No. COA 21-629 SEVEN BC DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

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 v. ) **From Edgecombe**

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JOHN MICHAEL MCNEIL )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**QUESTIONS PRESENTED**

1. **WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT’S MOTION TO REDACT SECTIONS OF THE INTERROGATION IN WHICH THE DETECTIVES MADE UP INCULPATORY WITNESS TESTIMONIAL STATEMENTS?**
2. **WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT’S REQUESTS TO PUT BEFORE THE JURY EVIDENCE THAT MR. STRICKLAND HAD A RECORD FOR VIOLENCE WHICH WAS CONTRARY TO THE PROBATION OFFICER’S ASSURANCE THAT MR. MCNEIL HAD NOTHING TO FEAR FROM MR. STRICKLAND?**

**PROCEDURAL HISTORY**

 On November 18, 2019, John Michael McNeil was indicted on one count of first-degree murder. On January 22, 2020, the State informed the court it was not seeking the death penalty. The court ordered the case declared non-capital. The case came on for trial at the March 29, 2021 Session of the Edgecombe County Superior Court, the Honorable Craig Croom presiding. On April 7, 2021, the jury returned a guilty verdict on first degree murder.

 The court sentenced Mr. McNeil to the mandated life without parole sentence. (Tp. 646)

**GROUNDS FOR APPELLATE REVIEW**

 This is an appeal of right pursuant to the provisions of N.C. Gen. Stats. §§ 7A-27(b) and 15A-1444(a) and Rule 4(a) N.C.R.App.P. from final judgments of conviction by a defendant who pled not guilty and was found guilty of non-capital crimes.

**STATEMENT OF THE FACTS**

 John McNeil was living alone in his family’s home in the summer of 2019. Margaret Solomon, the pastor of Lord Jesus Christ Center in Rocky Mount, promised Mr. McNeil’s mother she would take care of John and his sister, after her death. When Mr. McNeil’s mother died, the church purchased the family’s home at 1417 Hill Street in Rocky Mount. Mr. McNeil and his sister were the only individuals on the lease. Gabriel Ball convinced Mr. McNeil to take in Kenneth Strickland, a convicted repeat felon. Mr. McNeil invited Mr. Strickland to stay with him. After Mr. Strickland moved in at the end of July 2019, Mr. McNeil discovered Mr. Strickland was dealing drugs out of the house and paying individuals with counterfeit cash. Pastor Solomon demanded Mr. McNeil tell Mr. Strickland he could no longer stay in the house. On August 27, Mr. McNeil told Mr. Strickland he had to leave. When Mr. McNeil returned home that evening, he realized Mr. Strickland had not left. The two men argued and fought. Mr. McNeil was cut and Mr. Strickland was stabbed. As there was no working phone in the house, the two men walked across the street to ask a neighbor to call emergency services. The neighbor ordered them off his porch. The men walked back across the street and re-entered Mr. McNeil’s home. Mr. Strickland was injured again and died in the bedroom he was using.

A. John McNeil Told The Paroled Felon Who He Had Invited To Stay In His Home That He Needed To Leave After He Realized The Man Was Dealing Drugs And Passing Counterfeit Bills

 In July 2019 John McNeil was living by himself in the family home where he had lived all his life. He worked maintenance at a nearby McDonalds. (Tpp. 868, 870) Margaret Solomon, the pastor at Lord Jesus Christ Center in Rocky Mount, was close to the McNeil family. She promised his parents that when they died she would take care of John and his sister. After John’s mother died, Pastor Solomon paid off the house and allowed John and his sister to live there. (Tpp. 994-995) When Pastor Solomon discovered that Kenneth Strickland had moved into the home, she told John that he and his sister were the only individuals on the lease, and he should ask Mr. Strickland to leave. (Tpp. 877, 995) Mr. McNeil had allowed Mr. Strickland to move in when a mutual friend told him Mr. Strickland was living at a halfway house and was tired of living there. The friend told him it would be mutually beneficial because Mr. Strickland had a car and could drive him to work. (Tp. 871)

 After Mr. Strickland moved into the home, he told Mr. McNeil he had drug-related charges and that his hands were registered in Nash County. To get respect, he beat people up. (Tpp. 873, 878, 879) Mr. Strickland started selling drugs from the house. When Mr. McNeil went into the bedroom Mr. Strickland was using, he saw a white substance in a bag. Mr. Strickland told him it was heroin. Mr. McNeil also saw cocaine and marijuana. (Tp. 874) Mr. Strickland had counterfeit money he used to pay people. Mr.McNeil was afraid angered individuals might come and shoot up his house. (Tp. 875)

 On Monday, August 26, as Mr. McNeil was walking toward his home, he spotted smoke and fire trucks. Mr. Strickland admitted he had accidentally started a kitchen fire. (Tp. 881) Crime scene photographs showed substantial fire damage in the kitchen. (Tpp. 898-899) The next day Mr. McNeil told Mr. Strickland it was mandatory that he leave, because his landlord had told him that he and his sister were the only names on the lease. (Tpp. 880-881, 883) They talked in the morning. Mr. Strickland agreed to leave by that night. (Tp. 884)

