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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019-001570

THE STATE, ...RESPONDENT,

v.

DEVIN ZACHARY ELIJAH RUTTLE,.....APPELLANT.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. The circuit court abused its discretion in concluding that Nysha Jefferies, Juror 92, was not the same Nysha who attended New Life Deliverance Worship Center and whose grandfather was the victim of a violent crime.

2. The circuit court abused its discretion by denying Appellant's Motion for New Trial due to juror concealment where the juror in question, Nysha Jefferies, intentionally concealed clearly responsive information during voir dire that would have been material to Appellant's intelligent use of peremptory challenges or could have supported a for cause challenge.

3. The circuit court's denial of immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 et. seq. (the "Act" or "PPPA"), constituted an abuse of discretion because the court imposed an improperly elevated burden of proof upon Appellant to establish immunity.

4. The circuit court's denial of immunity under the PPPA was controlled by an error of law because the court misinterpreted the "without fault" element of self-defense by concluding that an individual is debarred from exercising his fundamental right of self-defense simply by doing an action that affords an opportunity for conflict.

5. The circuit court's denial of immunity under the PPPA constituted an abuse of discretion because it was grounded in factual conclusions, including that Appellant "confronted" decedent with a gun and that decedent knew anything about the presence of individuals other than Appellant, that are without evidentiary support.

6. In light of the new rule enunciated by the Supreme Court in *State v. Burdette*, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019) and *State v. Smith*, 430 S.C. 226, 233-34, 845 S.E.2d 495, 498-99 (2020), the trial court committed reversible error by giving an implied malice charge where evidence had been presented that the Appellant acted in self-defense.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court properly denied Appellant's post-verdict and sentence motion for a new trial, finding he failed to meet his burden at the hearing of proving Juror 92 intentionally concealed information during *voir dire*.

2. Whether the circuit court properly denied Appellant immunity from prosecution under after a *Duncan* hearing[2] because Appellant failed to prove he was not without fault in bringing on the difficulty by a preponderance of the evidence, and whether the court correctly ruled Appellant did not prove the elements of self-defense and Section C of the Act by a preponderance in its written Order denying immunity.

3. Whether the issue is preserved for appellate review; but if it is, whether trial court exercised proper discretion when charging the jury on implied malice particularly because the now-disallowed "malice may be inferred from the use of a deadly weapon" charge was omitted.

[2] *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, standard of review, and burden of proof for a pre-trial immunity determination under the Protection of Persons and Property Act. S.C. Code §§16-11-410 to 450 (2015)).

STATEMENT OF THE CASE

Appellant Devin Ruttle was indicted at the October 2017 term of the grand jury for Spartanburg County for murder, and at the August 2018 term for unlawful carrying of a pistol. 2017-GS-42-05449, 2018-GS-42-04411. Appellant shot and killed the victim, Dalton Moore, at the Timken Activity Center in Cowpens, South Carolina after improperly concealing a pistol without a permit. Appellant was prosecuted by Deputy Solicitor Derrick Bulsa and Assistant Solicitor Jesse Williams; Appellant was represented by Richard Vieth, Esq. Tr. 84. His co-defendant, Lorenzo Calderon, was indicted for accessory after the fact to a felony and was represented by Monier Abusaft, Esq. Tr. 72.

The Honorable J. Derham Cole held a pre-trial hearing pursuant to the Protection of Persons and Property Act, S.C. Code §§ 16-11-410 to 440 on August 29, 2018. Immunity Tr. 1-87. Appellant claimed he was entitled to immunity from prosecution because he fired his weapon in self-defense after the victim advanced with a knife. *Id*. Judge Cole issued a written Order denying immunity on September 5, 2018, finding Appellant did not prove he was not without fault in bringing on the difficulty by a preponderance of the evidence. Immunity Order 1-4.

Appellant proceeded to trial by jury from September 10 to 13, 2018, after which Appellant and his co-defendant were found guilty as charged. Tr. 595-596. Lorenzo Calderon received 15 years suspended to 5 years in jail with five years of probation. Tr. 605-606. Appellant was sentenced on September 14, 2017 by Judge Cole to life in prison. Tr. 605-606. He also pled guilty to three other indictments: 2017-5446 possession with intent to distribute 11 bags of marijuana, 2017-5447 possession of 162 alprazolam pills, and 2017-05448 possession of less than one gram of meth. Tr. 611-625. He received 5 years, 6 months, and 3 years respectively, and one year for the unlawful carry charge, all to be run concurrently. Tr. 611-625.

