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SC Court of Appeals

**STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2019-000938

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THE STATE,

Respondent,

vs.

DEVIN JAMEL JOHNSON, Appellant.

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Appellant, Devin Jamel Johnson, # 359432 (Appellant) is confined in the South Carolina Department of Corrections (SCDC) as the result of his second Charleston County conviction and sentence for murdering Akeem Smalls. The Charleston County Grand Jury originally indicted him on September 12, 2011, for murder (2011-GS-10-5207) and possession of a firearm during the commission of a violent crime (2011-GS-10-5208). ***R. 608-11.***

Appellant received a jury trial before the Honorable R. Markley Dennis, Jr., on March 31 - April 3, 2014. Beattie Butler and Rhett Dunaway, of the Charleston County Public Defender's Office, represented him in the trial court. The jury convicted him of both charges. Judge Dennis sentenced him for both offenses. Appellant timely served and filed a notice of appeal.

This Court reversed his convictions on November 16, 2016. *State v. Johnson*, 418 S.C. 587, 795 S.E.2d 171 (Ct.App. 2016), *cert. denied* (Nov. 2, 2017). The Court denied the State's timely Petition for Rehearing and Suggestion for Rehearing En Banc on January 20, 2017. The State filed a Petition for Certiorari on February 21, 2017. Appellant filed a Return to Petition for Certiorari on March 28, 2017. The South Carolina Supreme Court filed an Order denying certiorari on November 2, 2017, and the Remittitur was sent to the Charleston County Clerk of Court on November 7, 2017.

On December 10, 2018, the Charleston County Grand Jury again indicted him for murder (2018-GS-10-6264, ***R. 612-13***) and possession of a firearm during the commission of a violent crime. He received his third jury trial before Judge Dennis on April 1-4, 2019.[1] John J. Kozelski, III, and Tola Familoni, of the Ninth Circuit Public Defender's Office, represented him at trial. Assistant Ninth Circuit Solicitors Stephanie B. Linder and Price Sigal prosecuted the case. The

[1] Apparently, a retrial occurred between the issuance of the Remittitur on direct appeal and the trial now being appealed. *See **Mtn. 501; 506.***

jury convicted him of murder but acquitted him of the weapons charge. ***R. 492***. Judge Dennis sentenced him to thirty-six years imprisonment. ***R. 493-94; R. 614*** (sentencing sheet).

Appellant filed a motion for new trial on April 15, 2018, in which he argued that the trial judge erroneously gave an accomplice liability instruction. ***R. 599-600***. On May 29, 2019, Judge Dennis held a hearing on the motion. ***Mtn. 497-516***. Judge Dennis denied the motion at the conclusion of the hearing. See ***Mtn. 514-16***.

Appellant timely served and filed his notice of appeal. He filed an Initial Brief of Appellant on April 6, 2020.

## STATEMENT OF FACTS

In June 2011, Appellant lived with Tenika Elmore in Orangeburg, South Carolina. She drove a blue 2008 Toyota Camry. Also, she was gainfully employed in North Charleston and she commuted to work each day from her Orangeburg residence. Appellant's sister, Sharmaine Johnson, lived in a Charleston apartment complex and the victim, Akeem "Ace" Smalls, was her boyfriend. The victim owed Appellant money. Tenika thought the two men were friendly, but she was unfamiliar with any business relationship between them and Appellant did not want her to know that he sold "weed." ***R. 97-100; 111-12***.

Appellant dropped Tenika off at work in North Charleston on the morning of June 8, 2011. They were in her Camry, which was missing a hubcap. *See* State's Exs. 25-28. After dropping her off at work, he had the car for the remainder of the day.[2] He was late in returning to pick her up on the 8th and he should have been there at 11:00 p.m. However, he did not seem "rattled" or "shaken up" and he did not tell her anything that he had seen. ***R. 100-04***.

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[2] Tenika did not always know where he would go when he dropped her off, but he often went either to Sharmaine's apartment in Charleston, or to either Walterboro or Summerville. ***R. 99-100***.

From there, they drove to Summerville and picked up Appellant's daughter. After stopping to buy gas, they went to their Orangeburg home. Throughout their trip home, he never mentioned anything that had occurred earlier that night. Tenika learned the next morning that that the victim had been killed when she overheard Appellant on the phone. Appellant acted as if this was the first time he heard about it. Finally, Tenika testified that the expression to "wet someone" meant "to shoot them," although she admitted to other possible interpretations on cross-examination. ***R. 104-07; 110-11.***

Robert Holmes testified that he and the victim, Akeem "Ace" Smalls, were close friends and saw each other frequently. Also, they smoked marijuana daily and they sold marijuana as well. They got their marijuana from Appellant, whom Holmes met through the victim. The victim had stolen a quarter pound of Appellant's marijuana, which was worth roughly $1,000.00.[3] About a week before the murder, Holmes had a conversation with Appellant. Appellant was looking for the victim but Holmes did not tell Appellant where to find him. Holmes corroborated that to "wet somebody up" meant to shoot them. ***R. 76-80; 82; 85; 95-96.***

On cross-examination, Appellant elicited that he would stash his "high-grade" marijuana at his sister's apartment. The victim would then sell it because Appellant did not know potential buyers in the area and the victim did. Mr. Holmes told police that the victim had paid some money to Appellant and that "everything seemed fine" between the two men. ***R. 90-91; 94.***

On the night of June 8th, Diangelo Bumcum went to visit friends in Building E of the apartment complex in question. Upon arriving at the complex, he saw his close friend, the victim, on the second floor of Building C. The two talked and drank on the porch, for several

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[3] He admitted on cross-examination that he told the police that Smalls stole roughly $500.00 worth of marijuana, that Smalls had given Appellant some money, and that Smalls "thought everything was fine." ***R. 91-94***. Obviously, he was dead wrong.

minutes. Eventually, Bumcum left Smalls' apartment and went to visit other friends who were in Building E. Sometime later, he saw flashlights moving around outside of the apartments and went out to investigate. He saw police officers outside and they informed him that the victim had been shot. ***R. 310-13***.

Bumcum was upset. So, he called some of his family members and told them what had happened. When he spoke to his mother, she told him to come home and he did so. When Bumcum learned that police were looking for him in connection with the murder, he voluntarily surrendered, gave a statement, and fully cooperated with the investigation because he was not involved in the murder. ***R. 313-15***.

Vanessa Bumcum Morton, Bumcum's mother, testified that she had met the victim through another relative and that he "was like family." She corroborated that Bumcum was "quite hurt" when he called and told her about the victim's death. She told him to come home and he did so. When they discovered that police were looking for him, she immediately called the police and they came to her house. Although police obtained a search warrant, she consented to a search and helped them search the house for evidence. She gave them the pants and t-shirt that her son had been wearing on the $9^{th}$. ***R. 300-06***.[4]

Charleston City Police Department Officer Matt Jahngen testified that he responded to a dispatch for gunshots fired at the Charleston County apartment complex on the night of June $8^{th}$. After he arrived, he received information that a victim of a gunshot wound had "fled the area and could not be located." Other officers were on the scene. So, he began walking down a nearby street until a woman directed him back to Building D of the complex. ***R. 116-20***.

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[4] She explained on cross-examination that her son was originally arrested for the murder because he was the last person to see the victim alive. ***R. 307-08***.

Officer Jahngen saw blood on the ground outside of Building D. He followed the trail of blood until he encountered a man who guided him to a lot near the apartment complex. While there, Officer Jahngen heard a cry for help and ultimately found the victim lying on his back, on a table, behind an abandoned house. The victim had obviously been shot[5] and although still conscious, he was generally unresponsive to questions. All he said was that he had been shot in the back and that he could not breathe. Also, he had removed all of his clothing, except for his boxer shorts and socks, and he had a "great deal of blood" on him. ***R. 120-22; 127. See also R. 165-71*** (testimony of Inv. Jeff Miller, crime scene investigator).

The Department's crime scene investigators responded to the apartment complex on June 8th and determined that the shooting had occurred in Building C. There, they found four, fired, 9 mm. Luger shell casings and blood drops in the entrance of the hallway. In the parking lot outside of the building, they found one of the victim's black Nike sandals under a car door. They ultimately found that the trail of blood drops led from the area of the shooting, to and through other Buildings D and E, and into the parking lot. The drops were also an air conditioning unit outside of E. They found bullet fragments in Building D. ***R. 129-47; 156.***

David Osborne, who was a Sergeant in the Charleston Police Department's violent crimes unit of at the time of the murder,[6] responded to the crime scene to June 8th. By the end of the evening, police had developed both a person of interest and a vehicle of interest. Sgt. Osborne collected copies of the apartment complex's surveillance video on June 9th. Although

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[5] Dr. Nicholas Batalis, the forensic pathologist who performed the autopsy, opined that the victim died from a gunshot wound to his back, which led to "massive bleeding." The bullet entered the middle of the victim's back, just to the left of center. It then traveled "through one of the ribs on the left side, went through the left lung, and then exited one of the ribs on the left side kind of where the top rib meets your collarbone." ***R. 418-21.***

[6] He was an Assistant Solicitor in the Ninth Circuit Solicitor's Office at the time of the retrial. ***R. 189***

the murder was not caught on video, the videos from "the office, C and D, in between Building C and D and in between Buildings D and E" provided important evidence against Appellant. (State's Ex. 55). In reviewing the videos, Sgt. Osborne discovered that while the videos had consistent time stamps on them, the time stamp was eight minutes slower than real time. R. ***189-98***.

Using the videos, police determined that the murder occurred at approximately 10:18 p.m. (or 10:10:30 video time) because the victim is seen running out of Building C shortly after that time. Moments later, another camera shows him running across the parking lot between Buildings D and E, which was consistent with the blood trail that had been found. The office camera shows a car that was missing the rear passenger hubcap backing into a parking space at 10:15:55 p.m., which would enable the driver to quickly exit.[7] Two men are seen getting out of this vehicle and walking toward the far end of Building C, where the murder occurred. Within fifteen or sixteen seconds of the shooting, both men are seen running back to the car, getting into it and quickly driving out of the complex. The driver was wearing a white tank top and black pants. ***R. 198; 200-13; 238-42; 270-72; 280.***[8]

Police spoke with Tenika on June 10th and she cooperated with them. Police also saw that her Camry "had the same characteristics" of the car in State's Ex. 55, such as the missing hubcap. ***R. 213-14.*** With the assistance of the U.S. Marshal's Task force, Appellant was located

[7] The car in the video was consistent with Tenika's blue Camry. ***R. 204-05***. Further, the car was very easily identifiable because it had a unique license plate, and the missing hubcap. *See* State's Exs. 25-28.