 When Mr. McNeil returned home after 10:00 p.m. he noticed Mr. Strickland’s car was still in the yard. (Tp. 884) Mr. Strickland told him somebody had broken into the house by busting out the back door window. Crime scene videos showed the broken window. (Tp. 886) Mr. McNeil told Mr. Strickland that he had put his life in danger by being a drug dealer. (Tpp. 885, 890) Mr. Strickland became aggressive and punched Mr. McNeil in the jaw. (Tp. 888) The men traded punches. (Tpp. 888, 891) When Mr. McNeil grabbed Mr. Strickland, he saw him take something from his pocket that looked like a box cutter. (Tp. 895) Mr. McNeil was cut in his abdomen. (Tp. 396) Body cam footage showed blood running down his stomach. (Tp. 892) After he was cut, Mr. McNeil grabbed a kitchen knife, reached over Mr. Strickland’s back and stabbed him. (Tp. 889) Mr. McNeil was in fear for his life and believed it necessary to use deadly force to defend himself. (Tp. 895)

 After Mr. Strickland was stabbed, Mr. McNeil told him his cell phone was dead. McNeil did not know the pin code on Mr. Strickland’s cell phone. (Tp. 903) Mr. McNeil grabbed Mr. Strickland to take him outside to the neighbors, so that someone could call for an ambulance and the police. The two men walked across the street to Mr. Pittman’s home. (Tp. 905) Mr. Pittman yelled for the men to get off the porch because they were scaring his children. (Tpp. 219, 906) The men walked to another neighbor’s house, but there no one came to the door. Mr. Pittman watched the two men walked across the street to John’s house. (Tp. 219)

 When they re-entered the house, Mr. Strickland became aggressive. He hit Mr. McNeil in the face with a hard object chipping his tooth. (Tpp. 913, 914, 997) Mr. McNeil grabbed a bat and struck Mr. Strickland twice on the side of his head. (Tp. 915) He dragged Mr. Strickland into his bedroom where he fell face down on the floor and died. (Tp. 915)

 Mr. McNeil got sick. He was in the bathroom, cleaning up when he heard knocking. The second time he heard knocking, Officer Crumpton announced it was the police. (Tp. 916) John testified he had to do what he had done because Mr. Strickland was going to kill him. (Tp. 988)

B. Police Officers Found Trails Of Blood Leading From John McNeil’s House Across The Street To Mr. Pittman’s With Objects Strewn Along The Path

 Officers Pennington, Crumpton and Fields responded to a call from Mr. Pittman at 1408 Hill Street in Rocky Mount at 11:55 p.m. on August 27, 2019. (Tp. 198) Officer Pennington narrated photographs taken of Mr. Pittman’s front porch, showing a large amount of blood on the door, porch and steps. (Tpp. 199-207) The body cam footage of the officers questioning Mr. Pittman on his front porch was played for the jury with hearsay redacted. (Tpp. 253; SE 20[[1]](#footnote-1)) Mr. Pittman told the officers he heard banging on the door and men yelling to open the door because they needed help. (Tpp. 219, 253; SE 20at 2:27) Mr. Pittman was interviewed later at the police station. This interview was entered as State’s Exhibit 151. He again told the officers that he heard men yelling: “Open the door! open the door! Help!” (Tp. 729; State’s Exhibit 151 at 3:12). Mr. Pittman told the men to go away. After he took time to check on his family, he opened the door and watched the two men walking across the street together. He told the officer the men were trying to get help. As they crossed the street, the men were just walking. (State’s Exhibit 151, 4:48 – 5:00)

 After speaking to Mr. Pittman on his front porch, the officers headed across the street to see if anyone was injured or had died. As they walked toward 1417 Hill Street, officers noticed a bloody sandal, eyeglasses, and a large bloody knife. (Tpp. 220-221) The officers knocked on the front door. It took five to seven minutes for John McNeil to come to the door. (Tpp. 230, 272) It appeared to the detectives that Mr. McNeil had been in a physical altercation. He was sweating and had a wound on his abdomen, which could have been a stab wound. (Tpp. 285, 337, 396) After Mr. McNeil answered the doors, the officers searched inside and found blood in the living room, blood in the kitchen and a baseball bat. (Tpp. 250, 339) Crime scene photographs were shown to illustrate the trail of blood, the blood in the home and the objects the detectives found. (Tpp. 259-267) Mr. Strickland was lying dead in the back bedroom. (Tp. 252) Photographs of the body and bodycam footage showing the body were shown to the jury. (Tpp. 310, 312, 305-310, 361-365) Officers found narcotics paraphernalia, blunt wrappers, packaging, and baggies in the bedroom Mr. Strickland was using. (Tp. 351) Counterfeit $100 bills were seized from Mr. Strickland’s room, along with lottery tickets or receipts. (Tpp. 504, 56-517)

