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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Aiken County

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2017-001950

THE STATE,

RESPONDENT,

Santonio Torez Williams,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. When the State laid a foundation for authentication during their case in chief, did the trial court err in allowing the State to introduce a recording of Appellant's jail call during through a rebuttal witness?
2. Did the court err in failing to grant a new trial, when the State failed to disclose that a jailhouse snitch requested a deal prior to testifying at trial?

STATEMENT OF THE CASE

Appellant was indicted by the Aiken County Grand Jury for Murder. R. 627. On January 30, 2017, Appellant was called to trial before the Honorable Roger Young and a jury. Tr. 1. Appellant was represented by Nicolas McClarley and Derek Bush. R. 1. The State was represented by Strom Thurmond, Jr. and Cassie Hall. R. 1. Appellant was found guilty. R. 531. Appellant was sentenced to 50 years. R. 532, l. 3.

Appellant filed a motion to reconsider the sentence. While the motion to reconsider was pending, Appellant filed a motion for a new trial based on newly discovered evidence.

For the post-trial motions Appellant was represented by Tristan Shaffer while the State was represented by J. William Weeks and Cassie W. Hall. R. 535. This motion was denied in an order filed September 5, 2017. R. 619.

This appeal follows.

ARGUMENT

I. When the State laid a foundation for authentication during their case in chief, the trial court erred in allowing the State to introduce a recording of Appellant's jail call during through a rebuttal witness.

Relevant Facts

On April 17, 2016, Demarius Jefferson (a.k.a. Dmob) called the Aiken County Sheriff's Office. R. 123, ll. 18-20. Dmob was dating Mercedes Navas. R. 107, ll. 7-8. Three days early, Navas's Toyota Corolla was used in a drive-by shooting. R. 227, ll. 9-12. As a result of the shooting, of a 16 year-old girl lost her life.

The night of the shooting Dmob borrowed the Corolla and met up his friend Demorris Harris (a.k.a. Bope). R. 110, ll. 14-21. Dmob and Bope had been friends since high school. R. 131, ll. 20-25. Afterward, Dmob picked up Appellant. The group went to play basketball. Later that evening the decedent was killed.

Although on April 17, 2016, Dmob gave a statement to law enforcement, he did not tell them Bope was present on the night of the shooting. R. 130, l. 12—196, l. 7; R. 131, ll. 24-25. It was not until 3 days later that Dmob finally told investigators that Bope had been driving the car, but even though he mentioned Bope, he denied knowing Bope's real name. R. 135, l. 16—201, l. 4.

By the time of trial, Dmob claimed that Appellant had requested to borrow the car to go get something to drink. R. 114, ll. 6-9. Dmob claimed that he told Appellant that he could go, but only if Bope drove. Dmob claimed Bope and Appellant left in the Corolla, and that around the time they returned he began to hear sirens. R. 115, l. 22—181, l. 4.

Bope testified that he drove Appellant around to different locations without knowing that Appellant was preparing to shoot anyone. R. 219-225. Bope claims that he was surprised when Appellant pulled out a shotgun and fired at decedent. R.. 225, l. 20—294, l. 18.

Cheryll Grubbs testified that after the shooting Dmob came to her house. Grubbs said Dmob was acting nervous. R. 444, ll. 17-21. Dmob told Grubbs that he had been involved in a drive-by and that he was the driver. R. 444, ll. 22-25.

However, the day after the shooting, Bope had a conversation with Kahlo Calhoun where he admitted that he was the shooter. R. 439, ll. 11-24.

The State had no physical evidence linking Appellant to the shooting. R. 191, ll. 10-13. The State did have tracking on cell phones belonging to Appellant and Navas. R. 93, ll. 10-18; R. 306, ll. 5-8; R. 322, ll. 15-19. Navas indicates that she allowed Dmob to borrow her cellphone that night. R. 93, ll. 1-10. Appellant and Navas phones indicate they were near each other for much of that evening. R. 322-342.

At the beginning of trial, the State pre-marked State's Exhibit 63. Tr. 11. State's Exhibit 63 is a jail call where Appellant discusses Bope. R. State's Exhibit 63. The State would later allege that this statement would indicate that Bope was not involved in the shooting.

During the State's case in chief, the State sought to introduce several recorded jail phone calls involving Appellant. Captain Nick Gallam was called in the State's case in chief to help authenticate several of the recordings. R. 178-179. The State did not attempt to introduce State's Exhibit 63 during their case in chief. R. 2.

