TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 5

ARGUMENTS

1.

The judge erred by refusing to suppress evidence seized from appellant's Jeep. First, the judge erred by ruling any deficiencies in the actions of the police were irrelevant since a search warrant was not necessary. Article I, §10 of the South Carolina Constitution granted appellant additional protections against unreasonable search and seizures. Second, the evidence allegedly seized from appellant's Jeep should not have been admitted since a return of the items was *not* done in violation of S. C. Code §17-13-140. The integrity of the evidence gathering process was strongly at issue in this case, and appellant was prejudiced by the state's failure to file the statutorily mandated return........ 6

2.

The trial judge erred by admitting hearsay testimony that "all of the evidence led to" or pointed to appellant in this case. Officer Ricky Weston's testimony that all of the evidence led to appellant was based on what others allegedly told him. As such, it was impermissible and highly prejudicial hearsay evidence. 16

3.

The court erred by refusing to grant a mistrial where the solicitor impermissibly commented on appellant's right not to testify. The solicitor's comment was burden shifting, and a mistrial should have been granted. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925) 7

German v. State, 325 S.C. 25, 478 S.E.2d 687(1996) 17

Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999) 14

State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991) 14

State v. Brown, 317 S.C. 55, 451 S.E.2d 88 (1994) 17

State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) 20

State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) 20

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 8, 13, 14

State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) 12, 13

State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980) 20

State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987) 20

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) 20

State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) 6

State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995) 11

State v. Sweet, 342 S.C. 342, 536 S.E.2d 91 (Ct. App. 2000) 21

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) 21

Statutes

S.C. Code §17-13-140 .... passim

S.C. Code §17-13-141 .... 4, 8

Constitutional Provisions

Article I, §10, South Carolina Constitution 6, 9, 13, 15

Fifth Amendment, United States Constitution.. 20

Fourteenth Amendment, United States Constitution 14, 20

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by ruling any deficiencies in the search warrant process were irrelevant because a search warrant was not needed under the "automobile exception," and by admitting evidence seized from appellant's vehicle, where the state failed to file a return of the items allegedly seized pursuant to S.C. Code §17-13-140 & 141, particularly where the state's mishandling of seized evidence was at issue, since Article I, §10 of the South Carolina Constitution provided appellant additional protection against unreasonable searches and seizures in this privacy area?

2.

Whether the court erred by allowing Lieutenant Ricky Weston to testify that "all the evidence led to Levell Weaver" since this allegation was hearsay because it was based upon what other people allegedly told Lieutenant Weston?

3.

Whether the court erred by refusing to declare a mistrial where the solicitor argued that only the appellant could tell the jury why he was outside the nightclub that night, since this was an impermissible comment on appellant's right not to testify, and it was so prejudicial a curative instruction was insufficient to cure the extreme prejudice?

STATEMENT OF THE CASE

Appellant was indicted at the August 1999 term of the Williamsburg County grand jury for the offenses of murder, armed robbery and possession of weapon during a violent crime. R. 526. His first trial ended in a hung jury on May 18, 2001.

Appellant's case was then called to trial on August 17, 2001, on the murder and possession of a weapon during a violent crime charges in front of the Honorable Howard P. King, Jr., and a jury. William Jenkinson and Michael Nettles represented appellant. The assistant solicitor was Harry Conner.

The jury found appellant guilty on both counts after initially asking the judge if returning the following morning for further deliberations was an option. R. 515, l. 17 – 516, l. 12. Judge King then sentenced appellant to thirty years imprisonment for murder and five years for possession of a weapon during a violent crime. R. 525, ll. 12-16.

This appeal follows.

ARGUMENT

1.

The judge erred by refusing to suppress evidence seized from appellant's Jeep. First, the judge erred by ruling any deficiencies in the actions of the police were irrelevant since a search warrant was not necessary. Article I, §10 of the South Carolina Constitution granted appellant additional protections against unreasonable search and seizures. Second, the evidence allegedly seized from appellant's Jeep should not have been admitted since a return of the items was *not* done in violation of S. C. Code §17-13-140. The integrity of the evidence gathering process was strongly at issue in this case, and appellant was prejudiced by the state's failure to file the statutorily mandated return.