 Mr. McNeil told the officers at the door that he and his roommate had been assaulted by two unknow men. (Tp. 418) He was driven to the police station for interrogation. The interrogation lasted over four hours, from 1:30 a.m. until 5 a.m. The DVD was played and Detective Whichard summarized what was being said. Mr. McNeil told the detectives Mr. Strickland had just gotten out of prison and needed a place to stay. (Tp. 695) He then told the detectives men had broken in who had had dealings with Mr. Strickland about drugs and fake cash. After Mr. Strickland ran out to try to get help, he returned to the home and the men continued their attack. The men left in a black vehicle. (Tpp. 696-699) The officers told Mr. McNeil witnesses had made statements incriminating him, but the officers had invented these witness statements. The court instructed the jurors that the law allows an officer to lie to a defendant. (Tpp. 607, 770, 804) At approximately the 4:07 mark in the interrogation, Mr. McNeil admitted he stabbed Mr. Strickland after Mr. Strickland threatened him. (Tp. 807) He told the officers the argument began because Mr. Strickland was bringing guns into the house, attracting the wrong type of attention to the house, and giving fake $100 bills to people. (Tp. 808)

 The pathologist testified the cause of death was due to multiple sharp and blunt force injuries involving the head and torso. (Tp. 467) His examination revealed blunt force head injuries and fractures of the skull. The stab wound was to the torso with disruptions of the lung, rib, diaphragm, and stomach. (Tp. 449)

C. A Probation Officer Failed To Warn Mr. McNeil That Mr. Strickland’s Criminal Record Include A Felonious Assault

 Mr. Strickland’s probation officer, Erin Reid, told the jurors Mr. Strickland had been released from prison in January after serving an active sentence for possession of a Schedule II drug. He moved from one transitional house to another. (Tpp. 474,477) Mr. Strickland had given Ms. Reid a new address on July 30, 2010. She saw him on August 16 and August 21 at Mr. McNeil’s house. (Tp. 475) On one of the visits she talked to Mr. McNeil, who asked her if Mr. Strickland was on probation for anything serious. She told Mr. McNeil he didn’t have anything to worry about. (Tp. 479) Even though she was his probation officer, Ms. Reid had not reviewed Mr. Strickland’s record. (Tp. 489) Defense counsel argued that the State had opened the door to entering Mr. Strickland’s record. The State objected. The court sustained the State’s objection. (Tp. 486) Defense counsel called Kathy Jones, who was with the Nash County clerk’s office. Ms. Jones testified before the jury as to Mr. Strickland’s conviction for sale and delivery of cocaine in November 2017. (Tp. 1000) After the jury left, defense counsel made a proffer of Mr. Strickland’s other convictions, including multiple counts of felony braking or entering and felony larceny, thefts of motor vehicles, felony possession of cocaine, possession of a firearm by a felon and assault with a deadly weapon. (Tp.1005 – 1011)

**ARGUMENT**

1. **THE TRIAL COURT ERRED WHEN INSTEAD OF REDACTING THE OFFICER’S IMAGINARY INCULPATORY WITNESS TESTIMONIAL STATEMENTS IT INSTEAD INSTRUCTED THE JURY THAT IN NORTH CAROLINA OFFICERS MAY LIE TO DEFENDANTS DURING INTERROGATIONS**

 Trial counsel objected to playing to the jury the video of the interrogation of Mr. McNeil without first redacting incorrect statements made by the officers. The detectives told Mr. McNeil witnesses told police they saw Mr. Strickland running to get away, the two men fighting, and that Mr. Strickland had stated Mr. McNeil had stabbed him. These allegations were not based on reality, as Mr. Pittman, the only eyewitness, told the officers the two men were looking for help together and walked away together. No witness told officers Mr. Strickland was trying to get away from Mr. McNeil, that the two men were fighting in the street or that Mr. Strickland told anyone Mr. McNeil had stabbed him, Defendant could not cross-examine the witnesses. Defense counsel objected based on his constitutional right to confront witnesses against him. Instead of granting the Defendant’s request that the officer’s imagined-inculpatory statements be redacted, the Court ruled it would instruct the jurors that officers can lie to defendants, without specifying what they were lying about. (Tpp. 597, 607) As Mr. McNeil’s defense was that Mr. Strickland attacked him and he responded in self-defense, the allegations were grossly prejudicial. The Court’s instruction did not cure the constitutional error, as Defendant could not confront non-existent witnesses. Allowing introduction of the statements of non-existent and therefore unavailable witnesses violated Mr. McNeil’s constitutional rights to confrontation, due process, and a fair trial. U.S. Const. Amends. V, VI and XIV; N.C. Const. Art. I, Secs. 19 and 23.

standard of review

 The standard of review for questions of law is *de novo*. Such errors are fully reviewable by this Court. *Watkins v. N.C. State Bd. of Dental Examiners*, 258 N.C. 190 (2004); *State v. Ladd*, 308 N.C. 272; *State v. Khan*, 366 N.C. 448, 453 (2013); *In re Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647 (2003).

**discussion**

A. Defense Counsel Objected To Playing Parts Of The DVD In Which Officers Stated Witnesses Had Seen Mr. Strickland Being Chased By Mr. McNeil When The Detectives Admitted They Had Made Up That Part

 The only witness the officers talked with on the day of the incident, whose interview was entered into evidence, was Mr. Pittman. Mr. Pittman told the officers who came to his house and the officers who interviewed him at the police station that the men were pleading for help and when no help was offered, they walked back to Mr. McNeil’s house together. (Tpp. 219, 906) Despite Mr. Pittman’s statement, the officers told Mr. McNeil during the interrogation that neighbors saw Mr. Strickland running to get away from Mr. McNeil, the two men fighting and that witnesses heard Mr. Strickland declare Mr. McNeil had stabbed him. When the State informed the court it intended to introduce the DVD of the interview through Detectives Denton and Whichard, the defense attorney objected, telling the court that at a few places in the five-hour long interrogation officers referred to witness statements that had not been provided in discovery.