Bope was also called by the State. The following is an excerpt from Bope's cross-examination:

> Q. Okay. Do you know Kahlo Calhoun?
> A. Yes, sir.
> Q. Do you remember talking to him the day after the shooting?
> A. No, sir.
> Q. Do you remember telling him that Brisco was in the car?
> A. No, sir.
> Q. Do you admit or deny telling Kahlo Calhoun that you shot the gun?
> A. No, sir.

Q. You deny that?
A. I deny everything he said.

R. 244, ll. 9-12.

Despite this line of questioning, State's Exhibit 63 was not immediately introduced into evidence. R. 2. Instead the State merely had Mr. Brighthop identify the voice on the calls during its case in chief. R. 399, ll. 13-25. However, the State failed to introduce State's Exhibit 63 into evidence in their case in chief. R. 2.

At the close of the State's case, Appellant was advised on his right to testify. After already having heard the State's case against him, Appellant decided not to testify. R. 431, ll. 1-24.

During the defense's case, Kahlo Calhoun was called to impeach Bope. Calhoun testified that Bope had told him that he was the shooter. R. 507, ll. 11-24. This directly refuted Bope's testimony that Appellant was the shooter.

After, the defense closed their case, The State informed the court that it intended to introduce what had previously been marked as State's Exhibit 63. R. 453, l. 12—455, l. 20. The Appellant objected arguing that the State was aware of this and decided not to introduce it in their case and chief. R.454-456. Additionally, trial counsel argued that he did not know what Appellant was discussing on the recording. R. 454, ll. 7-8.

The State claimed they were unaware Appellant planned to call Calhoun. R. 455, ll. 13-18. However, the Solicitor stated that they had already had a witness to testify it was Appellant's voice. R. 453, ll. 12-17.

During the argument on this issue, the following exchange took place:

> THE COURT:...That issue of whether or not Bope was the shooter was not in evidence until Mr. Calen -- or Calhoun, I guess it was, testified. And so that would be new evidence that was not in during direct of their case in chief, so it would be in reply.
> MS. HALL: Thank you, Your Honor.

> THE COURT: I understand the information may have been available to them, but it wasn't an issue. Nobody brought up that Bope was the shooter, in fact, so there was no need to --
> MR. MCCARLEY: May I? One more sentence, Your Honor?
> THE COURT: Sure.
> MR. MCCARLEY: Does it affect you at all that I did cross specifically on it? I asked Demorris Harris if he was the shooter.
> THE COURT: Yeah, but he denied it. There was nobody that said that he was until a witness testified today.

R. 455, l. 21—R. 456, l. 15. The Court then allowed State's Exhibit 63 in over objection. R. 464, ll. 6-10.

Argument

"Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). Trial courts ordinarily have discretion to allow rebuttal testimony; however, this discretion has bounds. *See State v. Bailey*, 279 S.C. 437, 440, 308 S.E.2d 795, 797 (1983) ("While the admission to reply or rebuttal testimony is ordinarily a matter within the discretion of the trial judge, the exercise of discretion in this case was controlled by error of law to the prejudice of appellants and must be reversed."). A South Carolina law does not favor rebuttal testimony that is a surprise to the defendant. *See McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984) ("Rebuttal testimony must be in response to an issue raised for the first time during the defendant's case in chief. Among the factors to be considered by the trial judge in making his decision are the type of witness involved and the degree of surprise to the other party.").

Additionally, a defendant's right to testify on his own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments. *See Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). A defendant may choose to exercise this right after hearing all of the States' evidence. *See Brooks v. Tennessee*, 406 U.S. 605, 610, 92 S. Ct. 1891, 1894 (1972) ("[A]

defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed."). To allow the State to present new statements made by the defendant during reply, it infringes on a defendant's right to testify.

In this case, the State intentionally waited to introduce State's Exhibit 63. The State pre-marked the exhibit. R. 2. Laid a foundation for Authentication in its case in chief. R. 399, ll. 13-25. But the State held this evidence back so they could rebut an exculpatory statement that they had provide Appellant on the second day[1] of trial. This late disclosure of exculpatory information turned out to be a strawman.[2] The State adopted a sandbagging trial strategy by waiting until rebuttal to knock the strawman down. *See Bailey v. State*, 440 A.2d 997, 1003 (Del. 1982) (The Delaware Supreme Court held the trial court abused its discretion in permitting the State to utilize the "sandbagging" trial strategy in its reply closing argument). In doing so, they impermissibly used rebuttal to complete their case in chief. Therefore, this case should be reversed and remanded for a new trial.