Defense counsel moved to suppress evidence taken from appellant's Jeep because, inter alia, no return was made to the search warrant as required by S.C. Code §17-13-140. There was no good faith effort on the part of the police to comply with the statutory mandates of S.C. Code §17-13-140 and §17-13-141. R. 28, ll. 14-23; Motion to Suppress. R. 532.

Defense counsel argued the vehicle was in the possession and control of appellant and that he therefore had standing under State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), to challenge the admission of the evidence. The judge would ultimately agree appellant had standing. R. 30, l. 18 – 31, l. 3; R. 45, l. 1 – 46, l. 11. Defense counsel also relied on Article I, §10 of the South Carolina Constitution, which provided a higher expectation of privacy than the federal constitution. R. 31, ll. 4-9.[1]

[1] Defense counsel Jenkinson argued State v. McKnight before the Supreme Court. R. 45, ll. 13-18.

Counsel distinguished cases holding that the return requirement of S. C. Code §17-13-140 was only a ministerial act. Counsel noted that in this case the return had never been made. It was therefore impossible to verify the items that were allegedly seized from the Jeep. Counsel analogized the situation to a defective chain of custody. R. 39, l. 9 – 42, l. 23.

As will be seen infra, the first trial ended in a hung jury, and both sides were aware of Officer Parrott's alleged mistake in collecting evidence. Parrott had written that appellant's underwear was taken from Jamal Weaver, who was at Arnold Weaver's home where the Jeep was seized on the night of the murder. R. 393, l. 21 – 401, l. 18.

Parrott would later claim he took appellant's underwear from him at the jail, not Weaver's house, and that they were bloody. Appellant would offer testimony from a jailer that appellant's underwear was not bloody. The jailer said that he would have seized them — for health reasons if no other reason — if they had been bloody. Arnold Weaver also testified he did not see blood on appellant when he came to his house that night, allegedly with the Jeep, before the police arrived. R. 233, l. 1 – 249, l. 20; R. 254,l. 7 – 264, l. 19; R. 286, l. 23 – 300, l. 15; R. 308, l. 15 – 266, l. 2.

Thus, the search and failure to make a return to the search warrant issues in this case were substantive on the issues of the integrity of the state's evidence, and appellant's guilt or innocence. This is not just an exclusionary issue case.

As stated, in denying appellant's motion to suppress, the judge ruled appellant had standing for his suppression motion. However, the judge ruled the search warrant was not required under the Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925), "automobile

exception" doctrine. Therefore the judge reasoned that the failure to comply with the statutory requirements of S.C. Code §17–13–140 and 141 did not matter. R. 334, l. 17 – 345, l. 2.

Defense counsel then repeated his argument that Article I, §10 of the South Carolina Constitution afforded appellant additional protection from unreasonable searches and seizes. He noted that the police correctly thought they had the have a search warrant to search appellant's Jeep. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) was given to the Court as authority. R. 329, ll. 8–16; R. 341, l. 18 – 345, l. 2. The judge responded that the search warrant was not needed in this case, and the fact that the state did "not follow the rest of the statutory provisions does not invalidate the search because it is not a required step. It's something they could have done, but did not have to do." The judge stated that he was the trial judge in Forrester. The judge also stated that there was no additional right provided by the state Constitution in this case. R. 339, l. 12 – 345, l. 2.

Trial evidence

Officer Sandy Thompson was dispatched to investigate a shooting at Rob's Place on June 23, 1999, between 11:00 and 12:00 p.m. He found the victim fatally wounded from gunshots in the parking lot of Rob's Place. The decedent was wearing only his shorts and socks as he lay dead in the parking lot. Thompson said there were drag marks nearby. He testified this indicated the body had been moved. A watch and necklace were lying near the decedent. R. 59, l. 16 – 67, l. 5.

