible penalty range that Antoine Gill and Maurice Washington's murder charges carried was not harmless beyond a reasonable doubt. The State disagrees and petitions this Court to affirm the trial court. The Appellant had ample opportunity to demonstrate the potential bias of both co-defendants, and both the solicitor and the defense made sure the jury knew both men were "not good people" and were testifying to help themselves. Extensive, independent evidence corroborated both Gill and Washington's testimonies and an independent witness placed the Appellant at the scene of the crime. Further, forensic evidence placed the Appellant at the scene: his touch DNA was found on a .45 Springfield weapon recovered from the Lincoln Navigator whose shell casings were found at both scenes where the Appellant and Ivan Greene had gotten shot. The Appellant's fingerprint was found on the Lincoln Navigator, and no witness could tie the Appellant with the vehicle before the date of the shooting. Finally, the Appellant had the strongest motive for the attempted murder of Marquise Bryant as he suspected Bryant of being the one who shot him earlier in the day. In considering these facts in light of the *Van Arsdall* factors and the *State v. Whatley* totality test, the trial court's error was harmless beyond a reasonable doubt. This Court should affirm.

Relevant Facts

A little over a year before the Appellant's trial, Antoine Gill and Maurice Washington entered into a Proffer Agreement with the State before giving their statements in December of

2018 about what had happened on September 23, 2016. Tr. 79, lines 11-18. In it, they both affirmed they were not promised any leniency in exchange for their testimony against the Appellant. The jury was told that the Appellant, Gill, and Washington were all charged with murder from the get-go at Appellant's trial. Tr. 73, lines 12-22.

Antoine Gill took the stand first, and the solicitor opened the questioning by asking him about his prior criminal record. Tr. 233, line 23 to Tr. 234, line 9. Gill admitted he had done drugs with the Appellant and admitted he was "snitching on his friend" by testifying. Tr. 234, lines 10-25. The solicitor and Gill had the following exchange:

> And you are here because your attorney encouraged you to cooperate; right? Yes. And you're hoping that by cooperating that a judge at a later date will give you a break? Yes. That's what – that's why you're doing this. You're doing this to help yourself? Yes . . . . Why are you doing this? To help myself.

Tr. 235, line 23 to Tr. 236, line 15.

He testified that he had done coke on the incident date and then immediately admitted he had previously given untruthful, contradictory statements to law enforcement; that he had lied. Tr. 237, line 9 to Tr. 239, line 20. "Who was the person encouraging you to finally come clean?" "My lawyer." "And why was that?" "He said it would help me in the long run." Tr. 239, lines 16-20. He testified that he was the driver of the Navigator that night and that the Appellant was sitting in the back seat of the Navigator with a handgun near where his fingerprint was found, next to Randall Myers who had a .45. Tr. 253, line 20 to Tr. 254, line 4, Tr. 256, lines 9-25.

He confirmed the six of them had come up with a plan to find and shoot Marquise Bryant, Tr. 257, lines 1-9, and that the Appellant along with Nathan and Randall Myers AKA "Thugga" were the shooters that night. Tr. 262, lines 12-21. He testified to the route the Navigator took, and that testimony was corroborated by cell phone records. Tr. 275, lines 1-25.

On cross-examination, the following exchange occurred between the defense and Gill:

> Antoine, let's go through some things here. So you admit you lied; correct? Yes. You actually lied about your record; correct? . . . No. You had two burglaries, correct? No . . . . No, I didn't. No, I ain't never had no second one. It was just one. And you had a – you had a drug charge; correct? . . . Yes. And a possession of stolen motor vehicle charge; correct? Yes. And you just – you admitted to the – to the jury here that you do cocaine; correct? Yes.
>
> And on September 23rd, you did a lot of cocaine; correct? . . . Not a lot, but I used. So that's not a lot of cocaine for you? No . . . . And the solicitor mentioned . . . . you've signed a proffer agreement; correct? Yes. Do you remember signing that proffer agreement? I remember signing it. Do you remember what's in that agreement? I ain't read it or nothing. You didn't read it? So you signed the agreement, but you didn't read it? You didn't know what you were agreeing to?
>
> He just tell me that – my lawyer just tell me it'll help me in the long run, like, to sign it and tell them what they want to know and he do the rest. Did you know that you were signing to agree to take a polygraph examination? No. Have you taken a polygraph examination? No. But you agreed to tell the truth? Yes. Right after you signed that agreement, you agreed to tell the truth; correct? Yes. But you didn't, did you? No.
>
> And the solicitor even explained it to you if you didn't tell the truth, they could use whatever you say against you; correct? Yes. So you – the first thing you said to them was you were not there? Yeah . . . .