[8] The prosecution also introduced a photograph taken from the video depicting the victim as he fled his attackers (State's Ex. 62). It was taken at 10:18 p.m. in real time. ***R. 207-08***. The prosecution likewise introduced photographs of the Camry and its driver (Appellant) as State's Exs. 73-77. R. ***209-11***.

and arrested in Orangeburg on June 10th. He was brought back to Charleston the same day and he gave a videotaped statement to Inv. Osborne and Det. Craig Kosarko, which was introduced as State's Ex. 80. ***R. 214-19.***

In the portions of his statement that were played for the jury, he repeatedly denied being in Charleston for several hours. He finally admitted that he had gone to the Charleston apartment complex and claimed that he had gone to get his clothing from his sister. A "friend," whom he named only as "Creep," was with him. As they walked to his sister's apartment, Appellant claimed that he saw a dark-skinned black man fire gunshots.[9] Scared, he and Creep ran back to the car and left. He dropped Creep off and later picked up Tenika at her job. Appellant also admitted that the victim owed him money but he claimed it had been loaned to pay bills and he did not mention marijuana. R. ***220-21; 223-35; 264; 266-67; 279-80.*** *See also* State's Ex. 80.

In the interview, Appellant claimed that "Creep" had a tattoo, and that officers could find him by going to a Summerville pool hall where a man known as "Midget" could help them locate Creep. Sgt. Osborne ultimately tracked down a man in Summerville nicknamed "Creep," but this man was eliminated as a suspect because he did not have a tattoo and he had a different phone number from the "Creep" in Appellant's cell phone directory. R. ***234-35; 242-43; 272-74*** State's Ex. 80.

On June 14th, a crime scene investigator found a Luger 9 mm. bullet in a drawer of a nightstand in Sharmaine's apartment. **R.** ***172-74.*** Appellant's fingerprint was on this bullet (State's Ex. 53). Police likewise found eighteen of his prints on Tenika's Camry. ***R. 184-86; 291-95.*** On June 14th, Det. Kosarko obtained the surveillance video of the Kangaroo 2 gas station in

[9] Det. Kosarko had shown Appellant a photograph of Diangelo Bumcum early in the interview and Appellant claimed not to know Bumcum. Yet, after admitting that he saw the shooting, he told the officers that they should look for "D." Sgt. Osborne confirmed that police were interested in Bumcum because he was the last person to see the victim alive. R. ***235-37.***

Summerville because police received information Appellant had been there on the night of the murder. The video (State's Ex. 76) covers from 11:00 pm. on June 8th until 1:00 a.m. on June 9th. The video depicts Appellant arriving at the station around 12:24 or 12:25 a.m. on the 9th. "He was wearing a white tank top and dark pants," and he could be seen interacting with other people. He did not seem to be in a state of shock. ***R. 327-32.***

Appellant had a cell phone when he was arrested. Police seized it and obtained a search warrant for his cell phone records covering a period from June 4 through June 9, 2011. They thereafter received these records. ***Rr. 222; 333-37.*** Appellant's Verizon Wireless cell phone logs (State's Exhibit 57), published through the testimony of Det. Kosarko, reflected that he made or received ten calls between 9:01 and 10:02 p.m., on the night of the murder, but no calls between 10:03 and 10:34 p.m. He then made or received twelve calls between 10:35 and 11:45 p.m. R. ***367-72***; State's Exhibit 57, ***R. 525*** (cell phone logs). Also, he called the victim four days before the murder. ***R. 382.***

He telephoned a Terry Stevens at 9:04 p.m.; his mother at 9:15, 9:20, and 9:32 p.m.; and his sister, Sharmaine, at 9:30 p.m. (In the call to his sister, he blocked her from seeing his identity). Sharmaine called him at 10:35 p.m. He then called Tenika and, at 11:08 and 11:09 p.m., he called Stevens. Sharmaine called him, again, at 11:15 p.m. R. ***372-76;*** State's Exhibit 57, ***R.525.***

Additionally, there were a series of text messages between Appellant and Stevens on June 8th. At 12:08 p.m., a text message from Appellant's phone to Stevens' phone read, "I gonna need that bread today, at least half." At 12:10 p.m., he texts, "on my ass, brah." At 12:15 p.m., he texts, "When dat go because I'm almost on E and my girl got to get to work rest of the week." Stevens replied, it would be when he got off work. At 12:27 p.m., Appellant says, "Just hit me

up. I be around." At 1:30 p.m., Appellant asks, "What time you get off? I'm whipping. We can cool it." At 1:41 p.m., he asks Stevens, "where you be? I'll be around. I'm driving five." ***R. 338-41; 356-58;*** State's Ex. 82, ***R.*** ___-__ (PowerPoint of text messages).[10]

At 1:54 p.m., Appellant says, "just hit me up, five." At 4:37 p.m., Appellant sends a text message, "*hey, I go wet dude ass up tonight*."[11] (Emphasis added). At 4:39 p.m., Appellant asks, "what time you get off?" At 4:44 p.m., he says, "Yeah I take you back to the Chuck," or Charleston. At 8:33 p.m., Appellant says, "Just bring your ass down here because I'll come down there before my 5 word." At 8:59 p.m., "I need you. When you gonna be home." Then, at 9:34 p.m., he tells Stevens, "I can't wait on you. *I gotta handle my biz*." ***R. 356-63*** (emphasis added); State's Ex. 58-59, ***R.526-27*** (official printout of text messages); State's Ex. 82.[12]

Appellant and his mother exchanged several text messages on June 9th, the day following the murder. At 7:03 p.m., he tells her, "I want to be all right. Shay got it all twist up right now, but I know you praying." At 7:43 p.m., she responded, "How you mean you want to? All right. Deal with yourself. Maintain your cool. Let them figure it out. You had nothing to do with it." A minute later, his mother sends a text directing him to "[c]lear all your texts." At 10:38 p.m., he

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[10] The actual text messages were marked as State's Ex. 85 for identification ***R. 356***.

[11] Sgt. Craig Kosarko testified that he had previously heard the term "wet" somebody means "I'm going to shoot somebody," which "essentially ... means that when you shoot somebody, their clothes get wet from the blood." ***R. p. 359***. Sgt. Osborne also testified that the phrase means "to shoot somebody. ***R. 247-48***. Of the five definitions for the phrase listed in the Urban Dictionary lists, three refer to killing someone. The "Top Definition" is "[t]o shoot or (sometimes stab) a person several times, usually in an attempt to murder them. Called 'wet up' because there is enough blood to soak their clothes, leaving them 'wet'." *See* https://www.urbandictionary.com/define.php?term=wet+up, last visited July 31, 2020.

[12] Again, the murder occurred at roughly 10:18 p.m. **R.** ***360***.

sends her a text, saying, "Talk to her, ma, and don't forget to erase your texts." ***R. 364-67;*** State's Ex. 64, ***R. 528-30*** (official printout of text messages).

The Verizon historical cell site location information relating to Appellant's cell phone from 9:01 to 11:40 p.m. on June 8, 2011, reflected that for most of June 8, 2011, his phone used cell sites in the Summerville and North Charleston area. The one anomaly was a call at 10:02 p.m., when the phone used a tower near the interchange of the 1-26 and I-526. **R.** ***398-407; 409-14;*** *see also* State's Ex. 70.

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only" and it is "bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citation omitted). Errors of law that are not prejudicial do not warrant reversal. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error." *State v. Smith*, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956). "On appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion." *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

## ARGUMENTS

### I. The trial judge did not abuse his discretion by finding that Appellant's June 10, 2011 custodial statement was freely and voluntarily given, where the totality of the circumstances was that the length of the interview as well as the interviewing officers' references to his daughter, their refusal to provide Appellant a cigarette, and their statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," did not cause his will to be overborne and render his statement involuntary.

Notwithstanding Appellant's attacks upon the trial judge's ruling, Respondent submits that the trial judge did not abuse his discretion by finding that Appellant's June 10, 2011 custodial statement was freely and voluntarily given. The totality of the circumstances was that the length of the interview, the interviewing officers' references to his daughter, their refusal to provide Appellant a cigarette, and their statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," did not cause his will to be overborne and render his statement involuntary. Rather, the video of the interview (State's Ex. 80) reflects that the officers never made any threat involving Appellant's daughter and that he did not make his statement until more than an hour after cigarettes are last mentioned. Indeed, it is clear from the video that he changed his story only after his private conversations with his Tenika and his mother, with whom *he had asked to speak.*

**A. The *Jackson v. Denno* hearing and the trial judge's ruling.**

The State's only witness at the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing was David Osborne, who testified that he is employed in the Ninth Circuit Solicitor's Office but that he was employed as the Sergeant in charge of the violent crimes unit of the Charleston Police Department in June 2011. R. *30-32*. Sgt. Osborne interviewed Appellant on June 10-11, 2011. Appellant did not appear to have any mental or physical defects, he never indicated that he was in pain, he appeared to be of average intelligence for his age, he did not appear to be intoxicated, he appeared to understand what Sgt. Osborne said to him and Sgt. Osborne understood his responses. The officers would have offered him something to drink, he was offered an opportunity to use the bathroom, and he was not threatened. Also, Sgt. Osborne did not make any threats of violence, or promises of future leniency in order to get Appellant to speak. The entire

interview lasted for approximately $4^{1/2}$ to 5 hours, which Sgt. Osborne testified was "maybe slightly more than average [for a homicide], but it was about average." ***R. 34-36.***

Before Sgt. Osborne and Sgt. Kosarko began questioning Appellant, Sgt. Osborne first advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant indicated that he understood each right as it was read to him and he signed a form indicating his understanding of these rights, which the officers witnessed. State's Ex. 80 at 21:18:47 – 21:20:18. *See also* ***R. 34-35; 37-40.*** Also before speaking to him, the officers had spoken to Tenika Elmore, who told them that Appellant had her "pretty distinctive" Toyota Camry after dropping her off at work and that he was supposed to pick her up at 11:00 p.m. but was fifteen or twenty minutes late. Further, they had reviewed the surveillance video from the apartment complex where the shooting occurred.[13] ***R. 33-34; 52-53.***