Thompson testified he began looking for appellant's green Jeep as a result of his investigation. R. 73, l. 12 – 74, l. 2. Thompson found appellant's Jeep at the home of Arnold Weaver. R. 74, ll. 1-20.

Thompson said he opened the door to appellant's Jeep and smelled bleach. Thompson said he seized "a bag of wash" from the "pump house" near the Jeep. R. 75, l. 23 – 77, l. 1. The Jeep was towed to the county jail "and locked up at the county jail." R. 77, ll. 10–15.

The state wold later introduce evidence over appellant' s continuing objections that blood was located in the vehicle, and on a cloth found inside appellant's Jeep.[2] R. 405, l. 15 – 411, l. 22. SLED Agent Steve Lambert testified:

> I developed DNA profiles from each one of those items and determined that each one of those items that I just mentioned all matched Dwayne McKnight [the decedent] the blood in the car – on the door handle, the blood on the exterior of the car, the blood on the shammy cloth and the blood on the underwear and also the blood on the passenger door of the Cadillac [the decedent's car] as we were excepted to since that was the – the point where the victim was shot.

R. 415, ll. 12-20.

Defense counsel later moved for a new trial based upon the seized evidence seized from appellant's jeep. Defense counsel repeated his argument that Article I, §10 of the South Carolina Constitution provided appellant with a higher expectation of privacy than the federal constitution. R. 517, l. 10 – 519, l. 9.

Other evidence

The state's case was essentially the testimony of Leroy Powell and Loretta Scott. Powell testified that he saw the decedent with Antonio Brown and Tracey Scott outside

[2] It was obviously the state's contention that the Jeep had been recently cleaned. However, during the suppression hearing appellant's Aunt testified that in addition to appellant regularly driving the Jeep, another member of appellant's household, Priscilla, used the Jeep also. Priscilla kept cleaning supplies in the Jeep for use in her job cleaning houses or Condominiums on Pawleys Island. R. 279, l. 17 – 283, l. 4.

Rob's place that night. Powell claimed that appellant "opened fire" on the decedent, and then told Powell, "You ain't seen nothing." R. 114, l. 2 – 118, l. 24.

Powell admitted he did not give the police appellant's name on the night of the shooting, He said, "Tracey Scott was talking to his mama [Loretta Scott] and Investigator Sandy [Thompson], right? He said his name was Levell Weaver, and that's how I remember it from then on out." R. 153, l. 2 – 154, l. 2.

Tracey Scott and Antonio Brown could not be located to testify at appellant's trial. However, Brown had earlier testified that he did not see who the attacker and shooter was that night. Brown did not implicate appellant, and there is not any indication of any motive for the shooting in this record.[3] See R. 1-26.

Loretta Scott was called to the nightclub after the shooting by her son Tracey Scott. The defense sought to show that Loretta Scott was giving her son advice, and was currying favor with law enforcement to save her son because she was the Assistant Clerk of Court. R. 487, l. 18 – 493, l. 16. Scott claimed she saw appellant standing over the dead victim with a gun and blood on his person when she arrived at the club *fifteen to twenty minutes* after her son called. Scott said appellant told her, "just leave. He said you don't need to be here. I said, no, Tracy called me and I need to see him." Scott also maintained she did not know where her son was at the time his testimony was sought during this trial.[4] R. 210, l. 6 – 213, l. 18; R. 220, l. 17 – 232, l. 16.

[3] The state did not proceed on the armed robbery charge. Further, the actions of those at Rob's Place following the shooting are strange at best.

[4] See, also, R. 51, l. 20 – 52, l. 20.

Robert Williams, the owner of Rob's Place testified appellant was acting normally after the shooting. R. 233, ll. 4–18. Williams remembered Loretta Scott coming to the club that night after the shooting. Williams said Scott did not say anything to him about allegedly seeing appellant outside with a gun, or standing over the victim. Williams acknowledged the delay in the police being called after the shooting — "a right good bit of time. Williams said Loretta Scott was at the club during the delay. R. 203, l. 16 – 206, l. 19.