Tr. 276, line 19 to Tr. 280, line 19.

The cross then continued with: "You are charged with murder, right?" Gill answered, "Right." Tr. 290, lines 6-7. "You are facing life without parole?" Right. "You are facing a minimum of 30?" The solicitor then objected and the trial court sustained the objection. Tr. 290, lines 6-13. A little while later, the defense said, "And then that's when they said that you are in trouble for murder?" Gill: "Uh-huh." Tr. 294, lines 3-10. Then, "But overall, you lied to the State?" "Yeah." "You lied to the State multiple times? "Yeah." "And you want us to believe you today?" "I don't know." Tr. 298, line 24 to Tr. 299, line 6. In all, cross-examination was extensive, and took up 23 pages of transcript. Tr. 276 to Tr. 299.

On redirect, the State asked Gill, "Mr. Gill, you are facing murder and you still have murder charges pending, don't you?" "Yes." "And after that proffer . . . you didn't get out of jail right away?" "No." Tr. 299, line 25 to Tr. 300, line 5.

When Maurice Washington took the stand, he immediately admitted he called the Lincoln Navigator his "sales truck" because he sells crack cocaine out of it. Tr. 335, line 15 to Tr. 336, line 9. The solicitor then asked him about his criminal record: a 2011 possession of cocaine base and a 2014 possession with intent to distribute. Tr. 337, lines 7-14. He said that earlier that day on September 23, 2016, he went to O'Reilly's to get his brake light fixed. Tr. 338, line 17-19. This testimony was corroborated by a receipt found in the Lincoln Navigator by investigators after the shooting. Tr. 481, lines 9-13. He then explained the plan the six men had hatched and admitted they did it "in retaliation for [his] buddy getting shot." Tr. 342, lines 13-21.

Washington testified that he was the driver of the pickup truck that followed the Navigator onto Hassell Street, Tr. 343, lines 8-12, and explained which men had guns and where they were sitting in the respective vehicles. Tr. 343, lines 1-25. He said the Appellant and Randall Myers were the ones shooting from the Navigator. Tr. 349, lines 7-11. He admitted initially lying to the police on the stand. Tr. 359, line 8 to Tr. 360, line 14. The solicitor asked, "You are here today because you want to help yourself?" Washington answered, "Yeah." The solicitor: "But you're not here because of Ivan Greene or to help society or some greater cause. If we're honest, you're here to help yourself?" "Yes, ma'am." The solicitor: "And so you are hoping that whenever you go before a judge that your lawyer can show you cooperated and that you will get some benefit for this testimony?" "Yes, ma'am." Tr. 360, lines 15-25. The questioning by the State continued: "You are facing a murder charge?" Washington answered, "Yes, ma'am." Tr. 361, lines 1-2.

On cross-examination, the defense began with: "All right. Maurice, you're facing a murder charge; correct?" "Yes, sir." "You're trying to help yourself; correct?" "Yes, sir." Tr. 362, lines 15-19. But when the defense asked, "Do you know what the penalty is for murder?" the solicitor objected and the trial court sustained the objection. Tr. 362, lines 20-22. The defense then asked Washington about the proffer agreement he had with the State, Tr. 363, line 20 to Tr. 365, line 12, and thoroughly questioned him about the lies he had told law enforcement during the course of the investigation. Tr. 366, lines 8-25. Washington then admitted to the jury that he had been selling crack the day of the incident. Tr. 367, lines 20-23. In all, cross-examination spanned 21 pages of transcript. Tr. 362, line 14 to Tr. 383, line 8.

During his opening statement in the Appellant's trial, the Solicitor told the jury all about the co-defendants' pending charges, and said they were "not good people." Tr. 73, lines 15-16.