The officers initially let Appellant tell his story about his activities. ***R. 34-35.*** For most of the interview, Appellant insisted that he was in Orangeburg and that he had never gone to the apartment complex in Charleston, even when confronted with evidence demonstrating that he was lying to the officers about his whereabouts for the latter part of June 8th and even though Sgt. Osborne did not believe his story. Appellant asked for cigarettes several times during the interview. However, smoking was not permitted in the interview room and Sgt. Osborne did not let him smoke because of security concerns.[14] Sgt. Osborne likewise told Appellant that

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[13] Additionally, Appellant's niece, who "was eight or nine at the time, said that she … saw him outside the window holding a pistol right after the shooting. That's what started the investigation onto Mr. Johnson." ***R. 52.***

[14] Sgt. Osborne explained that he had allowed suspects to smoke in other cases and that it depended on the crime charged. If taken outside, a murder suspect has to remain shacked and must be wearing "a belt harness or a security belt that you could loop the handcuffs through." Sgt. Osborne could not do this alone and he did not feel comfortable escorting Appellant through the office and outside to smoke. ***R. 36-37.***

"cigarettes are for cooperators" because Sgt. Osborne did not want to escort Appellant while he had a cigarette in hand and because Sgt. Osborne thought that even though Appellant understood he was being interviewed for the murder, he did not appreciate the seriousness of the situation "enough to trust him to go downstairs with him." The denial of cigarettes, however, did not lead to a confession or cause Appellant to change his story. When asked if the tone of the interview ever changed, he explained that "there's going to be peaks and valleys the entire time" in a long interview such as this one. ***R. 36-37; 40-43.***

At one point, Sgt. Osborne told Appellant that it did not get any more serious than murder and that "there was a possibility that he would not see his daughter again." Again, this did not cause Appellant to confess or change his story. After interviewing Appellant for over 3 ½ hours, Sgt. Osborne allowed Appellant to speak privately to both Tenika and his mother on Sgt. Osborne's cell phone before they continued the interview. It was following this conversation that Appellant admitted that he had been in Charleston on the night of June 8th. ***R. 42-45.***

On cross-examination, Sgt. Osborne admitted that Appellant asked to smoke within three minutes of the interview and that cigarettes and nicotine can be addictive. However, he disagreed with Appellant's suggestion that nicotine can be as addictive as heroin. He testified, "Through my training and experience, I have never seen an individual who is addicted to nicotine do what drug addicts do ... on a daily basis. Never." Still, Sgt. Osborne understood that Appellant wanted to smoke. He also admittedly told Appellant that cigarettes were for people who cooperate and that he thought Appellant was being untruthful during this portion of the interview. ***R. 47-52.***

State's Ex. 80, the video of the interview, clearly demonstrates that Appellant's statement was freely and voluntarily given. The video begins at 9:02:00 (21:02:00). Before the interview begins, he asks if there is any way that he could he get a smoke. 21:05:07. Sgt. Osborne tells him

that they might be able to work it out. 21:05:14. As Sgt. Osborne is getting Appellant's clothes, he asks if Appellant needs to use the bathroom or wanted water. Appellant indicates that he does not need to use the bathroom, but may want some water after he smokes a cigarette. Sgt. Osborne's reply is "okay. There. Enough." 21:13:45 – 21:13:56.

The interview begins after both Sgt. Osborne and Sgt. Kosarko entered the room at approximately 9:18 p.m. State's Ex. 80, at 21:18:32. Before they begin questioning Appellant, Sgt. Osborne advises him of his *Miranda* rights and Appellant indicates that he understood each right as it was read to him. He then signs a form waiving these rights, which each officer witnesses. State's Ex. 80, at 21:18:47 – 21:20:18.

Roughly forty-seven minutes into the interview, Appellant asks if he could please have a cigarette, and Sgt. Osborne tells him no because he has been lying. Appellant says he understands this explanation. 22:05-46-22:06:07. He again asks for a cigarette roughly six minutes later. 22:11:59. Sgt. Osborne says "No, cigarettes are for guys who cooperate." When Appellant insists that he has cooperated, Sgt. Osborne says, "Guys who don't cooperate end up going to prison for a long time." This exchange ends at 22:12:13 and the officers exit the room. Sgt. Osborne re-enters the room at 22:13:08 and briefly asks Appellant to identify a person in a photograph, but he leaves the room at 22:13:34 after Appellant did not identify the person. Although another officer thereafter comes into the room and obtains information for the paperwork associated with Appellant's arrest, the interview does not start again until 22:18:40 when Sgt. Osborne re-enters room.

Sgt. Osborne tells Appellant that Tenika did not believe it and wanted to talk to him. Appellant says, "Please let me talk to her." Sgt. Osborne dials her number on his own phone, hands phone to Appellant and leaves the room at 22:18:50 (10:18 p.m.). Appellant speaks with

her, alone, until 22:27:56, when Sgt. Kosarko enters the room. As Kosarko starts to exit the room after Appellant ended the call, Appellant asks to "please" speak with him again. 22:28:46. Appellant then says that he is a cigarette smoker and asks if he can "have a cigarette to calm myself." He adds that "so much is going through my head." In response to Sgt. Kosarko's reply that he did not have a cigarette, Appellant indicates that "Goldstein [does]." Sgt. Kosarko questions whether Goldstein has a cigarette, and Appellant indicates that he had asked Goldstein. Sgt. Kosarko tells him at this point, "That's just not going to happen, man."

At 22:29:40 (10:29 p.m.), Sgt. Kosarko tells Appellant that having a cigarette will not clear his head. Appellant acknowledges this, but says that it would calm him down. He states that things keep "coming at" him and he realizes that he is in a "whole world of trouble." At 22:30:05, Sgt. Sgt. Kosarko says that "You've done nothing tonight to help yourself, nothing, and a cigarette is not going to change that." Rather, Kosarko tells Appellant that he needs "to do the right thing." Yet, Appellant still refuses to change his story or stop the interview after Sgt. Osborne re-enters the office and starts questioning him again.[15]

He persists with this version for almost another hour, despite being repeatedly confronted with evidence placing him at the scene with his girlfriend's car.[16] For the most part, his demeanor is very calm, even when admitting (at 23:09:10) that no one could say that he was in Orangeburg that night.[17] At 23:20:10, he says that Sgt. Osborne did not know how tense he was,

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[15] At 22:43:49, he starts to explain why he needed a cigarette, but is told, "Forget about it."

[16] When Appellant expresses concern about retaliation by the victim's family against his sister (22:55:44), Sgt. Osborne explains that police had done everything to eliminate the possibility of retaliation, and that this was not a concern.

[17] At 23:16:08, Appellant asks for water and Sgt. Kosarko leaves to get it. Sgt. Osborne then asks if Appellant needs to use bathroom and Appellant says no. 23:16:17. Sgt. Kosarko brings in water at 23:18:18. At 23:35:34, he again wants more water and Sgt. Kosarko gets it for him. Sgt.

he says that he is a heavy smoker and I don't know how I'm going to make it ... in jail" because of "withdrawals from his "nicotine habit." He compares his desire for a cigarette to the craving of methadone or heroin addicts. In reply, Sgt. Osborne says that if he tells police what happened, they will go outside and smoke a cigarette. *See* 23:20:10 – 23:21:10.

Appellant then laughs and says, "We're still back at square one," 23:21:13, and he continues to assert that he was not in Charleston on June 8th. After Sgt. Osborne explains that Appellant doesn't want to walk out of the room with the statement that he had given, Appellant replies, "That's what I'm saying right now as far as the cigarette thing." 23:24:45 – 23:24:51. In response, Sgt. Osborne tells him, "We are not going to have a cigarette until we get a truthful story out of you. I'm telling you that right now. It's not going to happen." He also tells Appellant that Appellant is not going to "bargain" or "negotiate" with him. 23:24:52 – 23:25:06.

Yet, Appellant still did not change his story. At 23:46:24-23:46:46, Appellant again mentions his "addiction" to cigarettes, in the course of explaining that Sgt. Osborne will get mad at him if he changes his story. Sgt. Osborne tells him that if he cooperates, he can have a cigarette "right now," but he will not get a cigarette if he does not cooperate. Nevertheless, he did not change his story, even though he is questioned for over thirty-two minutes. At 12:19 a.m. on June 11th (00:19:07), Appellant asks if he can speak with Tenika again, and Sgt. Osborne agrees to let him do so. Sgt. Osborne dials her number on his cell phone, hands he phone to Appellant and leaves the room at 00:19:50.[18]

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Osborne then asks if Appellant needs to use bathroom and Appellant says no. 23:35:45. He receives water at 23:36:14.

[18] Apparently, the original call did not connect and Appellant redials the number. Appellant then talks to Tenika.

Among other matters, he and Tenika discuss the evidence placing her car at the scene; evidence of his motive; and that contrary to what police told him, his niece did not see him there. He also asks her, early in their conversation, what she thinks he should do. 00:20:52-00:30:05. After the signal for this call is dropped, he redials the number and they resume their conversation at 00:30:34. In this conversation, he asks her if she will support him. At 12:34:01 a.m., he tells her that he saw the shooting but did not shoot. Rather, he walked up and saw what happened. He also says that he did not know the shooter and that he and the shooter were not together. He tells her that he had given a false statement and did not admit that he was present because he was scared.

When Sgt. Osborne starts to enter the room at 00:38:15, Appellant pauses in his conversation and tells Osborne, "I'm getting there. I'm getting' there ... to where you want." Sgt. Osborne immediately leaves the room and Appellant resumes his conversation with Tenika. This call ends at 00:40:38, and he calls his mother. He talks to his mother about the crime from 00:41:39 until 00:49:59, when Sgt. Osborne re-enters the room. In the conversation with his mother, he says that police want him to say that the passenger was the shooter but his passenger did not do it. He also reviews the evidence, as he understands it, with his mother, and he admits that he had already given police a statement that "wasn't true." He tells his mother to "hold on" at 00:50:55 and hands the phone to Sgt. Osborne. Sgt. Osborne speaks to her for almost a minute before Appellant asks if the other detective had to be in the room. 00:51:26. Sgt. Osborne tells Appellant's mother that he will call her back in five minutes and ends the call at 00:52:10. Sgt. Osborne tells Appellant that the other detective did not have to be present. Then, Appellant begins speaking.