Officer Ricky Weston admitted Loretta Scott refused to give him a statement, although other people did cooperate. R. 463, ll. 5–20.

Parrott also acknowledged that although the victim was shot thirteen times, the police could only account for four bullets, and seven casings at the scene. Parrott refused to admit that another firearm — or two shooters — could well have been involved. No 9mm weapon was ever recovered to test against the evidence that was found or was not missing. R. 381, l. 1 – 384, l. 13.

SLED agent David Collins admitted another gun could have been involved given the evidence. R. 438, l. 2 – 452, l. 3.

Discussion

Defense counsel correctly argued that this case was distinguishable from other cases which held the return to the search warrant requirement of S.C. Code §17-13-140 was simply a ministerial act. See, State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992); State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995). Defense counsel noted in this case that no return was filed by the state.

An issue was made throughout the trial of the defective chain of custody. Parrott claimed he did not take the underwear from Jamal Weaver at Arnold Weaver's house that

night as he put in his affidavit. Parrott said he took the underwear from appellant at the jail because there appeared to be blood on them. Parrott said his earlier statement that he received the underwear from a Jamal Weaver was a mistake. He denied he knew that Jamal Weaver was at Arnold Weaver's house that night. Parrott also refused to admit that if he was truthful about this fact it severely damage the state's ability to tie appellant to the bloody evidence. R. 396, l. 3 – 401, l. 14.

As stated, the jailer testified appellant's underwear were not bloody as Parrott claimed. R. 354, l. 8 – 357, l. 12; R. 387, l. 6 – 391, l. 6; R. 471, l. 6 – 278, l. 16.

The solicitor argued the state's handing of evidence was a weight question and did not go to the admissibility of the evidence. R. 323, l. 6 – 324, l. 5. Defense counsel argued the evidence should be excluded because it was grossly unreliable and the state's chain of custody was defective. Counsel argued there was evidence appellant's underwear was not blood and the evidence should be excluded. Counsel strongly challenged the integrity of the state's evidence. R. 324, l. 13 – 327, l. 7.

The judge allowed appellant's bloody underwear and the evidence allegedly seized from the Jeep to be admitted. From the admission of that evidence, SLED Agent Steve Lambert testified that there was a one in fifty-one trillion percent the evidence found in the Jeep, and on his the underwear was not the victim's DNA. R. 415, ll. 1-25.

In <u>State v. Freeman</u>, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995), this Court considered a similar issue. The defendant argued the search warrant was invalid because it was not never properly executed and returned. This Court distinguished cases saying that the return requirement of S.C. Code §17-13-140 was only ministerial. As in this case, the

defendant's challenge in Freeman was more broad because a return was *never* properly executed or completed, and therefore the search warrant was invalid.

The obvious purpose of the return requirement is to assure the integrity of the evidence seizing and handling process. It is meant to assure that the victim's blood does impermissibly come to be placed on the defendant's property to wrongfully implicate him.

Given the admitted errors by Officer Parrott, and defense counsel's not-so-subtle intention that Parrott was not telling the truth about the gathering of evidence, the failure to properly execute a return – any return to the search warrant – was not simply a ministerial defect.

As seen, the trial judge reasoned the search warrant was not necessary under the "automobile exception" cases. However, the state did get a search warrant in this case, as defense counsel argued the police knew they needed, and the return requirements of S. C. Code §17-13-140 therefore must be complied with for the reasons stated above.

Further, counsel correctly argued that under Article I, §10 of the South Carolina Constitution, appellant's had greater protections in this regard than under the federal Constitution. Counsel noted the Supreme Court's opinion in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). In Forrester, the Supreme Court held that by articulating a specific prohibition against "unreasonable invasions of privacy," South Carolina has indicated "that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution, resulting in the exclusion of the discovered evidence." State v. Forrester, 541 S.E.2d at 841.

The Supreme Court then noted that the South Carolina Constitution offered a higher level of privacy protection than the Fourth Amendment on the extent of consent, although it

rejected the defense argument that the state Constitution required the police to tell the suspect she had a right to refuse to consent to any search at all. State v. Forrester, 541 S.E.2d at 841.