> Throughout the course of the testimony this week, you will hear from Antoine Gill and you will hear from Maurice Washington. Ladies and gentlemen, they are also charged in this case. They are co-defendants of this defendant and they're not good people. Devils don't hang out with angels. You will hear that Brandon Grayer is charged with murder, attempted murder, burglary in the first degree, kidnapping, and possession of a weapon during the shooting. This is his week in court.
>
> This is his day in court, and those co-defendants, they'll have their day. This is not their day. This is Grayer's day. You'll hear from these co-defendants and you'll hear – and the reason why you'll hear from them is because you'll hear – we want to present to you the inside of this plan.

In the defense's opening statement, he also talked about the credibility, or lack thereof, of the co-defendants:

> Let's talk about Maurice. Maurice Washington. He lies. He lied before, he lied after he signed the [proffer] agreement, he lied, he lied, and he lied. He continues to lie. The State is using him because they got what they wanted . . . .
>
> Antoine Gill lied, lied, lied, lied. He wasn't there, wasn't there. Then you're going to hear him say more things that are different than what he originally said, what he signed. After he signed the agreement, he lied.

Tr. 78, line 19 to Tr. 79, line 2.

During closing argument, the solicitor again told the jury that Antoine Gill was not a good person.

> Antoine Gill is a difficult – well, he was a difficult witness, but what's he do? Well, first of all, we could hardly understand him. He's not a good person. You know, that's not what the analysis is though. You have to analyze whether he's telling the truth, and I've been through some of this, but he – the thing[] that you have to look at is what is corroborated. He tells everything. The gun he says Myers is using has the DNA on it. The route he says they took is corroborated by the cell phone towers. Where he says Randall [Myers] is sitting, there's blood. Where he says Grayer is sitting, there's a gun with Grayer's DNA on it.
>
> He incriminates himself. I mean at this point in the game, he's pretty much telling everything. He's telling that he did drugs. He's telling that they wanted to shoot Marquise [Bryant]. Another important fact is he never saw Grayer in that Navigator before that night, and that's important because how do you explain his fingerprint on the Navigator?

Tr. 590, line 22 to Tr. 591, line 14.

The solicitor also went over Maurice Washington's testimony in closing argument.

> Maurice Washington. He told you everything. The things he said can be verified. He talked about the O'Reilly's receipt, the cell phone tower records, Randall having no clothes on. He talks to you about the phone calls to his phone, which I just went through in detail. He tells you a lot of stuff that incriminates him. He calls the Navigator his sales vehicle. He takes it from that guy Omar that owes him money so he can make his cocaine sales. And he never saw Brandon Grayer in the Navigator prior to that night.

Tr. 591, line 23 to Tr. 592, line 7.

> I'm not going to beat a dead horse, but the corroboration is the DNA, the fingerprints, Randall's clothing at Pinero's, the receipt, the cell phone tower records, the phone calls. The Springfield shell casings at both scenes because they both say that that's what they're talking about in the trailer when G Baby [Appellant] gets back from the hospital.
>
> You know, oh, he's shot at and we're going to go out, we're going to go out and find him and we're going to get him, and they're all planning that and that's why they pile into those two cars. The jail call was really hard to understand, and you're going to have it back there and I would encourage you to listen to it. I'm going to tell you what that jail call tells you. Aside from the fact that Randall Myers and Brandon Grayer are discussing the evidence against them, think about this.

> If Randall Myers calls someone who wasn't at the scene and says our fingerprints are there, our stuff is all over, what are we going to do now, and you weren't there, wouldn't you say, "Why would my fingerprints be there? Why would my DNA be there?" That's not what Brandon Grayer says. He's like, "Oh, no, it's just a probability, it's just a probability. You know, it's not. It's all good."
>
> And then Randall Myers comes back and says, "Well, they've got experts. You know, this isn't good for us."

Tr. 592, line 8 to Tr. 593, line 5.

The solicitor continued to discuss the corroborating evidence and evidence against the Appellant in closing:

> We've got witnesses that see this man [the Appellant] shooting at Marquise at the scene. We've got his DNA on the gun. We've got his shell casings from the gun that his DNA is on at both scenes. We've got the phone records that show the route that's corroborated by the co-defendants. We've got the motive for retaliation. Of everybody, all six of these guys in these cars, [Appellant] is the one with the motive. He was the one that was shot earlier in the day by someone he thinks is Marquise Bryant.