Starting at 00:52:31, he finally says that he had gone to the Charleston apartment complex with "Creep" to get his clothes; that he had backed the car into the parking place; that he had seen a man walking a dog while he was there; that he saw the " 'D' dude," a dark skinned man with a "low haircut" shoot the victim; that the shooter was the person in the photograph that he had been shown earlier; that he did not know Creep's name, address or phone number, even though they had been friends for "a couple of months;" that neither he nor Creep had called the victim that night; and that he had not spoken to the victim in two weeks.

At 00:58:54-00:59:22, Appellant says, "Now, now I need a lawyer" in response to Sgt. Osborne indicating he did not believe what he as saying. Sgt. Osborne gets up and starts to leave the room, but Appellant asks him to stay. Osborne asks if he wants a lawyer or does he want Sgt. Osborne to listen to him. He says that he wants Sgt. Osborne to listen. So, they again discuss his new story. A break occurs at 01:35:36, when Sgt. Osborne stands, and with Appellant's consent, leaves the room. Appellant remains alone in the room until he gets up goes to the door and gets permission to use the bathroom at 01:42:45. He returns to the room at 01:42:50, and Sgt. Osborne then enters with his permission. At that point, Sgt. Osborne states that Appellant has twice asked for a lawyer. He assures Appellant that he will stop questioning Appellant if Appellant wants a lawyer or will stay if Appellant wants him to stay. Appellant indicates that he wants Sgt. Osborne to stay. But there is no further questioning. At 01:44:00, Appellant, asks for a cigarette. Sgt. Osborne says no because he did not tell the truth, and Appellant claims he was truthful. Sgt. Osborne disagrees and tells him that other officers are laughing at his statement. Sgt. Osborne leaves the room at 01:44:15.

In arguing that the statement should be suppressed, Appellant conceded that he had received and waived his *Miranda* rights but claimed that the statement should be suppressed

because his will was "overcome." The interview lasted almost five hours and he asked to smoke early in the interview. Although he was told "I think we can make that happen," he was never allowed to smoke. He contended that Sgt. Osborne's stated concerns about him smoking were inconsistent with the record. He further claimed that "addiction to nicotine" corrupts or weakens the mind and that this caused his mind to be "fragile." Also, he was "not a violent criminal," he had not been "deeply involved" in the criminal justice system, and he was unaware of the "ins and outs" of a murder investigation. Moreover, the officers used his concern for his daughter "to manipulate [his] will" and he suggested that this was no different than directly threatening him. For these reasons, he felt that "he would lose everything" if he did not cooperate and change his story. ***R. 54-57.***

The State argued that the statement was voluntary under the totality of the circumstances. Sgt. Osborne testified that the length of the interview was average for a murder case and that the interview did not last the entire time because Sgt. Osborne left the room for thirty minutes so Appellant could use the phone. As a result, his will was not overborne by the length of the interview. Also, the State referenced an Oklahoma case holding that withholding cigarettes does not overbear a suspect's will. ***R. 57-58.***

The trial judge stopped her at this point because he understood her argument about the cigarettes. ***R. 58.*** Based on Appellant's private phone calls, the trial judge found by the preponderance of the evidence that:

> [I]f the defendant hadn't shown such cognitive skills and awareness in the telephone conversation ... of saying specifically what they were claiming that he did, ... we only heard one side of the conversation and, frankly, to be candid with you, I don't know that the cigarettes were as compelling as what his mother and the other one were saying to him that he needed to do. That's what's the most compelling thing to me and, quite frankly, it shows pretty much ... his awareness of everything, having listened to it and he said, okay, and he makes a decision for himself to change it, not because he's threatened, but because of what somebody

> told him. ... I don't know what they said, but his demeanor during the conversation is not somebody that's stressed out. It's somebody that's saying, okay, ... basically, without saying it, I made a mistake. I hear you, mom. I've got to change this, and what do I need to change. Well, I'll say that I was there and this is my story. And frankly, it shows, okay, I got to change it and he's ... pretty sharp and aware because he goes from not being there to, well, let me tell you what it was really done.
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> And then, of course, that's -- there was some parts that were factually correct and a lot of parts that may be factually challenged, but it shows an awareness of this person of knowing exactly what he was doing and, furthermore, and I guess the biggest thing, he didn't have to say a word when he comes back in, but he starts talking.
>
> And that's -- again, why would he suddenly do that when he spent the last entire time without any additional threats just suddenly start talking except for what was said to him on the telephone conversations? And that would be the motivating factor, not the lack of having a cigarette.

***R. 58-60.***

The trial judge noted that he would charge jurors that they must determine the statement's voluntariness beyond a reasonable doubt. He rejected the comparison of nicotine addiction to heroin addiction based on the experiences of his administrative assistant. Finally, he again found that the videotaped telephone conversation disproved Appellant's claim the statement was involuntary but indicated that Appellant could argue those points to the jury. ***R. 60-61.***

Appellant objected when the State moved to introduce State's Ex. 80 into evidence and the trial judge overruled his objection. ***R. 218-19.***

**Discussion.**

There was no error. "'Questioning suspects is indispensable in law enforcement.'" *Culombe v. Connecticut*, 367 U.S. 568, 578 (1961). *Culombe* set forth the general test of voluntariness to be applied to the waiver of *Miranda* rights and any issue concerning the voluntariness of confessions generally.

> In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. *No single litmus-paper test for constitutionally impermissible interrogation has been evolved*: neither extensive cross-questioning—deprecated by the English judges; nor undue delay in arraignment—proscribed by McNabb; nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect—prohibited by several state statutes. ....
>
> *Each of these factors, in company with all of the surrounding circumstances*—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—*is relevant. The ultimate test remains* that which has been the only clearly established test in Anglo-American courts for 200 hundred years: The test of voluntariness. *Is the confession the product of an essentially free and unconstrained choice by its maker*? If it is, if he has willed to confess, it may be used against him. *If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.*

*Id.* at 601-022 (emphasis added) (footnote and citations omitted).

The Supreme Court has consistently adhered to *Columbe* in subsequent cases. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 434 (2000); *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973); *Arizona v. Fulminante,* 499 U.S. 279 (1991). Likewise, the voluntariness test set forth in *Columbe* has been consistently followed by this Court and the South Carolina Supreme Court. *E.g., State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001); *State v. Rochester,* 301 S.C. 196, 199-202, 391 S.E.2d 244, 246-47 (1990); *State v. Moultrie*, 273 S.C. 60, 61-62, 254 S.E.2d 294, 294-295 (1979). "On appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion." *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996).

Here, the trial judge properly found that Appellant's statement was freely and voluntarily given under the totality of the circumstances. The evidence reflects that Appellant is an adult; that he was not intoxicated; that he did not have any problems communicating with the officers and the officers did not having problems communicating with him; that he appeared to be of normal intelligence; that the officers did not make any threats of violence; and that they did not threaten him or offer any leniency as to the charge or sentence, in order to induce his statement. Nor did the officers withhold any other creature comforts from him, other than cigarettes. To the contrary, they twice provided him water when he requested it. Also, he once refused an offer for a bathroom break before questioning began (21:13:47), and again during the interview. 23:16-08-23:16:17. When he later asked to use the bathroom, he was immediately allowed to do so. 01:42:50-01:43:55. Further, he is repeatedly told that he did not have to give a statement and that he was free to stop questioning when he so desired. When he asked for a lawyer, questioning did not resume until he stated that he wanted to continue talking. *See* 12:58:53-12:59:28; 01:42:50-01:43:50.[19] Thus, Sgt. Osborne scrupulously honored his right to counsel.

While the interview was lengthy,[20] Appellant ignores that there were several breaks taken during the interview process, that he was left alone for over forty-five minutes during these breaks, and that he spoke to Tenika twice and his mother once. *See* 22:12:13-22:27:56,[21] 00:19:51-00:49:57, 01:35:36-01:41:45. Sgt. Osborne testified that the length of the interview was

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[19] Apparently, the second time he asked for a lawyer occurred outside of the interview room.

[20] Questioning began at 21:20:34 (9:20 p.m. on June 10th) and had concluded by 01:41:45 (1:41 a.m. on June 11th).

[21] During this break, Sgt. Osborne was in the room for several seconds but immediately left when Appellant did not identify a person in a photograph. Further, after his first conversation with Tenika, Appellant stops Sgt. Kosarko from leaving, asking to "please" speak with him again. 22:28:46.

average for a murder case, and Respondent submits that statements given after much longer interviews have been found to be voluntary. *See People v. Collins*, 106 A.D.3d 1544, 1545, 964 N.Y.S.2d 393, 395 (N.Y.A.D., May 03, 2013) ("Contrary to defendant's contention, ... his statements made during the first 15 hours of interrogation were not involuntary due to police coercion"), *leave to appeal denied, People v. Collins*, 21 N.Y.3d 1072 (N.Y., Sept. 12, 2013) (Table); *Clark v. Murphy,* 331 F.3d 1062, 1073 ($9^{th}$ Cir.2003) (eight hour interrogation in a small, windowless interrogation room did not render confession involuntary), *cert. denied*, 540 U.S. 968 (2003), *overruled in part on other grds, Lockyer v. Andrade,* 538 U.S. 63 (2003); *Torrence v. Ozmint*, 2008 WL 628604, 23 (D.S.C., Mar. 5, 2008); *State v. Neeley*, 271 S.C. 33, 244 S.E.2d 522 (1978); *State v. Chasteen*, 228 S.C. 88, 88 S.E.2d 880 (1955); *State v. Gilbert,* 273 S.C. 690, 258 S.E.2d 890 (1979).

Also, despite Appellant's repeated requests for a cigarette and the officers' refusal to provide him with one, the video reflects that his demeanor was calm throughout much of the interrogation. Given that he only gave officers false statement about his activities on the night of the murder, his requests for a cigarette seem to be little more than a delay tactic. Significantly, he never exhibited any signs of physical discomfort, much less signs of withdrawal from his supposed addiction. *See United States v. Coleman*, 208 F.3d 786, 791 ($9^{th}$ Cir. 2000) (heroin withdrawal and physical discomfort was not enough to establish involuntariness of confession). *See also People v. Hernandez*, 204 Cal.App. 639, 648, 251 Cal. Rptr. 393, 398 (Cal.App. 1988) ("The mere fact of being in the state of drug withdrawal does not render all confessions *per se* involuntary. The totality of the circumstances must be examined to determine whether the confession was the product of a rational intellect and a free will"). In light of the serious potential charge that he faced, it is almost incredible to believe that he would give a statement in order to

obtain a single cigarette. See *People v. Badgley*, 2007 WL 162515, 7 (Mich.App., Jan. 23, 2007) (finding that defendant's statement was not rendered involuntary even though "[d]uring the interview, defendant was denied certain liberties, including his repeated requests to see his fiancée and his family, and a request for a cigarette," where defendant faced serious charges and where defendant had been advised and waived his *Miranda* rights before giving statement).