II. The trial court err in failing to grant a new trial, when the State failed to disclose that a jailhouse snitch requested a deal prior to testifying at trial.

Relevant Facts

There was no physical evidence linking Appellant to this shooting. R. 191, ll. 10-13. At best, the State had cell records indicating that Appellant's phone was in the vicinity of the shooting, but relied on lay witnesses to prove he was with his phone. Additionally, nearly all of the lay witnesses

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[1] R. 463, ll. 13-22; R. 437, ll. 19-25.

[2] Appellant is not implying that the timing of the disclosure of Calhoun's statement was intentional. The record is insufficient to establish that the exculpatory evidence was disclosed on

placing Appellant at the scene of the shooting, could have been involved in the shooting. R. 439, ll. 11-13; R. 444, ll. 24-25.

However, the State had a jailhouse snitch, Victor Mercuri. Mercuri testified that during a conversation with Mercuri's cellmate, Appellant admitted to shooting the victim. This conversation allegedly occurred while in the Aiken County Detention Center. During trial Mercuri testified to the following:

> They were teasing [Appellant] for shooting a female. The conversation was along the lines of he -- they called [Appellant] a shitty shot. And I guess [Appellant] was supposed to shoot somebody else, but ended up shooting a female. And [Appellant] replied and said that he intended on killing both of them, but he missed the n***** and shot the b****.

R. 168, ll. 13-20. Mercuri also claimed:

> [Appellant] said that he shot the bitch, as he called her, out of retaliation for someone killing his brother, and by doing so, he was going to obtain a higher rank in his gang.

R. 169, ll. 5-8.

Mercuri was in the Aiken County Detention Center on pending charges for Armed Robbery, Possession of a Weapon During the Commission of a Violent Crime, Malicious Injury to the Jail, Possession of a Stolen Motor Vehicle, and Manufacturing Methamphetamine. R. 165, l. 10—166, l. 5. At trial, Mercuri claimed that he was never offered any deals. R. 166, ll. 14-18. On cross examination the following exchange took place:

> Q. Okay. And you're looking at 35 years?
> A. Yes, sir.
> Q. And those 35 years are in the hands of these folks?
> A. **The hands of the jury.**
> Q. No, sir. That's not your jury.
> A. **Well, the day I have trial, whenever that happens.**

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the second day of trial. Appellant is merely asserting that the sought to wait until Appellant's counsel had committed to a defense before using their evidence.

R. 172, ll. 7-14 (emphasis added).

After the trial, Mercuri received an 18 year sentence. After pleading guilty he notified Appellant's trial counsel that he had lied about the statements. R. 544, ll. 5-10; R. 550, l. 8—551, l. 4. Appellant filed a motion for a new trial based on Mercuri's testimony.

During the hearing the Solicitor testified that prior to the trial, Mercuri indicated that he wanted a plea deal to strong arm robbery. R. 583, ll. 14-19; R. 586, ll. 5-18. The Solicitor "shut him down" because he did not want to "taint his testimony." R. 587, ll.14-25. When asked what he meant by "taint his testimony", the Solicitor testified that it was "important" for Mercuri to be able to testify that he did not have any deals. R. 591, l. 23—592, l. 3. The Solicitor admitted the fact that Mercuri asked for a deal at a meeting may indicate that Mercuri had the expectation of some reward by testifying. R. 596, ll. 5-12. However, when asked if Mercuri's request was disclosed to Appellant, the Solicitor stated, "I don't recall if I did." R. 547-550.

At the conclusion of the hearing, Appellant argued the following:

> [R]elated to Mr. Thurmond's or Solicitor Thurmond's testimony, he basically testified that he does not recall disclosing that there was -- that Mr. Mercuri had asked a plea offer. Your Honor, I think that that evidence should have been disclosed. I think it should have been brought up in front of the Court because whenever he got up there, it makes it more likely that he has some sort of bias. It is -- I believe it is -- it does go to -- it is relevant to whether or not he would expect some benefit from testifying, the fact that he actually requested a plea offer.
>
> It is -- it could make a difference in the way the jury views the case and the way the jury views his testimony because the way it stood was he got up there and merely said, you know, I -- there's no reason for me to testify. I'm not getting any benefit from this. But if the solicitor understood that he had some sort of expectation of that, due to the fact that he's actually requesting it during their meeting, that should have been disclosed. I think that would have been discoverable. I think that -- that it -- had defense counsel known that, they probably would have brought it up. Well, you say that you didn't -- you weren't promised anything, but weren't you asking for a plea offer whenever you met with the solicitor on this case? That's legitimate material that should have been disclosed under [*Brady v. Maryland*, 373 U.S.