Tr. 596, line 19 to Tr. 597, line 2.

Both Gill and Washington agreed to testify against their penal interest even though no promises were given from the Solicitor's Office that they would be receiving any leniency in exchange for their testimony. Tr. 279, lines 12-19, Tr. 365, lines 7-12. In fact, almost a year and a half after the Appellant's trial, both men ended up pleading straight up to accessory after the fact to murder. Public Index.

Relevant Law

"The constitutional right to . . . cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures . . . that convictions will not result from the testimony of individuals who cannot be challenged at trial." *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). Cross-examination allows a defendant the opportunity "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand

face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief." *State v. Stokes*, 381 S.C. 390, 402, 673 S.E.2d 434, 440 (2009); *Mattox v. United States*, 156 U.S. 237, 242 (1895). However, the 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." *Stokes*, 381 S.C. at 401-402, 673 S.E.2d at 439 (emphasis added).

The right to cross-examine adverse witnesses "does not mean . . . that trial courts conducting criminal trials lose their discretion to limit the scope of cross-examination." *State v. Saltz*, 346 S.C. 114, 130-131, 551 S.E.2d 240, 249 (2001); *Cf. State v. Lynn*, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981) (A trial court's ruling regarding the scope of "cross-examination of a witness to test his credibility is largely within the discretion of the trial court, and its decision . . . will not be disturbed on appeal absent a manifest abuse of discretion.") "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

"Generally, a judge may prevent the introduction of evidence which informs the jury of the possible sentence defendants may receive if convicted because it is either irrelevant or substantially prejudicial." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002). "However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence." *Id.* at 331-332,

563 S.E.2d at 318. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (cleaned up). "The lack of a negotiated plea . . . creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318.

All things considered, however, "[a] violation of the defendant's Sixth Amendment right to confront [a] witness is not *per se* reversible error if the 'error was harmless beyond a reasonable doubt.'" *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); *State v. Murphy*, 270 S.C. 642, 644, 244 S.E.2d 36, 36-37 (1978) (Confrontation Clause violations are subject to a harmless error analysis.) Error is harmless where it could not have reasonably affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Gillian*, 360 S.C. at 456-57, 602 S.E.2d at 74-75; *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). If the appellate court finds the error was harmless beyond a reasonable doubt in the context of the entire record, the conviction must stand. *State v. Holder*, 382 S.C. 278, 286, 676 S.E.2d 690, 694-695 (2009).

In making a harmless error determination, the appellate court must consider the facts of the individual case and the following factors:

> (1) [T]he importance of the witness' testimony in the prosecution's case;
> (2) Whether the testimony was cumulative;
> (3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
> (4) The extent of cross-examination otherwise permitted; and

(5) The overall strength of the prosecution's case.

State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994) (quoting *Van Arsdall*, 475 U.S. at 684).

In *State v. Williams*, this Court upheld the appellant's conviction even though the trial court prevented the defense from cross-examining a witness regarding pending charges against him, finding any error was harmless beyond a reasonable doubt. *Williams*, 432 S.C. at 515, 854 S.E.2d at 166. The appellant was on trial for the murder of James Spellman. *Id.* at 518, 854 S.E.2d at 167. The State presented no forensic evidence other than a mangled .40 caliber bullet and presented witnesses who heard the shots and saw a "blue car pull off" but could not identify the shooter(s). *Id.* at 518, 521, 854 S.E.2d at 166, 168. The victim's cousin did place the appellant at the scene, testified he saw a gun in his pants, and said he saw and heard the appellant shoot the victim. *Id.* at 167-168, 854 S.E.2d at 520. The other witness for the State who placed the appellant at the scene had pending armed robbery and drug possession charges and the defense moved to cross-examine him on the number of years he would face if convicted. *Id.* at 168, 854 S.E.2d at 519.

The trial court held a bench conference to determine whether the appellant could cross him on the penalty range, and the court held that the appellant could ask about the charges but not the possible penalty because "the penalty was a matter for the court." *Id.* The witness then told the jury he was charged with "sale undercover," robbery, and "marijuana, methamphetamine [charges], whatever it is, I don't know," then admitted his charges would be prosecuted by the same Solicitor's Office, and that the State had not promised him anything, including dropped charges, in exchange for his testimony. *Id.*, 854 S.E.2d at 168.