Moreover, neither the officers' refusal to provide a cigarette to Appellant nor Sgt. Osborne's statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," caused his will to be overborne and thereby rendered his statement involuntary. To the contrary, State's Ex. 80 reflects that the last mention of cigarettes occurred at 11:46 p.m. (23:46:24-23:46:46), or approximately fifty-four minutes before Appellant began his statement. (00:52:31). *See id. See also People v. Nelson*, 2003 WL 22890655, at *5 (Cal.App., Dec. 8, 2003) (unpublished) ("Detective Stover's admittedly aggressive questioning and her denial of defendant's request for cigarettes did not rise to the level of coercive conduct tending to produce an involuntary and unreliable statement"); *Wilkes v. State*, 917 N.E.2d 675, 681-82 (Ind. 2009) ("The offer of a cigarette specifically in exchange for information could be viewed as an inducement leading to an involuntary confession. However, given the lapse in time between the cigarette and this admission and that Wilkes had already admitted to having flashes of Donna in a bloody bed and of Avery facedown and bound in her bed, the trial court had sufficient evidence to conclude that Wilkes's will was not overcome by the promise of a cigarette"); *Anderson v. Terhune*, 467 F.3d 1208, 1213 (9th Cir. 2006) (statement not involuntary when detectives

withheld cigarettes until defendant agreed to talk), *rev'd en banc on other grds*, 516 F.3d 781 (9th Cir. 2008).[22]

Appellant further contends that his statement was involuntary because the officers repeatedly used his 6-year-old daughter as leverage in order to induce a statement. This contention is without merit. By Respondent's count, either Appellant or the officers mention his daughter a total of sixteen times throughout the course of the interview.[23] Most of the references are very brief and he is assured before the interview begins that she is fine. *See* 21:05:37. The discussion on how his daughter would or should perceive him if he did not give a statement or if he was convicted of murder and went to prison for thirty years did not render his statement involuntary. Unlike *State v. Corns*, 310 S.C. 546, 526 S.E.2d 324 (Ct. App. 1992), or *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), neither Sgt. Osborne nor Det. Kosarko threatened either Appellant's daughter or any other family member with arrest or otherwise. The statements relating to his daughter simply "are not the type of tangible threat related to children or family members generally considered to render a confession involuntary. Such statements are more akin to a psychological tactic than actual coercion." *State v. Johnson*, 422 S.C. 439, 457-58, 812 S.E.2d 739, 748 (Ct.App. 2018), *reh'g denied* (Apr. 26, 2018), *cert. denied* (Aug. 3, 2018).

Further, the trial judge correctly recognized that Appellant did not give his statement until after he had spoken to both Tenika and his mother, and that his conversations with them demonstrated that he fully understood the predicament in which he found himself. His claim the statement was involuntary further ignores that he explained early in the interview (23:30:04-23:30:51) that his reluctance to give a statement resulted from evidence the police had of his

[22] He does not cite any authority for the proposition that withholding cigarettes unless he was truthful rendered the statement involuntary.

[23] See 21:05:37, 21:21:04, 21:35:18, 21:36:36, 21:46:44, 21:51:58, 22:01:29, 22:06:53, 22:30:15, 22:35:04, 23:58:28, 00:00:11, 00:07:24, 00:09:22-00:12:54, 00:17:46-00:08:50, 01:24:15.

motive, and that he felt that the police would attempt to blame the murder on him, no matter what he said. His argument likewise ignores that when Sgt. Osborne began to enter the room during his conversation with Tenika, at 00:38:15, he pauses the conversation and tells Osborne, "I'm getting there. I'm getting' there ... to where you want." Sgt. Osborne immediately leaves the room and Appellant resumes his conversation with Tenika. Thus, the trial judge correctly found that his will was not overborne by the officers' refusal to provide him with an opportunity to smoke a cigarette unless he cooperated or because of comments about his daughter.

Accordingly, the record supports the trial judge's finding that his statement was voluntary and that his will was not overborne.

**II. The trial judge did not abuse his discretion by excusing Juror # 7, who unintentionally failed to reveal until rather late in the trial that he knew a witness, where the State had four unused peremptory challenges and it would have exercised one to remove the juror if aware of this information during jury selection. Also, Juror # 7 had been sleeping during witness testimony earlier in the trial.**

Respondent further submits that the trial judge did not abuse his discretion by excusing Juror # 7, who did not reveal until rather late in the trial that he knew a witness. Although this failure was apparently unintentional, the State had four unused peremptory challenges and indicated that it would have exercised one to remove the juror if aware of this information during jury selection. Also, earlier in the trial, the trial judge had observed the juror sleeping" while a witness was testifying.

**A. How issue arose at trial.**

As part of the jury voir dire, the trial judge asked if any veniremen were "related by blood or marriage to," "ha[d] any business dealings with them, [or were] socially or casually acquainted with" a list of potential witnesses, including "Vanessa Morton." No venireman responded affirmatively to the question. ***R. 9-10***. Juror # 7 was eventually seated as a juror. ***R.***

***24-25***. Vanessa Bumcum Morton and her son, Diangelo Bumcum, subsequently testified as prosecution witnesses. *See* "Statement of Facts."

In a recess following the State's direct examination of Sgt. Osborne, the Assistant Solicitor stated that she had noticed a male juror sleeping "a few times." The trial judge stated that he had likewise seen this. The juror "did the best he could" to stay awake and drank some water, "but it wasn't long and he was back to sleeping again." The trial judge promised to address this at the end of the trial. ***R. 250-51***.

The trial judge received a jury note during a break in Det. Kosarko's testimony (*see* Court's Ex. 7, ***R. 523***) and he alerted the parties that there was "a dilemma." Following an unrecorded bench conference, the parties agreed to let the trial judge address Juror # 7 "outside the jury room." ***R. 342***. Following a break to question the juror, the trial judge stated that he had read *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), where the Supreme Court held that the trial judge abused his discretion in excusing a juror who had inadvertently failed to disclose her acquaintance with a witness. Also, he noted that he had earlier observed that Juror # 7 appeared to have been sleeping during testimony. However, he had spoken to Juror # 7, and the juror appeared to be alert. ***R. 342; 344***.

With respect to Ms. Morton, Juror # 7 told the trial judge that he had not recognized her at first, and he thought it was important to let the court know when he realized that he knew her. After the trial judge discussed the standard set out in *Stone* for dealing with a juror who inadvertently conceals information, as opposed to a juror who intentionally does so, Assistant Solicitor Linder confirmed that the State was asking the trial judge to excuse juror # 7 because he was sleeping earlier and because the State had unused peremptory challenges that it would have exercised it to remove the juror if aware of this information during jury selection. ***R. 344-47***. The

trial judge found that although there was no basis to excuse the juror for cause, "the State would've had every reason to exercise that [challenge]." R. *347*.

Appellant maintained that Assistant Solicitor Linder had indicated in the unrecorded bench conference that she would not have struck Juror # 7 because he knew a person on the State's witness list. Appellant further argued that Ms. Morton did not play "a very critical role" in the case and that Juror # 7's knowledge of her did not support his removal. Also, both sides had agreed to seat Juror # 7, and Appellant did not think that Juror # 7 had been sleeping earlier. Appellant admittedly saw Juror # 7 "close his eyes from time to time," but said, "I do think he was listening. I think he was nodding his head to certain statements that were made by witnesses." ***R. 347-48***.

Assistant Solicitor Linder agreed that Juror # 7's failure to disclose was innocent. However, she pointed out that she had only exercised one peremptory challenge in striking the jury (*see* R. ***20-28; 495-96***) and indicated that she would have struck Juror # 7 if he had disclosed that he knew Ms. Morton. She explained that when she spoke at the bench conference, she had not known the purpose of the conference and that she had rethought the issue. Given the uncertainty of how jurors will act if they know a person on a witness list, she would have struck him out of an abundance of caution. ***R. 348-49***

The trial judge stated that he would read *State v. Woods*, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001). Analogizing his next question to a *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), inquiry, he then asked whether Appellant could point to any juror who knew a potential witness that the State did not strike, and Appellant said no. The trial judge likewise was not aware of any such juror. Further, he stated that he understood the State's position in light of some of the witness' statements. ***R. 349-51***. He then denied Appellant's motion as follows:

> I just find that to be a legitimate reason that is not pretextual, not that I have to make that finding, but I think she's entitled to it.
>
> That, coupled with the fact that -- frankly, so that we have it [on the record] to protect ... my discretion, I wrote down a note watching him sleep that I was going to bring it to your attention because I was concerned about it.
>
> And I'll add this to it. .... He's the only one I wrote their age and I went back and looked at how old he was. He was 64. And I know how I was yesterday afternoon some too and I thought, you know, giving him that, this is a -- they're watching a film and he -- the one thing that gave me -- that I thought, well, maybe that's some redemption, he tried to drink some water at one point and he kept his eyes open and, frankly, he kept his eyes open on your cross, but then he started dozing again at some of that too. So I mean I watched him pretty much the rest of the afternoon off and on.
>
> But I think for the reason stated that she would've exercised a peremptory challenge is ... a major motivating factor and I'm going to excuse him from the jury.

***R. 351***. The trial judge brought Juror #7 into the courtroom, excused him and, at Appellant's request, seated the first alternate in his place. ***R. 352-53***.

Obviously concerned with the right of both parties to a fair trial, the trial judge cited to this Court's decision in *State v. Coaxum*, 2011-UP-496 (Ct.App., Nov. 7, 2011), *rev'd*, 410 S.C. 320, 764 S.E.2d 242 (2014), where he was also the trial judge. He noted that this Court held he had erroneously removed a juror where the juror's failure to disclose was not intentional and that "it's not a material basis for a peremptory challenge that a witness knows somebody." He found this puzzling in light of the ability of parties to use peremptory strikes to remove jurors even when the jurors indicate they could still be fair and impartial, despite their knowledge of a witness. ***R. 422-23***.[24]

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[24] Appellant mistakenly states that the trial judge was referencing the Supreme Court's decision in *Coaxum*. Yet, as discussed *infra*, only this Court found that he had abused his discretion because the failure to disclose was unintentional. The Supreme Court found no abuse of discretion.