MR. SMITH: Basically, Detective Denton makes a comment that the victim was running down the street and yelling that Mr. McNeil stabbed him and yelling for help. Like he was running away from him. And nobody has . . . there’s been no witness who testified to that. . . . And it’s just little things like that that are—you know, trying to be placed into evidence through hearsay. That is, trying to implicate my client was chasing Mr. Strickland and he was screaming for help and trying to get away from him. When nobody, no eyewitness has testified to that.

(Tp. 583) The State responded it was not introducing these third-party testimonial statements for the truth of the matter asserted. Defense counsel countered: “I mean, obviously they entered to the truth of the matter asserted trying to label my client as the attacker in this case.” (Tpp. 585-586) He continued: “They haven’t produced who these people are. He hasn’t had a chance to cross-examine them, interview them, or do anything with them and that’s how they’re trying to prove this case.” (Tp. 586) The first section of the DVD that Defendant objected to was played for the court. (Tp. 587; State’s Exhibit 132 at 4:06:16) The State made an offer of proof:

Q. All right. Detective Denton, you just heard the evidence that . . .excuse me, the videotape that was played at the time stamp was at the bottom 4:06:16?

A. I did.

Q. And it goes to 4:06:32. There you confront the defendant with that people saw them fighting and what else did you say?

A. I’m sorry.

Q. Do you remember?

A. Yes. I told that people saw him running across the street.

Q. Okay.

A. People were saying . . .excuse me, that Mr. Strickland was saying, I’ve been stabbed, he stabbed me.”

Q. And those people are not going to be testifying in this case?

A. That’s correct.

(Tpp. 588-589) Detective Denton explained he asked those questions to get a reaction from the Defendant. On cross in *voir dire*, Detective Denton admitted he did not know who these people were:

Q. You don’t know who told you that they saw my client chasing the victim and the victim saying, “Help me, this man stabbed me”? You don’t remember who said that?

A. No.

(Tp. 590) Defense counsel asked if these comments had been included in any of the discovery provided to Defendant or if it were in his report. Detective Denton answered: “No.” (Tp. 591)

 After the detective admitted the comments had not been disclosed to the defendant, defense counsel moved for a mistrial:

MR. SMITH: And, Judge, I move for a mistrial. I mean, they haven’t provided us information. And now they’re trying to get this stuff in. I move for a mistrial because they didn’t abide by discovery.

The State responded that they had provided the DVD. Defense counsel continued:

MR. SMITH: Judge, the officer said he interviewed somebody who heard the victim make an obviously relevant and inculpatory statement. He didn’t include that in a report, and he didn’t provide that to us. And we’re hearing it today for the first time.

(Tp. 592) The prosecutor asked Detective Denton if he had received “that information from other officers.” The detective responded: “Yes. That part, yes.” (Tp. 592)

 The court explained in his opinion the detective would be in a better position if he were lying about what the witnesses said, than his current stance that he was repeating what he heard from others:

THE COURT: Okay. So that’s where we get into the discovery issue. You see that difference. If you just point-blank lied. . . I hate to tell you this. He’ll be in a better position because then it’s just simply saying he’s making this stuff up and he’s lying about it. And he can say that’s my interview technique. But if we’re talking about a situation where he heard it from other officers who interviewed people on the scene then we come into the discovery issue that Mr. Smith just . . . in other word, the fact that he is telling the truth, you see how that sort of irks in a sense.

(Tp. 594) The court then *voir dired* Detective Denton:

Q. [from the court] Okay. Let me ask it this way. Sergeant Denton, did anybody actually tell you that Strickland went to someone’s house and said, “He stabbed me”?

A. That part, that particular sentence, no. That was my insert.

Q. Okay. All right.

A. I had been told. . .just to clarify. . .I was told by Pennington about running about running around yelling I’ve been stabbed help, and whatnot. I insert the part about, he stabbed me.

Q. Okay.

A. That part there is all me.

Q. Everything else is what I heard from officers.

(Tp. 596) After hearing that Detective Denton had made up the part that Mr. Strickland accused Mr. McNeil of stabbing him and the rest he had heard from other officers, the court ruled the video would not be redacted. Instead he would instruct the jurors that the law allows an officer to lie to a defendant. Defense counsel renewed his objection. (Tp. 598)

 Pursuant to this ruling, the State stopped the video at 4:06:16 for the instruction. The court instructed the jurors:

THE COURT: All right. Thank you. Ladies and gentlemen, you are about to hear a statement. You are not to consider this statement as for the truth of the matter asserted but only as to the effect on the defendant or the reaction of the defendant. This type of question is used as an investigative technique to elicit a reaction. Not that the events occurred as asked. The law allows an officer to even lie to a defendant as part of this investigative technique. You may proceed.

The court did not explain what part of the detective’s questions were lies, only that an officer may lie.