This Court found the trial court erred in limiting cross-examination into potential sentencing exposure on pending charges but found it was a harmless error because one of the

witnesses who identified the appellant as the shooter's cross-examination was not limited, and the State presented independent testimony regarding the relationship between the appellant and the victim, and presented testimony placing the appellant at the scene, identifying him as the shooter. *Id.* at 524, 854 S.E.2d at 170. Plus even with the limitation on the witness' cross-examination, "Williams's counsel was able to muddy [his] credibility." *Id.* at 525, 854 S.E.2d at 170. "Williams was able to effectively adduce evidence of . . .'bias, prejudice or . . . motive to misrepresent' for impeachment purposes despite the . . . court's exclusion of the sentencing line of inquiry." *Id.*; Rule 608(c); *Williams*, 432 S.C. at 171, 854 S.E.2d at 171.[1]

The appellant in *Williams* argued the circuit court's error was not harmless because:

> [T]he possibility of a serious penalty was proper impeachment evidence related to . . . his bias and motive to testify against him. [He] assert[ed] the circuit court's error could not be harmless because the State presented no forensic evidence connecting him to the murder, the State's other witnesses either did not witness the crime or were not credible, [the two eyewitnesses were] both related to [the] Victim, and there were multiple unidentified individuals at the scene of the shooting.

Williams, 432 S.C. at 522, 854 S.E.2d at 169. This Court, however, found the trial court's cross-examination limitation was error, but the error was harmless, as the appellant suffered no prejudice and "the harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* at 525, 854 S.E.2d at 171.

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[1] *State v. Whatley*, 407 S.C. 460, 469-471, 756 S.E.2d 393, 397-398 (Ct. App. 2014):

> [The] trial court's error in preventing cross-examination of [the] witness . . . as to mandatory sentenceshe faced for reduced charges pending at time of trial was deemed harmless where the defendant had ample opportunity to otherwise demonstrate [his] bias, testimony of another witness established same material facts [he] recounted, and [his] testimony did not contradict that of the other witness on any essential point.

Similarly, here, the trial court also limited the defense from cross-examining the two testifying co-defendants on the penalty range they faced for their murder charges. However, just like in *Williams*, the error was harmless. The State presented independent forensic evidence that tied the Appellant to the scene: a fingerprint on the Navigator and touch DNA on the .45 Springfield. The State also presented evidence that an independent witness had identified the Appellant as a shooter at the scene. Both the State and the defense also called the co-defendants' testimony into question: both acknowledged before the jury that Gill and Washington were not "good people," that they were also charged with murder and would have their day in court, and both told the jury they lied to law enforcement. Both Gill and Washington admitted they were testifying to help themselves, and the jury was told that one faced life without parole for a murder charge. Both men also admitted on the stand that they had taken drugs the day of the incident. The jury was well aware of and able to properly assess any bias either co-defendant had. The jury was also aware that the State had not promised either co-defendant leniency or a deal in exchange for their testimony. This Court should find the trial court's error was harmless.

In *State v. Barnes*, the trial court allowed two co-defendants to be tried simultaneously for murder and a myriad of other charges. *State v. Barnes*, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017). On appeal, Barnes argued the trial court had abused its discretion in denying his motion to sever because a joint trial "compromised his right to effectively cross-examine" his co-defendant's girlfriend, whose credibility was central to the trial as she identified Barnes as a co-conspirator and as the shooter. *Barnes*, 421 S.C. at 52, 804 S.E.2d at 304.

> In a separate trial, he would have been able to elicit that [his co-defendant and his girlfriend] were codefendants in an unrelated pending burglary charge . . . believ[ing] this would have allowed him to better portray to the jury that [the girlfriend's] testimony lacked credibility because she was seeking to protect [the co-defendant], with whom she share[d] two children.