> 83, 83 S. Ct. 1194 (1963)] [*Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972)] and [*Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959)] and the State case I cited [*Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006)]. That is legitimate information that should have been disclosed. The State indicates, we don't know if we – we don't recall disclosing it. Your Honor, that is information that should have been disclosed. That in and of itself, which the solicitor admitted to, regardless of his testimony, is Brady material that was not disclosed, Your Honor.

R. 606, l. 12—607, l. 15.

In the order denying the motion for a new trial, the court found the following:

> [A] criminal defendant's desire to have a favorable outcome in his case is such a basic and inherent desire, a mere statement to that regard does not create new and discoverable impeachment evidence. Likewise, non-disclosure of such a statement in no way undermines the confidence in a fair trial - particularly when the party making the statement was impeached on those grounds during the trial.

R. 625

Argument

"An individual asserting a *Brady* violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (*citing Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

Plea agreements made with witnesses are subject to disclosure. *See Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 834 (1996) (Affirming the PCR court that found "that Washington was entitled to a new trial because of the State's misconduct in failing to fully disclose the nature of its relationship with a witness."). This duty to disclose extends to expectations of reward. *See United States v. Bagley*, 473 U.S. 667, 683, 105 S. Ct. 3375, 3384 (1985) ("The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the

Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.").

The duty to disclose favorable impeachment information is present even when there is no agreement between a witness and the State. *See Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989) ("The fact that there was no agreement, however, is not determinative of whether the prosecution's actions constituted a *Brady* violation requiring reversal under the *Bagley* standard. We hold that, viewed in the context of petitioner's trial, the fact of [the witness's] impending commutation hearing was material in the *Bagley* sense and that petitioner therefore is entitled to relief.").

In Appellant's case, the State should have disclosed the fact that Mercuri asked for a plea to strong arm robbery. The Solicitor **admitted**[3] that Mercuri's request could have been used as evidence to show Mercuri expected a plea offer. *See United States v. Oliveros*, 275 F.3d 1299, 1307 (11th Cir. 2001). ("When it comes to a witness' motive to lie, however, what counts is not the actual extent of the benefit the witness has received or will receive, **but the witness' belief about what he is getting.**" (emphasis added)). However, the Solicitor told Mercuri that he did not want to "taint his testimony" because the Solicitor knew[4] it was "important" in this case that Mercuri was able to tell the jury he did not have any deals. R. 591, l. 23—592, l. 3; R. 596, ll. 13-15. So he "shut it down" and told Mercuri to listen his attorney. R. 587, ll. 22-25. The Solicitor understood that a person testifying "frequently get[s] some consideration." R. 597, ll. 2-8.

Although no deal was offered, Mercuri clearly was making attempts to cooperate in exchange for a plea agreement. R. 596, ll. 5-12. This would be contrary to Mercuri's assertion at

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[3] R. 596, ll. 5-12.

[4] Clearly the Solicitor was aware that there was some exculpatory value in the mere fact that Mercuri requested consideration. In this very case, the Solicitor was allowed to call a rebuttal witness to show that one of the defense witnesses sought consideration for providing

trial that "a jury" would decide what he would get. *Cf. Riddle*, 369 S.C. at 47-48, 631 S.E.2d at 75 ("The failure to correct false evidence is as reprehensible as its presentation.").

In its order denying a new trial, the trial court found that Appellant was not prejudiced by the failure to disclose because Mercuri was cross examined on his potential sentence. However, "[t]he fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner [does not turn] what was otherwise a tainted trial into a fair one." *See Napue v. Illinois*, 360 U.S. 264, 270, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959). Mercuri was an important witness for the State because he claimed that Appellant admitted to the crime. In a case with no physical evidence tying Appellant to the shooting, evidence that would impeach Mercuri was material under *Brady*. Therefore, this case should be reversed and remanded for new trial.

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information. R. 453, ll. 5-9; R. 460, ll. 2-7. Similarly, the Solicitor disclosed this same type of impeachment evidence to Appellant.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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