 The State played the DVD in two parts. The first part of the DVD was played during Detective Whichard’s testimony. Defendant objected to time stamp 2:01:39 to 2:01:55. In this section the detective told Mr. McNeil that neighbors saw him chasing after Mr. Strickland and the two men fighting. (State’s Exhibit 132, time stamp 2:01:49) When the video reached time stamp 2:01:35, it was paused so that the judge could repeat his instruction on lying to the defendant. (Tp. 769) Again, the court did not clarify which part of the questioning was lying to the defendant.

 On cross-examination Detective Whichard testified that he remembered telling Mr. McNeil that Mr. Strickland was seen running for help and saying that Mr. McNeil had stabbed him and that these statements were not true. He confirmed that the only eyewitness “that we have who saw those two gentlemen that night was Mr. Antoine Pittman.” (Tp. 827)

B. Allowing Alleged Witness Testimonial Statements Before The Jury When The Witnesses Are Unavailable To Cross-Examine Violates The Constitutional Right To Confrontation

The Sixth Amendment right to confrontation applies to the states through the Fourteenth Amendment of the United States Constitution. *Barber v. Page*, 390 U.S. 719, 721 (1968).The Confrontation Clause provides “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. Amend. VI. The prosecution must present its witnesses to testify in court so that the jury can observe their demeanor and the defense can have an opportunity to cross-examine the witness. “The right to confront one’s accusers is a concept that dates back to Roman times.” *Crawford v. Washington*, 541 U.S. 36, 50 (2004) See also, *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (Confrontation Clause bars “trials by anonymous accusers, and absentee witnesses”); *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (“[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.”) Testimonial evidence includes testimony at a former trial: “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford* at 68.

 Appellate review of whether a defendant’s right to confrontation has been violate is a three-fold analysis: “(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant.” *State v. Clark*, 165 N.C.App. 279, 283 (2004), quoting *Crawford* at 69. Under the first factor in *Clark*, the evidence in this case was testimonial—witnesses telling investigators that they saw Mr. Strickland being chased by Mr. McNeil, the two men fighting and Mr. Strickland shouting that Mr. McNeil had stabbed him. The second factor concerns the court’s ruling on unavailability. The court decided that the witnesses did not exist. A non-existent witness is *per se* unavailable. Defendant has met the third *Clark* factor. He could not cross-examine the witnesses the detectives alleged made the inculpatory statements.

C. The Case Law Relied Upon By The Court And The Prosecutor Is Not Applicable To The Question Of A Violation Of A Defendant’s Constitutional Right To Confrontation

 The court based its decision on its understanding that North Carolina condones lying by officers during interrogations, but that case law is limited to whether the use of trickery renders a confession involuntary. (Tp. 598) Our Supreme Court first addressed the issue of using trickery to elicit confessions in 1983. Justice Harry Martin explained that the use of trickery is not condoned in North Carolina, but if trickery is the only factor going to possible coercion, the trickery does not render a resulting confession to be involuntary: “The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.” State *v. Jackson*, 308 N.C. 549, 574 (1983) (*emphasis added*). *Jackson* and cases following the holding in *Jackson* are limited to whether the use of trickery renders the confession involuntary. *See e.g*., *State v. Barnes*, 154 N.C. App. 111, 114 (2002); *State v. Bone*, 354 N.C. 1, 13 (2001). *Jackson* does not address whether when a detective uses testimonial witness statements as a form of trickery these statements need to be redacted before publication of the interrogation to a jury.

 At trial the prosecutor relied upon *State v. Castaneda*, 249 N.C. App. 383 (2016), for the issue of whether trickery can be published to the jury. *Castaneda* held that the detective’s repeated accusations that the defendant was lying did not need to be redacted before publication to the jury. (Tp. 583). *Castaneda* did not involve detectives making up witness statements. Instead, the detectives referenced third party statements without identifying the witnesses. The *Castaneda* opinion does not discuss whether these witnesses had been disclosed in discovery or whether the statements had been made available to the defendant. As the issue in *Castaneda* was whether the detectives could mention authentic witness statements to a suspect, it is not applicable to the situation in which a defendant’s constitutional right to confrontation is violated by a detective making up testimonial inculpatory witness statements. *Castaneda’s* holding is further restricted to an examination of the effect the trickery had on the defendant and whether the trickery is relevant for any other purpose, such as impeaching the defendant. *State v. Clevinger*, 249 N.C. App. 383, 390 (2016). Mr. McNeil’s story did not change after the first imaginary witness statement that “a man without a shirt on is chasing after this guy and you are seen fighting with this guy.” (State’s Exhibit 132 at 2:01:49) Mr. McNeil continued to maintain for approximately two hours after 2:01:49 that the injuries were the result of a home invasion. Instead of impeaching Mr. McNeil’s testimony, the false witness statements had the effect of impeaching the statements made by the only eyewitness presented by the State, Mr. Pittman.