The trial judge further observed that Juror # 7 had been sleeping at times and that this was important to his decision. The trial judge stated that his concern was that if Juror # 7 "missed a point," he might rely on his knowledge of [Ms. Morgan] whom he knew." The trial judge further noted that Ms. Morgan had "an unusual personality and that was noted by her responses coming up [to the stand]," which might impact a juror who knew her. Thus, he understood the State rethinking its initial position and asking for the juror's removal. ***R. 423-25.***

**B. The trial judge did not abuse his discretion in removing Juror # 7.**

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). However, "the law is well settled that the defendant has no right to a trial by any particular jury or jurors and has the right only to a trial by a competent and impartial jury." *State v. Rogers*, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974). Also, it is the trial judge's the duty to ensure that a jury comprised solely of fair, impartial, and unbiased jurors is impaneled. *State v. Powers*, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998); *see also* S.C. Code Ann. § 14-7-1010 (Supp. 2020). Respondent submits that the facts surrounding the trial judge's decision to remove Juror # 7 and replace him with an alternate closely parallel the facts in the Supreme Court's decision in *State v. Coaxum*, 410 S.C. 320, 764 S.E.2d 242 (2014) and that there clearly was no abuse of discretion under *Coaxum*.

As in this case, Juror # 7 in *Coaxum* failed to respond when the trial judge asked on voir dire whether "any members of the jury panel [were] related [by] blood or marriage, socially or casually connected with [Coaxum], or that have any business dealings, any connection whatsoever?" Juror # 7 was then seated. *Id.* at 325, 764 S.E.2d at 244. After the State had presented half of its witnesses, the trial judge "received a note from the jury foreperson indicating that Juror # 7 recognized one of [Coaxum's] family members sitting in the

courtroom." *Id.* After the trial judge's "off-the-record discussion with the juror to determine the nature of her relationship with the family member and whether she could remain impartial during the trial," he reported that "Juror # 7 and [Coaxum's] family member were co-workers, and that the family member previously claimed that Juror # 7 was a 'distant cousin.'" *Id.*

The juror "indicated that, once she recognized [Coaxum's] family member, she felt uncomfortable not disclosing the working and family relationship between the two." Yet, she stated that "the working and family relationships would not affect her decision in the trial." *Id.* Although the juror's initial nondisclosure during voir dire was unintentional, the Assistant Solicitor asked that she be removed from the jury because "'these types of relationships ... [,] ultimately she may not be able to put it out of her mind,'" and the Assistant Solicitor indicated that he would have exercised one of the State's three remaining peremptory challenges against the juror if he had "known of the relationship" between the juror and Coaxum, "no matter how tenuous." *Id.*

Coaxum "argued for a public policy against replacing jurors in the middle of a trial" because alternate jurors allegedly do not pay close attention to the evidence. *Id.* at 326, 764 S.E.2d at 244. The trial judge granted the State's motion to excuse Juror # 7 because even though her failure to initially disclose her relationship with Coaxum's family member did not support a challenge for cause, he found that "the connection would have been a legitimate basis for the State's exercise of its peremptory strikes, and that the State would have struck Juror # 7 had she disclosed the connection." *Id.*

On direct appeal, this Court found that the trial judge had abused his discretion by excusing the juror "because, in essence, a trial court may remove a juror mid-trial only if the juror has intentionally failed to disclose." *Id.* at 326, 764 S.E.2d at 245. However, the Supreme

Court granted the State's subsequent petition for writ of certiorari and reversed this Court's decision. In the course of reversing, the Court explained that:

> We have previously held that a new trial is required "*only* when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Woods,* 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added). In the face of a juror's intentional nondisclosure of pertinent information during voir dire, "it may be inferred, nothing to the contrary appearing, that the juror is not impartial." *Id.* at 587–88, 550 S.E.2d at 284. Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by proving the concealment was, in fact, intentional; however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent. *Id.* at 589, 550 S.E.2d at 285.
>
> In contrast, if a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial.[6] *Cf. id.* (" 'Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional,* should the trial court inquire into prejudice.' " (quoting *Doyle v. Kennedy Heating & Serv., Inc.,* 33 S.W.3d 199, 201 (Mo.Ct.App.2000))). Paralleling the inquiry in cases of intentional concealment, the trial court in the unintentional concealment situation must determine whether the information concealed would have supported a challenge for cause or would have been a material factor in a party's exercise of its peremptory challenges. *State v. Stone,* 350 S.C. 442, 448, 567 S.E.2d 244, 247–48 (2002) (citing *Woods,* 345 S.C. at 587–88, 550 S.E.2d at 284).
>
> > FN6 *See, e.g., State v. Sparkman,* 358 S.C. 491, 495–98, 596 S.E.2d 375, 377–78 (2004) (affirming the trial court's refusal to replace a juror when, after the verdict but before the sentencing hearing, the defendant became aware of the juror's unintentional nondisclosure during voir dire); *State v. Stone,* 350 S.C. 442, 448–49, 567 S.E.2d 244, 247–48 (2002) (finding the trial court abused its discretion in removing a juror during the punishment phase of a death penalty trial because of the juror's unintentional nondisclosure during voir dire); *Kelly,* 331 S.C. at 139–44, 502 S.E.2d 99 (affirming the trial court's decision to remove a juror midtrial and replace the juror with an alternate because the juror appeared to be biased); *Williams,* 321 S.C. at 459–60, 469 S.E.2d at 52 (same); *McDaniel,* 275 S.C. at 224, 268 S.E.2d at 586 (same).

> However, "where the failure to disclose is innocent, no inference of bias can be drawn." *Woods*, 345 S.C. at 589, 550 S.E.2d at 285. Accordingly, the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges. In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias.

*Coaxum*, 410 S.C. at 328-29, 764 S.E.2d at 245-46.

The Court observed that its "previous decisions have not focused on the need for this prejudice analysis," and that this Court "has periodically omitted it when considering cases involving a juror's unintentional nondisclosure during voir dire." *Id.* at 329, 764 S.E.2d at 246. The Court noted that this Court had applied the same analysis as it applied in *State v. Burgess*, 391 S.C. 15, 19–20, 703 S.E.2d 512, 514–15 (Ct.App.2010), which authorized removal only if the two criteria from *Woods* are present and because the juror's failure to disclose was unintentional, the juror could not be excused. The Supreme Court explained, however, that "[w]hile the information concealed in *Burgess* may not have been material—and thus the court of appeals may have reached the correct result in that case—it [was] too broad to say that, in all cases, when the concealment is unintentional, it is automatically immaterial." *Coaxum*, 410 S.C. at 330, 764 S.E.2d at 247.

The Court found that "[w]hile the trial court likely would have been justified in refusing to excuse Juror # 7 from the jury, its decision to remove her is not an abuse of discretion given the thorough inquiry it conducted into the solicitor's strategy in seating or striking prospective jurors. *Id.* at 330-31, 764 S.E.2d at 247 (citing [*State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998)]; and [*State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980)]). Finally, the Court concluded that "as there is no question the jury was impartial after Juror # 7's

removal," Coaxum could not show any prejudice from the excusal of the juror and was not entitled to a new trial. *Coaxum*, 410 S.C. at 331, 764 S.E.2d at 247.

Here, there was no abuse of discretion. The same trial judge as in *Coaxum* found that Juror # 7's knowledge of the witness, although inadvertently concealed, indicated the juror was potentially biased, and that the same Solicitor's Office as in *Coaxum* "was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias." *Id.* at 329, 764 S.E.2d at 246. The trial judge also found that the State's statement that it would have struck Juror # 7 if aware of the concealed information because of uncertainty as to how that knowledge might impact the juror's impartiality[25] was not pretextual because neither he nor Appellant were aware of the State seating any juror who knew a potential witness. *Cf. State v. Robinson*, 330 N.C. 1, 18-19, 409 S.E.2d 288, 298 (1991) (finding African-American juror's failure to disclose knowledge of officer in case and uncertainty in ability to impose death sentence were nondiscriminatory reasons supporting State's strike under *Batson*). Additionally, the trial judge was concerned that Juror # 7 might rely on his knowledge of Ms. Morgan because the trial judge had observed him sleeping during the course of live testimony.[26] Respondent likewise notes that Ms. Morgan's son, Diangelo Bumcum also testified and Juror # 7's

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[25] Again, the State's reason was very similar to the reason given in *Coaxum*.

[26] There is no merit to Appellant's contention - raised for the first time on appeal - that the trial judge only mentioned that he had observed Juror # 7 sleeping because of his concerns over this Court's decision in *Coaxum*. To the contrary, the judge had placed this observation on the record apparently before reading *Coaxam*. Also, because the record contains no mention of another juror sleeping in the trial, an extremely reasonable inference from the record is that Juror # 7 was the unnamed male juror whom the trial judge and the State had observed sleeping during the trial that was discussed before Appellant's cross-examination of Sgt. Osborne. Moreover, sleeping during trial testimony is a form of juror misconduct that supports excusing a juror if the trial judge finds prejudice therefrom. *See, e.g., State v. Smith*, 338 S.C. 66, 71-76, 525 S.E.2d 263, 265-68 (Ct. App. 1999). Yet, even if Appellant was correct, his argument is not preserved for this Court's review because it was not presented to and ruled on by the trial judge. See *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996).

knowledge of Ms. Morton potentially have impacted his assessment of Bumcum's testimony. Respondent submits that the trial judge's factual findings are not clearly erroneous. *See Wilson,* 345 S.C. at 5–6, 545 S.E.2d at 829.

Moreover, Appellant cannot meet his burden to show any prejudice from the trial judge's ruling. The trial judge replaced Juror # 7 with the first alternate, whom he selected at Appellant's request. There is no suggestion that the first alternate was not properly qualified and, "as there is no question the jury was impartial after Juror # 7's removal," Appellant could not show any prejudice from the excusal of the juror and was not entitled to a new trial. *Coaxum*, 410 S.C. at 331, 764 S.E.2d at 247. *See also State v. Williams*, 321 S.C. 455, 459-60, 469 S.E.2d 49, 52 (1996) (defendant suffered no discernible prejudice from the removal of the juror because the juror was replaced with a qualified alternate juror).