This Court affirmed Barnes' conviction because the trial court only prohibited him from telling the jury that his co-defendant's girlfriend was charged in the pending burglary case and did not stop him from confronting her about her bias in favor of his co-defendant because of their relationship or her "willingness to testify in hopes of reducing her exposure to substantial prison time on the burglary charge." *Id.* This Court found that Barnes suffered no prejudice as the prohibited impeachment did not prevent the jury "from making a reliable judgment about Barnes' guilt." *Id.* The girlfriends' testimony was cumulative to other evidence and this Court found Barnes' trial to be fundamentally fair. *Id.* at 53, 421 S.E.2d at 305.

In *State v. Saltz*, our Supreme Court upheld the appellant's conviction even though the trial court limited the scope of cross-examination of a witness for credibility and bias, finding the limitation did not violate his constitutional right to confront the witnesses against him. *Saltz*, 346 S.C. at 129, 551 S.E.2d at 248-249. The appellant was on trial for the murder of a 12-year-old boy and the witness in question was the best friend of the deceased's mother. *Saltz*, 346 S,C, at 128, 551 S.E.2d at 248. She was also the mother of a boy who had ridden in a truck with the deceased victim and the appellant the day before. *Id.* Nevertheless, the trial court sustained the prosecution's objection to the defense's cross-examination question as to her potential relational bias. *Id.* at 130, 551 S.E.2d at 249. "Although evidence of [the witness's] relationship to the [boy] would unquestionably be admissible to show [her] possible bias, the jury was already fully aware [she] was [the boy's] mother." *Id.* at 132, 551 S.E.2d at 250. "Appellant sought to ask [her] what she would do 'if she had to make a choice between being loyal to her friend and protecting her son.' This question did not seek to elicit a fact tending to show bias." "We believe the question was inappropriate and the trial court properly exercised its discretion in disallowing it." *Id.*

Similarly, here, although the scope of cross was limited regarding the potential number of years both co-defendants faced for their murder charges, the defense was not limited in their attempts to expose the possible bias of the two men. The jury was well aware that both Gill and Washington were also charged with murder and would be tried later for the offenses. It is well known in the community at large that a murder charge, unlike other charges, carries a substantial number of years, if not life, or even death. The jury was given plenty of information to properly deduce and make a reliable judgment about the Appellant's guilt, and the impeachment limitation did not stop them from weighing the credibility of the co-defendants while they sat before them on the stand. The co-defendant's testimony, while material, was also substantially corroborated by other independent evidence and testimony. This Court should find the error harmless as the prosecution's overall case against the Appellant was strong.

In *Wilds v. State*, the petitioner's two co-defendants were also charged with murder and armed robbery and both testified for the prosecution against the petitioner. *Wilds v. State*, 407 S.C. 432, 441-442, 756 S.E.2d 387, 392 (Ct. App. 2014). Neither were offered a deal in exchange for their testimony, but they both hoped their cooperation would be taken into consideration. *Id.* At trial, the following exchange between the Court and the defense occurred:

> **The Defense:** With regard to the pending charges as against [the two co-defendants], they are currently . . . both charged with murder and armed robbery. We would submit to the Court that I should be able to question them not merely about the existence of the charges but what they hope to get as a result of their testimony. Their understanding of the penalties they're facing now and specifics of the fact that they are looking at life in prison on the murder charge, and their hopes in regard to a reduction in sentencing.
>
> **The Court:** Yes, sir. It's appropriate to ask if they think they're going to get their sentence reduced or if they think they're going to get the charges reduced, but I think you can do that without going into details.

Wilds, 407 S.C. at 441-442, 756 S.E.2d at 392.

The PCR court concluded the petitioner's trial counsel was not ineffective for failing to object to (and thus preserve) the limitation of cross-examination because "there was no deal or promise of a lesser offense or lesser sentence, and the trial court allowed full impeachment of the co-defendants regarding their pending charges." They also found that even if trial counsel should have objected, the error was harmless. *Id.* at 442, 756 S.E.2d at 392. This Court acknowledged the fact that *Mizzell* had not been decided at the time of the petitioner's trial, leaving his trial counsel without the benefit of the holding, but still concluded that the error was harmless regardless, because additional evidence and testimony linked the petitioner to the crime. *Id.* at 443, 756 S.E.2d at 392. Additional evidence and testimony linked Appellant to the crime here as well, so this Court should find the trial court's error was harmless beyond a reasonable doubt.