D. The Trial Court’s Limiting Instruction Did Not Cure The Violation Of Defendant’s Right To Confrontation

 The trial court’s instruction read to the jury before the detective’s false statement concerning what a witness saw did not cure the confrontation violation, because the jurors would have had no way of knowing what part or how much of the detective’s narrative was a lie. The false statement about witnesses telling the police that they saw a man being chased by another man and the men fighting was embedded in a narrative in which the detective listed factors he maintained revealed Mr. McNeil’s story about a home invasion was false. Some of the factors were accurate, such as the blood on Mr. McNeil, other factors were made-up, such as the detective telling Mr. McNeil that people were calling into the police saying, “there’s a man screaming for help and there’s another man and he’s chasing after this guy and you are seen fighting with this guy.” To cure the violation, the court would have needed to inform the jury that the State had presented no evidence that any witness saw Mr. Strickland running away from Mr. McNeil or the two men fighting. Instead, the court gave a general limiting instruction, which failed to pinpoint the false statements or address the violation of defendant’s right to confrontation. Instead the court instructed the jury that “a question” is an investigative technique:

THE COURT: All right. Ladies and gentlemen, you are about to hear a statement. You are not to consider this statement as for the truth of the matter asserted but only as to the effect on the defendant or the reaction of the defendant. This type of question is used as an investigative technique to elicit a reaction, not that the events occurred as asked. The law allows an officer to even lie to a defendant as part of this investigative technique.

(Tp. 769) In addition to not pinpointing the “lie”, the court’s instruction must have confused the jury because it referred to a “question” asked by an officer. The false statements were not posed as a question, but were instead part of the officer’s declaration of allegedly known factors.

E. Allowing The Jury To Hear A Detective Recount Inculpatory Testimonial Statements Undermining Defendant’s Claim Of Self-Defense Cannot Be Found To Be Harmless Error

 The detective’s imaginary witness statements, that “the man without the shirt on is chasing after this guy” and is seen “fighting with this guy” directly and unfairly undermined the defendant’s claim of self-defense. (State’s Exhibit 132 at 2:01:49) If he were chasing Mr. Strickland, Mr. McNeil was the aggressor and self-defense would not be available to him. The court instructed the jury on the aggressor doctrine. (Tpp. 1098, 1099, 1100, 1103, 1105, 1106) Similarly, the made-up statement that Mr. Strickland shouted “he stabbed me” went to Mr. McNeil’s claim of self-defense. Jurors who remembered hearing that witnesses saw Mr. McNeil chasing Mr. Strickland would necessarily find Mr. McNeil was not acting in self-defense. If instead the only eyewitness statement to come before the jury had been Mr. Pittman’s, Mr. McNeil would be protected by the self-defense doctrine, as Mr. Pittman told the investigators: 1) the men were shouting “open the door, open the door, help”; 2) Mr. Pittman repeated “They were just trying to get help”; and 3) Mr. Pittman responded to the officers’ questions that when the men were crossing back to Mr. McNeil’s home “they were just walking.” (State’s Exhibit 151: 3:12; 4:48-5:00) According to Mr. Pittman’s recounting of the events, John McNeil was not an aggressor. He was a man trying desperately to help his friend. As defense counsel could not cross-examine any of the alleged witnesses who accused Mr. McNeil of being the aggressor, publishing the detective’s false narrative was grossly prejudicial.

 A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). The State cannot show that introducing to the jury alleged witness statements which painted Mr. McNeil as the aggressor, when his defense was self-defense, was harmless beyond a reasonable doubt. Defendant respectfully requests this Court hold that his motion to redact the imaginary testimonial witness statements should have been granted and order his conviction vacated.

1. **AFTER THE PROBATION OFFICER TESTIFIED THAT MR. MCNEIL HAD NOTHING TO WORRY ABOUT MR. STRICKLAND’S CHARACTER, THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT’S REPEATED REQUESTS TO ENTER INTO EVIDENCE MR. STRICKLAND’S CONVICTION FOR ASSAULT**

 The State called Erin Reid, Mr. Strickland’s probation officer, to testify. Ms. Reid affirmed she told Mr. McNeil he would have no problem with Mr. Strickland. The jurors would have rightfully assumed the probation officer was familiar with Mr. Strickland and would not have given this assurance if it were not accurate. Defendant filed a motion in limine and a memorandum of law pre-trial requesting permission to introduce evidence or testimony related to the victim’s character, disposition for violence, reputation and prior criminal history. (Rpp. 44-56) The motion was based on constitutional rights to due process, a fair trial and right to confrontation. (Rp. 54) During the trial, Defendant moved to be allowed to introduce Mr. Strickland’s criminal record. The court sustained the State’s objection. (Tp. 486) After Defendant presented his evidence at trial, he made a proffer of Mr. Strickland’s record. (Tpp. 1005-1011) The court denied Defendant’s motion to introduce these records. (Tp. 1012} Denying Defendant’s repeated requests to introduce Mr. Strickland’s criminal record violated his constitutional rights to due process, a fair trial and equal protection of the law. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Secs. 19 and 35.

standard of review

 The standard of review for questions of law is *de novo*. Such errors are fully reviewable by this Court. *Watkins v. N.C. State Bd. of Dental Examiners*, 258 N.C. 190 (2004); *State v. Ladd*, 308 N.C. 272; *State v. Khan*, 366 N.C. 448, 453 (2013); *In re Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647 (2003).