Unable to show an abuse of discretion under *Coaxum*,[27] Appellant argues that it should be overruled and that a party should not be required to show prejudice from the excusal of a juror who unintentionally fails to disclose knowing a potential witness on voir dire. Aside from the fact "decisions of the Supreme Court shall bind the Court of Appeals as precedents." S.C. Const. art. V, § 9; *State v. Patrick*, 318 S.C. 352, 358, 457 S.E.2d 632, 636 (Ct.App. 1995), the Supreme Court was merely explaining that its earlier opinions required a showing of prejudice but had not always focused on that requirement. *Coaxam*, 410 S.C. at 329-31, 764 S.E.2d at 246-47. Worse,

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[27] Appellant's contentions that the State "state failed to provide a detailed strategy for its exercise of peremptory strikes," that "the relationship between Juror [# 7] and the witness was a 'scant acquaintance,'" and that the trial judge only made a limited inquiry of Juror # 7's knowledge of Ms. Morgan are procedurally barred because they were not presented to and ruled on by the trial judge. *Watts*, 321 S.C. at 167, 467 S.E.2d at 278. See also *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal"). Moreover, the State was not asked to explain its one strike and it indicated that it would have struck Juror # 7 "out of an abundance of caution" for the reasons it had stated. Also, the record does not reflect the extent to which the trial judge questioned Juror # 7 about his knowledge of Ms. Morgan.

he has not advanced any sound reason for not requiring a showing of prejudice, since he "ha[d] no right to a trial by any particular jury or jurors," and only "the right ... to a trial by a competent and impartial jury." *Rogers*, 263 S.C. at 382, 210 S.E.2d at 609. Other jurisdictions have concluded that a defendant cannot show prejudice from excusal of a juror for misconduct where a qualified alternate is seated in the juror's stead because the jury convicting the defendant was fair and impartial. *See, e.g., United States v. Gonzales-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994) ("In any event, Gonzales-Balderas does not contest the impartiality of the panel that actually judged his case. This is fatal to his objection"); *Lowry v. State*, 963 So.2d 321, 327 (Fla. Dist. Ct. App. 2007) ("Even if there was error [from the removal of a juror], it was harmless because the juror was replaced by a duly selected alternate who was present for the entire proceedings, and we could conclude beyond a reasonable doubt that using the alternate did not affect the verdict"); *Ortiz v. State*, 835 So.2d 1250, 1251 (Fla. Dist. Ct. App. 2003) ("[A]ny error in removing a sleeping juror was harmless because the juror 'was replaced by a duly selected alternate who had been present during the entire proceedings and appellant has not shown that he was prejudiced by the substitution'") (citations omitted); *State v. Stafford*, 878 P.2d 820, 831 (Kan. 1994) ("A defendant has no right to any particular juror or to the original 12 jurors who are impaneled to hear a case").[28] Absent any proof of prejudice, Appellant's argument must fail.

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[28] *See also, e.g., Myers v. State*, 58 Md. App. 211, 234-235, 472 A.2d 1027, 1039 (Md. Ct. Spec. App. 1984) (finding the trial judge's removal of a seated juror based on a clear factual error to be harmless and non-prejudicial where the juror was replaced with a qualified alternate and the jury that decided the case was not objectionable); *Grant v. State*, 205 P. 3d 1,16 (Okla. Crim. App. 2009) (declining to reverse the trial judge's decision to remove a seated juror over Grant's objection after determining Grant suffered no prejudice from the juror's removal because the juror was replaced with a qualified alternate juror); *Thomburg v. State*, 985 P. 2d 1234, 1244 (Okla. Crim.App. 1999) ("Although Juror Collins may have been improperly removed, she was replaced by an alternate juror who had been passed upon by both the State and defense. Appellant has shown no prejudice from having his case decided by alternate Juror Boren rather than Juror Collins and we decline to find any. Reversal is not warranted"); *Lee v. State*, 340 Ark.

**III. The trial judge did not abuse his discretion by instructing the jury on accomplice liability where the instruction was supported by the evidence adduced at trial.**

Appellant contends that the trial judge violated due process by instructing the jury concerning accomplice liability. As a threshold matter, Respondent submits that his assertion of a due process violation misunderstands the function of the Due Process Clause. Rather, the appropriate inquiry is whether the trial judge abused his discretion in giving an accomplice liability instruction because this instruction is not required by the Due Process Clause. *See Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.... But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority") (citations omitted). There was no abuse of discretion and the trial judge's ruling must be affirmed because the requested accomplice liability instruction was supported by evidence in the record.

**A. Proceedings in the trial court.**

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504, 514, 11 S.W.3d 553, 559 (Ark. 2000) ("[A]n appellant must show prejudice, when the trial court removes a juror and seats an alternate in the juror's place"); *People v. Johnson*, 757 P.2d 1098, 1100 (Colo. Ct.App. 1988) ("Although defendant is entitled to a trial by a fair and impartial jury, he is not entitled to any particular jury. Moreover, defendant has failed to show that the remaining jurors were unfair or biased, or that he was actually prejudiced by the dismissal and replacement of this particular juror. Prejudice will not be presumed") (citations omitted); *State v. Pettigrew*, 116 N.M. 135, 141, 860 P. 2d 777, 783 (N.M. Ct.App. 1993) ("The alternate juror who replaced the excused juror was . . . selected and approved by Defendants along with the excused juror. Defendants presented no evidence to show that the alternate juror was biased, partial, or disqualified for any reason. When a seated juror is excused and replaced by an alternate juror prior to deliberations, the verdict is not affected, and a defendant is considered to have been tried by the same jury. . . . [W]e hold that Defendants in this case have failed to show that the substitution of an alternate juror interfered with their ability to receive a fair trial or prejudiced them in any way") (citations omitted).

After denying Appellant's motion for a directed verdict, the State asked whether the trial judge intended to instruct the jury on accomplice liability and the trial judge stated that he would "charge it in the sense of what is the hand of one. It talks about accomplice. It doesn't go into great deal about it. ... [b]ut ... it talks about being a part of it, ... [and] playing some role in it." ***R. 428-29***. Appellant objected to the instruction and the trial judge agreed to allow him to argue his objection after the charge had been given. ***R. 429***.

The trial judge subsequently instructed jurors that they could consider principles of accomplice liability in determining whether the State had established Appellant's guilt on the charge of murder, *see* ***R. 479-80***, but that they could not consider accomplice liability on the charge of possession of a weapon during the commission of a crime. Instead, he instructed jurors that the State had to prove beyond a reasonable doubt that Appellant possessed a firearm "at the time that that murder was committed." *See* ***R. 479-80***.[29]

Following the jury instructions, Appellant objected to the "hand of one/hand of all charge" because the State did not present "any evidence that the person that [Appellant] was with that night was the shooter." Instead, all of the State's evidenced pointed to Appellant as the shooter. "[E]ven their own State's witness [Sgt. Osborne] said we don't have enough to say he's involved or not, and that's why I think the Court should have declined to read that hand of one/hand of all charge." ***R. 486-87***.

The trial judge stated that he had thought the same as Appellant in the first trial of the case, until "the jury asked a very legitimate question," which caused him "to reflect on" the request for an accomplice liability instruction in the first place. He also indicated that he tries to

[29] He later reiterated this portion of his charge when the deliberating jury sent a note (Court's Ex. 10) asking if the hand of one instruction applied to the weapon charge. ***See R. 489-90***.

learn from his mistakes and he found that the instruction was "appropriate" in light of the evidence presented. ***R. 487-88.***

After the murder conviction, the trial judge indicated that he felt the jury had convicted based on accomplice liability. ***R. 493***. Appellant subsequently moved for a new trial based on the trial judge's accomplice liability instruction. *See* ***R. 599-607***. At the May 29, 2019 hearing on his motion, he asserted that the State's theory and the prosecution's circumstantial evidence in all three trials was that Appellant shot the victim and that the State had not presented any evidence that anyone else shot the victim. He further argued that *Wilds v. State*, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (Ct. App. 2014), *cert. dismissed as imprudently granted*, (October 7, 2015), was "directly on point" and required a new trial because this Court had found appellate counsel in *Wilds* was ineffective for not arguing the trial court erroneously gave an accomplice liability instruction under what Appellant felt were "very similar" facts. ***Mtn. 501-03***.

Appellant further claimed that the jury's verdict reflected that jurors did not believe Appellant was the shooter and found that the person with him was the shooter "by process of elimination." He also pointed to Sgt. Osborne's admission on cross-examination that the State lacked probable cause to serve a murder warrant on "Creep" if that person was identified. Rather, the State did not know the degree of "Creep's" involvement and whether he had conspired. ***Mtn. 504-05***.

In response, Assistant Solicitor Linder pointed out that she "made a very specific point to not say that [Appellant] was the shooter because I think there were questions about that." Appellant "had motive, access, he set up [the murder], he drove there [and] he was involved with everything." Yet, "he was recruiting ... assistance." When Stevens did not respond to his "innocuous text messages," he became very specific about his plans and "ultimately, ... he came

with another person." Unaware of his reason for recruiting someone to aid him, Ms. Linder hypothesized that he might have needed someone to provide him a gun because the murder weapon was never found; he could have needed "a cheerleader," since the defense elicited evidence that he was nonviolent, or he might not have wanted to murder "his sister's boyfriend on the doorstep." ***Mtn. 506-07***.

Addressing Sgt. Osborne's testimony that "he would not have charged Creep without talking to him," she pointed out that the State did not know whether "Creep" was the person who was with Appellant when the murder occurred. Appellant did not say this in his original statement, only later. Also, he had a telephone contact for "Creep" in his phone, but he was less than honest about this person's identity. He said his friend Creep lived in Summerville and described him as having a tattoo. When Sgt. Osborne called the number in the phone, the person who answered would not talk to him. Also, Sgt. Osborne tracked down a man nicknamed "Creep" in Summerville, but this man did not have a tattoo and his cell phone number was not the one listed in Appellant's phone. "So there's nothing to say that this Creep person is actually the individual that was in the car." ***Mtn. 507-08***. *See also* "Statement of Facts."

Ms. Linder correctly observed that Appellant's reliance on *Wilds* was misplaced because it was factually distinguishable, since Wilds' co-defendants testified that Wilds was the shooter. Accordingly, all of the evidence was that he was the shooter. Because there was no eyewitness testimony in this case, the trial judge's accomplice liability instruction was proper. ***Mtn. 508-09***.