Finally, in *Delaware v. Van Arsdall*, the trial court refused to allow the defense to cross-examine a witness for the State about an agreement he had with the prosecutor to discuss the murder in exchange for dismissing an unrelated charge against him. *Delaware v. Van Arsdall*, 475 U.S. 673, 673, 676-677 (1986). The Delaware Supreme Court overturned the appellant's conviction, finding the trial court violated the appellant's rights under the Sixth Amendment's Confrontation Clause by cutting off *all* questioning about the dismissal of the charge, as it would establish bias of the witness. *Id.* at 679.[2] The jury should be allowed to hear the facts from which they could "appropriately draw inferences relating to the reliability of the witness." *Id.* at 680. The United States Supreme Court, however, vacated and remanded, finding that while the denial of the respondent's opportunity to impeach the State's witness for bias did violate his rights under the Confrontation Clause, the error was likely harmless beyond a reasonable doubt,

[2] "[B]y improperly restricting defense counsel's cross-examination designed to show bias on the prosecution witness' part, [that violated] respondent's rights under the Confrontation Clause of the Sixth Amendment, and refused to consider whether such ruling was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 673.

although they left that determination to the Delaware Supreme Court, after establishing the factors test. *Id.* "The Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* at 681.

It is clear from recent case law that limiting impeachment of a co-defendant or a witness regarding the penalty attached to the charges they face is error. However, the analysis of whether the error was harmless or not should be analyzed on a case-by-case basis, taking the totality of the circumstances into account. The harmless error test is not a strict one, and is not absolute. Case law also shows that if there is independent corroborating evidence to the witness's material points, the defense had other opportunities to demonstrate the bias of the witnesses, the testimony presented is not contradicted by other testimony or evidence, cross-examination is not otherwise limited (and was otherwise extensive), and the overall strength of the prosecution's case is established, the error will likely be harmless beyond a reasonable doubt.

Here, when applying the *Van Arsdall* factors and the *State v. Whatley* totality test to the facts of this case, this Court should take into account all of the corroborating evidence and independent forensic evidence that tied the Appellant to the scene of the crime. The Appellant's jury was well aware that both Gill and Washington were also charged with murder and would have their day in court later on. Their potential bias was made extremely clear when they both admitted on the stand that they were testifying to help themselves, and their credibility was threatened when they admitted to doing and selling drugs on the date of the incident. It was also threatened by both the State and the defense in their opening and closing arguments when both attorneys were honest with the jury about who the co-defendants were as human beings and the proffer agreements they had entered into with the State.

The public at large is well aware that a charge of murder carries a substantial number of years, if not life, or death, unlike other charges where the penalty is not widely understood. The jury here was made aware that both men had signed a proffer agreement with the State but knew there was no current deal on the table or promise of future leniency in exchange for their testimony. Cross-examination of both men was extensive – over 20 pages of transcript for each man, and the Appellant had ample opportunity to establish their bias notwithstanding the trial court's limitation of impeachment. An independent witness, through the testimony of law enforcement, placed the Appellant on the scene. The prosecution's case against the Appellant was very strong even without the material testimony of the co-defendants.

The co-defendants' testimony was corroborated on nearly every point by other evidence including phone records, the O'Reilly's receipt, Myers' bloody clothes found at the scene, shell casings, fingerprints, and DNA. Because of this, the record does not support the finding that the trial court manifestly abused its discretion in limiting the scope of the co-defendants' impeachment on cross-examination. This Court should affirm the trial court and find that, by the totality of the circumstances, considering the context of the trial as a whole, the trial court's error was harmless as the error was insubstantial and did not affect the result.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
August 27, 2021

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2020-000556

THE STATE, ...RESPONDENT,

v.

BRANDON CHRISTOPHER GRAYER, ...APPELLANT.

DESIGNATION OF MATTER

In addition to the matter designated by Appellant, Respondent proposes the following matter to be included in the Record on Appeal:

(1) Trial Transcript date March 9-12, 2020, Page Nos. 662; 73; 78-79.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

I, Brandy Rankin, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, Designation of Matter, and Proof of Service have been forwarded via email to Appellant's counsel, David Alexander, Esq., via email today, August 27, 2021 to dalexander@sccid.sc.gov and to Mr. Alexander's assistant, Lindsey Matthews lmatthews@sccid.sc.gov.

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