**discussion**

A. After The Probation Officer Told The Jury That Mr, McNeil Had Nothing To Worry About Mr. Strickland, The Court Denied Defendant’s Requests To Put Before The Jury Mr. Strickland’s Record For Felonious Assault

 Erin Reid was an experienced probation officer. She told the jurors she had been employed by the North Carolina Department of Public Safety since May of 2010. She was familiar with Kenneth Strickland because she supervised him after his release. While he was in the transitional house, Ms. Reid saw him weekly. (Tpp. 473, 474) He had been released from prison after serving time for Possession of Schedule II. (Tp. 474) On August 21 Ms. Reid visited John McNeil’s house where Mr. Strickland was staying. She assured Mr. McNeil that Mr. Strickland would not be a problem:

Q. Did you see the defendant?

A. I pulled up to the house at 6:55 p.m. to speak with Mr. Strickland and verify his new address. And the defendant was in the yard when I pulled up, he was in the front yard.

Q. Okay. And did you speak to him.

A. I did.

Q. And tell us about that conversation.

A. It was just a quick exchange. I asked if Mr. Strickland was there. He said, “No, that he walked to the store to play the lottery.” He then asked me if he was on probation for anything serious. And I told him, “That he didn’t have anything to worry about.” It’s just not practice to discuss that with people. I don’t have permission.

(Tp. 479) On cross-examination, defense counsel asked about her access to Mr. Strickland’s prior record:

Q. Now as Mr. Strickland’s probation officer, you had access to his prior record, correct?

A. Yes.

Q. And you told Mr. McNeil he had nothing to worry about?

A. Yes.

(Tp. 481) At this point the jury was excused for a bench conference.

 During the bench conference defense counsel argued that by eliciting testimony concerning whether Mr. McNeil had anything to worry about concerning Mr. Strickland’s criminal record, the prosecution had opened the door to asking about Mr. Strickland’s prior convictions. The State responded that Ms. Reid’s assurance that Mr. Strickland was not a danger was not character evidence. (Tp. 482) The court sustained the State’s objection “at this point” based on Ms. Reid’s testimony that she had not reviewed Mr. Strickland’s record. The court added it was not “saying that you can’t get into in your case.” (Tp. 486) The court allowed defense counsel to ask questions about why she said what she did. (Tp. 487)

Q. And your testimony was you told him he didn’t have anything to worry about?

A. Yes, sir.

Q. Is it a matter of course for DPS to print a . . .an offender who was on probation, their record and include it in their file?

A. Yes.

Q. But you had not reviewed Mr. Strickland’s file, so you had no idea what his prior convictions were for, right?

A. I did not.

(Tp. 488) Ms. Reid did not explain her dereliction of duty.

 Defendant called Kathy Jones, from the Nash County Clerk of Superior Court’s office, to read into the record the offense for which Mr. Strickland was on probation. He was convicted of sale and delivery of cocaine on November 1, 2017. (Tp. 1001) After the jury had been released for the day, Defendant proffered the remainder of Mr. Strickland’s record: in February 1990 he was convicted of two counts of felony breaking or entering and felony larceny; in April 1997 he was convicted of felonious breaking or entering and felonious larceny; in March 2000 he was convicted of possession of a stolen automobile; in March 2003 he was convicted of assault with a deadly weapon, larceny of a motor vehicle and breaking and entering and felony larceny; in July 2004 he was convicted of felony possession of cocaine; and in July 2005 he was convicted of possession of a firearm by a felony, breaking and entering, larceny after breaking or entering and larceny of a firearm. (Tpp. 1004-1011)

 After the proffer, Defendant renewed his motion to introduce these records before the jury, based on Ms. Reid’s previous vouching for Mr. Strickland’s character. (Tp. 1011) The court found Mr. McNeil did not know about these convictions. In addition, the court noted “the probation officer testified that she did not review the convictions either in the file. Even though she should have, she did not.” (Tp. 1012) The court found that under Rule 404 none of the prior convictions went to a pertinent trait except for the assault with a deadly weapon. The court concluded: “So based on all of these reasons those prior convictions of the victim are excluded.” (Tp. 1012)

B. Mr. Strickland’s Prior Conviction For Assault Was Relevant, Admissible And An Essential Element Of The Defense

 After the jurors had heard the probation officer—who they could presume was familiar with the character of Mr. Strickland—assure Mr. McNeil that he had nothing to worry about, Defendant needed to impeach her testimony with evidence that Mr. McNeil did have something to worry about. In *State v Jacobs*, 363 N.C. 815 (2010), our Supreme Court held:

 Evidence of a person’s character is not admissible for the purpose of proving that he or she acted in conformity with that character trait on a particular occasion. N.C.G.S. §8C-1, Rule 404 (2009). However, this rule does not prohibit one accused of a criminal offense from offering evidence of a pertinent character trait of the victim. *Id*. rule 404(a)(2). Generally, when character evidence of a victim is admissible on behalf of the defendant, proof may be made on direct examination either by testimony as to reputation or in the form of an opinion. *Id*. Rule 404(a) (2009). Moreover, when character or a trait of character of the victim is an essential element of the defense, a defendant may also offer proof of specific instances of the victim’s conduct. *Id.* Rule 404(b) (2009). In addition, Rule 404(b) permits admission of evidence of “other crimes, wrongs, or acts,” as specified.