The Court in Forrester held that the police officer exceeded the scope of the defendant's consent by taking the lining out of her purse. Similarly, in State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991), this Court noted that the state Constitution could expand rights beyond the federal Constitution. However, the Court in State v. Austin found that the state constitutional issue was abandoned by the failure to argue it in the appellate brief.

Thus, whatever can be argued about the automobile exception federal cases, appellant had greater rights under our state Constitution. Cf. Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999). The police obtained a search warrant as they were obligated to do where they had secured a vehicle that was no longer mobile. That was clearly the policy of the police department, and that also speaks volumes about their obligation to follow our state's statutory provisions on search warrants.

South Carolina Code §17-13-140, the return to the search warrant requirement, when read with the South Carolina Constitution, Article I, §10, makes it apparent that the judge's ruling that the return to the search warrant requirement was irrelevant was erroneous.

The Court erred by admitting the evidence seized from appellant's jeep at Arnold Weaver's house, where Jamal Weaver was said to be, where no return was made to the search warrant as mandated by S.C. Code §17-13-140. This was particularly true given the state's admitted problems with handling the evidence or remembering where it was actually

seized. Further, our state Constitution provided appellant with additional protections — his right to privacy and his right against unreasonable searches and seizures — beyond those contained in the federal Constitution. See Article I, §10, South Carolina Constitution. Appellant should be granted a new trial.

2.

The trial judge erred by admitting hearsay testimony that "all of the evidence led to" or pointed to appellant in this case. Officer Ricky Weston's testimony that all of the evidence led to appellant was based on what others allegedly told him. As such, it was impermissible and highly prejudicial hearsay evidence.

Officer Ricky Weston testified he received a dispatch to the shooting at 10:58 p.m. while at his residence. R. 456, l.1 3 – 457, l. 5. Other officers were already on the scene when Weston arrived. Weston said that Lieutenant Sandy Thompson told him to start taking statements. R. 457, l. 22 – 461, l. 17.

On re-direct examination, the following occurred:

> Q. Did – Let me ask you this, Lieutenant Weston. Why didn't you do gunshot residue tests on these other people [at Rob's Place at the time of the shooting]?
>
> A. Well, all evidence that the people they interviewed there at Rob's Place –
>
> MR JENKINSON: I'll object to what these people said, Your Honor.
>
> THE COURT: All right. I'm going to sustain it as such because you did ask him the question, so he can give a reason without saying what the people told you. You can say what his investigation revealed. Thank you.
>
> THE WITNESS: All the evidence led to Levell Weaver. I didn't see no blood stain on none of the witnesses that I was talking to at that table. All of the witnesses that I talked to led me to believe that –
>
> MR JENKINSON: I object to that, Your Honor.
>
> THE COURT: Overruled.

> THE WITNESS: Led me to believe that the subject that we were looking for was the only suspect that really was involved with doing the killing at this crime scene, and I didn't see no reason to take swabs from those subjects at that table.

R. 463, l. 24 – 464, l. 19.

Discussion

First, it is important to note that this case is not State v. Brown, 317 S.C. 55, 451 S.E.2d 88 (1994), where the Court held statements were not hearsay if they were only offered to explain why the police began their surveillance. In German v. State, 325 S.C. 25, 478 S.E.2d 687(1996), the Court distinguished State v. Brown, noting that statements in Brown did not refer specifically to the defendant, but to drug activity in the apartment complex in which the defendant lived.

Here, as in German, evidence that all of the evidence pointed to appellant was highly prejudicial because it was not meant to show how or why the police started their investigation. Its purpose was to impermissibly point to the guilt of appellant through what others allegedly told Officer Weston. The evidence was not introduced in the limited manner permitted in State v. Brown, and it was highly prejudicial.

However, this case is different from German v. State in an important aspect. In German the evidence was that agent Poole had received tips that German was "distributing or selling cocaine." German v. State, 478 S.E.2d at 688 That was an impermissible comment or attack on his character because he was said to be a drug dealer. Evidence that someone is a drug dealer is evidence of bad character in general.