Appellant contended in reply that the judge erroneously gave the instruction because the State did not prove who the shooter was or that the other person was involved. Rather, he argued that this other person may have been merely present. ***Mtn. 509-10***.

The trial judge noted that there was a video showing two people getting out of the car and walking to the apartments. Shortly thereafter, the video shows them running out of the apartments and "jump[ing] into the car." Also, Appellant had sent a text indicating in slang that he planned to shoot someone that night and there was other circumstantial evidence implicating him in the murder. The trial judge further noted that the jury had acquitted Appellant on the weapon charge, which indicated that it found the State had not proved that he had possession of it beyond a reasonable doubt. The trial judge rhetorically asked, "Please tell me how there isn't some evidence of a shooter and this man being a shooter and being involved in a plan to go kill somebody[?]" He then denied Appellant's motion. ***Mtn. 510-11; 513-16.***

**B. Discussion.**

There was no abuse of discretion. "The law to be charged must be determined from the evidence presented at trial." *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). The trial judge "has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002); *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "If there is any evidence to support a charge, the trial court should grant the request." *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App. 2005).

This Court explained in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766, 769-70 (Ct.App. 2010) that:

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by

pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

*State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).

"Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

See also *State v. Reid*, 408 S.C. 461, 473, 758 SE.2d 904, 910 (2014).

Respondent submits that the trial judge properly instructed jurors on accomplice liability. Appellant's argument that the charge was improper because the State's theory was he acted as the shooter suffers from the same defect as the trial judge's reasoning in refusing to charge accomplice liability in Appellant's first trial. *See Johnson*, 418 S.C. at 591-92, 795 S.E.2d at 173 (refusing to charge accomplice liability because the State's theory was Appellant was the shooter). The determination of the law to be charged is based upon the evidence presented at trial, see *Rivera*, 389 S.C. at 404, 699 S.E.2d at 159; *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989), not the State's theory as to what the circumstantial evidence shows. While the prosecution's theory was that Appellant fired the fatal shot, the direct and circumstantial evidence presented supported the requested charge. Appellant conceded at the hearing on his new trial motion that the victim was murdered. ***Mtn. 510, lines 21-23.*** Also, as the State correctly argued below, the evidence proved that he had a motive to murder because the victim owed him money,

he had access, he set up the murder, and he drove to the apartment complex where the murder occurred.

When considered in connection with the video footage and photos taken therefrom at the apartment complex in the minutes leading up to and following the murder, the text messages he sent to Stevens not only show his malicious intent, they likewise support an accomplice liability instruction. His text messages clearly reflect that he was recruiting Stevens to assist in the murder, for whatever reason.[30] Although his initial messages seem innocuous, the one sent at 4:37 p.m. unquestionably revealed his plan when he said, "*hey, I go wet dude ass up tonight.*" The texts also seem to reflect that his level of anxiety increased each time he did not receive a satisfactory response from Stevens, until at 9:34 p.m., when he told Stevens, "*I can't wait on you. I gotta handle my biz.*" ***R. 356-63*** (emphasis added).

Another very reasonable inference from the surveillance video and still photos is that he found a person to assist him and that they murdered the victim while acting together, aiding and abetting one. This evidence reflects that Appellant backed Tenika's blue Camry into a parking place some distance away from the murder scene, which enabled him to quickly leave the complex after the murder. (It was also an unsuccessful effort to avoid detection). He and the unidentified accomplice then walk up to the complex. They are thereafter seen running back to the Camry, jumping in and fleeing the complex moments after the shooting occurred. *See Gibson*, 390 S.C. at 354, 701 S.E.2d at 770 (the State can prove "the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, ... by circumstantial evidence and the conduct of the parties"). Because there was neither a video of the shooting nor a

[30] As the State observed below, he might have needed someone to provide him a gun because the murder weapon was never found; he could have needed someone to motivate or reassure him, since the defense elicited evidence that he was nonviolent, or he might not have wanted to murder "his sister's boyfriend on the doorstep."

testifying eyewitness, the State did not have proof as to whether Appellant or his accomplice fired the fatal shots, only that one of them did so. While a very reasonable inference is that Appellant shot the victim, it is equally reasonable to infer that the other individual was the shooter or was otherwise present, aiding and assisting in the murder. This is very similar to the conflicting evidence in *Langley*, 334 S.C. at 648-49, 515 S.E.2d at 100-01 (evidence that defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on several theories of liability, including the hand of one is the hand of all theory).

For the first time on appeal, Appellant erroneously relies on this Court's decision in *Wilds* for the proposition that accomplice liability is an "alternative theory of liability."[31] In *Wilds*, this Court relied on language in the Supreme Court's opinion in *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which implied that a prosecution of a defendant under principles of accomplice liability was an "alternate theory of liability." *See Wilds*, 407 S.C. at 438-39, 450 SE2d at 390. This Court then found that appellate counsel was ineffective in failing to raise a challenge to the trial judge's accomplice liability instruction on appeal because there was no dispute that the defendant was the trigger man in the murder and armed robbery. *Id.* at 439-40, 450 SE2d at 390-91.

Contrary to his argument, the *dicta* in *Barber* relied upon in *Wilds* did not support the conclusion reached in *Wilds* and the trial judge's decision to give the instruction did not submit an alternative theory of liability to the jury. The statement in *Barber* that "an alternate theory of liability may … be charged when the evidence is equivocal on some integral fact and the jury has

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[31] This portion of his argument is procedurally barred because he did not raise it at trial. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal").

been presented with evidence upon which it could rely to find the existence or nonexistence of that fact," *Barber*, 393 S.C. at 236, 712 S.E.2d at 439,[32] was necessarily *dicta*. First, the Court in *Barber* held that the evidence supported an accomplice liability instruction. *Id.* at 236, 712 S.E.2d at 439.

Second and of equal if not greater importance, accomplice liability is not and cannot legally be an alternative theory of liability under South Carolina law. The accomplice liability doctrine can be directly traced to the early common law distinction between principles in the first degree and principles in the second degree. A person is a principle in the first degree if they are the actor or absolute perpetrator of the crime while a principle in the second degree are those who are present, aiding and abetting the *actus reus*. 4 William Blackstone, *Commentaries on the Laws of England* 34. The law has held that those persons who are present at a crime aiding and abetting are as equally guilty as principles since at least the time of King Henry IV. *Id.*[33]

Over two centuries ago, the South Carolina Supreme Court emphatically held in *State v. Fley*, 4 S.C.L. 338, 345 (2 Brev.) (S.C.Const. App. 1809) that:

> It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree* has been exploded. It *is now a distinction without a difference*."

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[32] In reversing Appellant's original conviction this Court, too, implicitly found that accomplice liability is an "alternative theory of liability," as the analogy to the Supreme Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001), makes clear. *See Johnson*, 418 S.C. at 592-94, 795 S.E.2d at 174-75.

[33] King Henry IV of England reigned 1399-1413.

(Emphasis added). *See also State v. Jenkins*, 48 S.C.L. 215, 226 (14 Rich.) (S.C.Const. App. 1867) ("All who are present concurring in a murder are principles therein, and the death, and the act which caused it, is, in the law, the act of each and of all. There is no distinction in the regard of the law, *in the degrees of their guilt*, or the measure of their punishment, *or the nature of their offence, founded upon the nearness or remoteness of their personal agency* respectively") (emphasis added); *State v. Hunter*, 79 S.C. 73, 73, 60 S.E. 240, 240-41 (1908) (where the defense disputed the State's witness who claimed defendant fired the fatal shot, the Supreme Court affirmed the conviction because the identity of the shooter was irrelevant and the defendant was properly convicted as a principle since he was an aider and abettor). *Accord* 1 Bishop, *Commentaries* 470.

More recently, the Court stated, "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Because South Carolina law does not recognize a distinction between liability as a principal in the first degree and a principal in the second degree, and because an accused indicted as a principal may be convicted under accomplice principles, *id.*, the submission of a jury charge on accomplice liability cannot create an alternative theory of liability, either legally or logically. Accordingly, the reference in *Barber* implying that a charge on accomplice liability is a different theory of liability was necessarily *dicta*.[34]

[34] As further support for the position that this language was *dicta*, the State would point out that S.C. Code Ann. § 14-1-50 (2003) provides that the English common law applies in this state where it is not inconsistent with the laws of this state. Also, "the common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of the common law be changed." *State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980); *accord Page v. Winter*, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("It is not for this court to repudiate the common law rule because we may think it illogical or undesirable"). *But*

Yet assuming that the language in *Barber* is not *dicta* and further assuming that *Wilds* was correctly decided, Appellant's reliance on *Wilds* is still misplaced because it is factually distinguishable. In *Wilds*, Wilds was tried for armed robbery and murder. Both of his co-defendants testified to their participation in the robbery and testified that Wilds was the triggerman in the robbery. During deliberations, the jury sent a note to the trial court asking, "[I]f we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?" Over objection, the trial court instructed the jury on accomplice liability. Subsequently, the PCR court found Wilds' appellate counsel ineffective for not challenging the instruction on appeal. *Id.* at 435-37, 756 S.E.2d at 388-89.

This affirmed the PCR judge. The Court noted that the jury may have doubted the co-defendants' testimony, but found that accomplice liability "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Id.* at 439, 756 S.E.2d at 390. This Court found Wilds was prejudiced because the jury instruction was given in response to the jury's question, enabling it to unanimously find a verdict. *Id.* at 439, 756 S.E.2d at 391. Here, unlike *Wilds* but like the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State did not have proof as to whether Appellant or his accomplice fired the fatal shots, only that one of them did so. As a result, the evidence supported an accomplice liability instruction.

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*see Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (the Supreme Court has the authority under extremely rare circumstances and for compelling need to substantially change the common law). Because the *Barber* Opinion did not address the common law rule abolishing the distinction between principles in the first degree and principles in the second degree, the language at issue must be considered *dicta*. *Id.* Of course, if Respondent is wrong and the language in *Barber* relied upon in *Wilds* was not *dicta*, then Barber contravenes this well-settled South Carolina law.

## CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment, conviction and sentence.

Respectfully submitted,

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SC Court of Appeals

**STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

Appeal from Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

**THE STATE,**

**Respondent,**

v.

**DEVIN JAMEL JOHNSON,**

**Appellant.**

Appellate Case No. 2019-000938

**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 28th day of September, 2020.

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