*Jacobs* at 821-822. The Court explained that while evidence of a victim’s prior bad acts would be impermissible if it only went to what the victim did at the time of the shooting, if the evidence is relevant to defendant’s state of mind it is not prohibited by Rule 404(b). *Id*. at 823. The opinion in *Jacobs* permitted the introduction of the victim’s prior record:

The copies of the victim’s conviction are relevant in that they are consistent with and corroborate to a degree defendant’s testimony about the victim’s violent past and prison time. Although they would be inadmissible under Rule 404(b) merely “to prove the character of [the victim] in order to show that he acted in conformity therewith, “these convictions serve the separate purpose of corroborating defendant’s testimony that the victim was a violent person who had been incarcerated. Accordingly, their admission is not precluded by Rule 404(b). Unlike prior convictions of a defendant, evidence of a victim’s prior convictions does not encourage the jury to acquit or convict on an improper basis. . . .We cannot discern a basis for excluding the victim’s convictions under Rule 403 because the victim was not on trial and, without this evidence, defendant’s self-serving testimony lacked objective corroboration on this point. Accordingly, the trial court erred in excluding this evidence.

*Jacobs* at 824-825.

 Under our Supreme Court’s holding in *Jacobs*, Mr. Strickland’s prior convictions were admissible because they were consistent with and corroborated Defendant’s testimony about Mr. Strickland’s violent past and time in prison:

A. Well, little did I know, you know, because he’s a stranger. With him living in a halfway house I knew he had been convicted, you know, been in prison. So I would talk to him, try to ask him, like, you know, why were you in prison. And he would tell me drug-related charges. And then he would bring up his hands are registered in Nash County. He beat up, you know, he wasn’t a stranger to fighting. He beat up a few people and he talked about how he gained respect in prison. And he talked about how he was the plug which means in street terms . . .

\* \* \*

Q. Okay. And you mentioned the plug stuff, the drug information. What about did he ever talk to you about assaultive-type behavior or fighting or anything like that?

A. Yes.

Q. What did he tell you about stuff like that?

A. He bragged about his fist being registered in Nash County. He said . . .

Q. What did you take that to mean, somebody’s hands being registered?

A. That he is a trained fighter and that he . . .

Q. What else did he tell you?

A. He told me about how he, like, in order to get respect, he beat people up.

(Tpp. 873, 878-879) Introduction of Mr. Strickland’s record would have corroborated “defendant’s self-serving testimony” concerning Mr. Strickland learning to use his fists in prison and his character trait of beating up people. Under *Jacobs*, Mr. Strickland’s prior convictions were admissible and relevant.

 Defendants have a constitutional right under the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment to present a complete defense. The Supreme Court has instructed that while it respects the role of the States “in the establishment and implementation of their own criminal trial rules and procedures” in some cases the Court would “have little trouble concluding’ that on the basis of the facts of the case, application of exclusionary rules deprived the defendant of a fair trial. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), citing to *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *Crane* explained:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Missisisippi*, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S. [479, 485 (1984)]

*Crane* at 690. As Mr. McNeil admitted to stabbing Mr. Strickland, his only defense to the murder charge was showing he had a reasonable belief that self-defense was necessary based in part on Mr. Strickland’s history of violent assaults. Precluding Mr. McNeil from introducing Mr. Strickland’s prior record violated his constitutional right to present a complete defense.

C. Denying Defendant His Constitutional Right To Present A Complete Defense Constitutes Reversible Error

 Denying Defendant his constitutional right to present a complete defense by introducing to the jury the “objective fact” that Mr. Strickland had a history of engaging in felonious assaults was grossly prejudicial. Mr. McNeil admitted to stabbing Mr. Strickland. The only question before the jury was whether his fear of serious injury or death was reasonable. His defense was that he feared Mr. Strickland would kill him. Allowing the jury to hear a probation officer testify that Mr. Strickland did not present a danger, without being permitted to impeach this testimony and corroborate Mr. McNeil’s testimony with the fact of Mr. Strickland’s record for felonious assault greatly weakened Defendant’s claim of self-defense. In its closing argument the State took advantage of Defendant’s inability to introduce the record, by incorrectly asserting that Mr. Strickland was not such a bad guy: “And Kenneth may not have been an angel, but he wasn’t the devil that this defendant is making him out to be.” (Tp. 1089) Mr. Strickland may not have been a devil, but without question he had a record for assault and had spent a significant time in prison which supported Mr. McNeil’s testimony that Mr. Strickland had learned to fight while incarcerated.

 A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). The State cannot show that denying Defendant his ability to present a complete defense was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, Defendant respectfully contends that this Court should reverse his convictions.

 Respectfully submitted this the 23rd day of November 2021.

Electronic Filing

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**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed electronically pursuant to Rule 26.

 I further hereby certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Sonya Caolloway-Durham, Special Attorney General, by email to scalloway@ncdoj.gov

 This the 23rd day of November 2021.

Electronic Filing

Marilyn G. Ozer

Attorney at Law

**CERTIFICATE OF COMPLIANCE**

 Undersigned counsel certifies that this Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it was prepared using Microsoft Word, Century Schoolbook, 13-point type. The word count, including footnotes and citations, is less than 8750 words, as indicated by Word, the program used to prepare the brief.

 This the 23rd day of November 2021.

Electronic Filing

Marilyn G. Ozer

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1. State’s Exhibit 20, the DVD with body cam footage uploaded contains eight files. The file for the body cam video which includes questioning Mr. Pittman is labelled 2019-005183.mp4.) [↑](#footnote-ref-1)