Here, the allegation was not as direct, and did not go to character. Meaning, it was a statement that other people had given Weston information that led him to believe

“all of the evidence” pointed to appellant as the murderer — this single transaction. As such, this was a hearsay problem. One of the primary evils of hearsay is that appellant could not confront and cross–examine the people who allegedly gave Weston “all of this evidence.”

Appellant should be granted a new trial given the obviously prejudicial nature of Weston’s unfair hearsay assertion that appellant had no way to challenge.

3.

The court erred by refusing to grant a mistrial where the solicitor impermissibly commented on appellant's right not to testify. The solicitor's comment was burden shifting, and a mistrial should have been granted.

In his closing argument, the solicitor said that Loretta Scott came to the crime scene and saw appellant standing over the victim in the parking lot. He argued, "he [the victim]:

> [w]as laying there and Levell Weaver was standing down near him or over him she [Scott] said. He had the gun in his hand and he had blood on him. Now, I can't explain to you why Levell Weaver was there.
>
> That's one of the things Mr. Nettles said, why would Levell Weaver stay around there all that time. Nobody can tell you that except Levell Weaver.
>
> I can't say why somebody would do something, but we know he was there because Ronald Williams said that he went out there a couple of minutes after the thing, after the shooting occurred, he went out the door. And he – he just didn't go out there –
>
> MR. NETTLES: Your Honor, please. We would object to that line of argument.
>
> THE COURT: What's the objection, Mr. Nets?
>
> MR. NETTLES: Pardon?
>
> THE COURT: What is the objection?
>
> MR. NETTLES: It's a matter of law that needs to be taken up outside of the presence of the jury.
>
> THE COURT: Come here.
>
> (Whereupon a bench conference was held).

R. 501, l. 13 – 502, l. 8.

The Court then gave a short curative instruction that the state had to prove the defendant's guilt beyond a reasonable doubt, and that the defendant had not burden of proof. R. 5020, l. 9 – 503, l. 18.

Following the solicitor's closing argument, the judge noted appellant made a timely motion for a mistrial based on the solicitor's argument. The judge stated that defense counsel objected that the argument was burden shifting and violative of the defendant's constitutional right not to testify. The judge also put on the record that defendant did not think any curative instruction could cure the damage. The judge said defense counsel's timely objection preserved the issue. R. 513, l. 12 – 514, l. 18.

Discussion

It is improper for the solicitor to refer to or comment upon a defendant's exercise of a Constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Such comments may not be made either directly or indirectly. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).[5]

The Fifth and Fourteenth Amendments forbid comments by the solicitor on the defendant's silence or his failure to testify. State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987).

The solicitor's comment that only appellant could tell the jurors why he was outside where the victim was found shot was a comment on appellant's right not to testify. It was highly prejudicial because it told the jury appellant was in a unique position to tell them what happened, and he had not come forward.

Defense counsel correctly argued the curative instruction could not remedy the prejudice, and that a mistrial was warranted. The solicitor's comment in his closing argument on appellant's failure to present evidence he was uniquely in the position to give — by testifying — was as pointed as possible in its devastating effect, and it denied appellant his right to a fair trial. See State v. Sweet, 342 S.C. 342, 536 S.E.2d 91 (Ct. App. 2000).

[5] Overruled on other ground in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Williamsburg County Court of General Sessions for a new trial.

Respectfully submitted,

____

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

This 24th day of November, 2003.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

____

ROBERT M. DUDEK
Assistant Appellate Defender

1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant.

November 24, 2003

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEVELL WEAVER,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEVELL WEAVER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Derrick K. McFarland, Esquire, this 24th day of November, 2003.

____
Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 24th day of November, 2003.

____________________________(L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005 .

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

November 24, 2003

Derrick K. McFarland, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Levelle Weaver

Dear Derrick:

Enclosed please find two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Assistant Appellate Defender

RMD/srw

Enclosure