Judge Cole denied Appellant's motion to reconsider his sentences on September 16, 2019 by another written Order, after which Appellant timely filed a notice of intent to appeal his convictions and sentence two days later. 05/12/2021 Tr. 27. Appellate Defense filed a motion to suspend the appeal and requested leave to file a motion regarding the disqualification of a juror on April 17, 2020. Counsel was then substituted and Appellant's new appellate counsel, Christopher Brumbak, Esq., filed a motion for a new trial. After briefing, the Court of Appeals granted the motion to suspend and, due to the pandemic, heard arguments on the motion for a new trial on May 12, 2021. 05/12/2021 Tr. 1-127. No party subpoenaed the juror in question (or asked the judge to secure her appearance), and as the motion for a new trial was predicated upon facts she would have supplied, Judge Cole denied the motion in a third written Order on April 8, 2022. This Brief of Respondent follows.

STATEMENT OF FACTS

"I messed up. I shot Dalton." "I took care of some business." - Devin Ruttle.

Tr. 293-294, Tr. 376-378.

18-year-old Dalton Moore died a half a mile from his house just after 7:00 P.M. on May 5, 2017 from a gunshot wound right under his right arm. 19-year-old Devin Ruttle ("Appellant") shot him after approaching him in the parking lot of the Timken Community Center in Cowpens, South Carolina. Tr. 80-81, Tr. 84, Tr. 106, Tr. 118, Tr. 334-362, Tr. 379.

Easter Sunday, April 16, 2017:

Appellant was with his friend Lorenzo Calderon ("co-defendant") on the afternoon of Easter Sunday in 2017 when they decided to drive to Dalton's neighborhood to meet someone Lorenzo knew. While they were driving, they saw Dalton standing at the edge of his driveway with his hands behind his back. Appellant knew him, having previously gone to his house for a birthday party, and it was well known that Lorenzo had issues with Dalton. The car happened to cut off in front of the driveway, so Lorenzo got out of the passenger's seat and pointed a gun at Dalton, who was moving toward them. Tr. 381-385, Tr. 409-414.

Friday, May 5, 2017

Three weeks later, Appellant woke up from a nap and called Lorenzo around 5:00 P.M. because he needed help getting his car out of a ditch. Lorenzo was with Hunter Sizemore at the time, so they both headed to where Appellant was. While driving on Foster Street, they spotted Dalton walking on the sidewalk in the opposite direction of downtown Cowpens, and Lorenzo hollered out of the car, "Don't get caught lacking."[3] After they got to where Appellant was, they got his car out of the ditch, and then Appellant, Lorenzo, Hunter, and another male[4] went to the

[3] Or "slacking." Tr. 214.
[4] Jacob Quinn did not testify at trial and was not involved in the incident.

Hot Spot to get gas around 6:40 P.M.[5] Appellant bought a gallon of water and filled the container with gas, and then they all went back to put it in the car. Tr. 203-208, Tr. 209-210, Tr. 214, Tr. 267-269, Tr. 386-388; State's Exhibit 1 (aerial map of the Hot Spot); State's Exhibits 19 and 20 (showing Appellant at the Hot Spot in a lime green hoody.)

Meanwhile, Dalton's friend Justin Rector was riding in the bed of a truck driving down Foster Street when he saw Dalton walking on the sidewalk right near Cowpens Middle School. Justin asked him if he wanted a ride, but Dalton declined, as he was only a half mile from his house. Moments later, Appellant and his crew – now in two vehicles – spotted Dalton on the side of the road as well.[6] Lorenzo demanded that Hunter stop his truck,[7] but after Hunter refused, Lorenzo hung out of the side of the truck and yelled derogatory things at Dalton. He then jumped out of the truck while it was still moving, leaving his phone behind. Appellant pulled his car over near the bottom of the hill on Foster and Lorenzo got into his passenger's seat.[8] Tr. 123-125, Tr. 208-209, Tr. 216-226, Tr. 386-390, Tr. 422-424, Tr. 449-452.

The two talked and decided Lorenzo would stay in the car while Appellant approached Dalton. Appellant armed himself with a pistol, got out of the car, and began climbing the hill that sloped upward toward downtown. Dalton had retreated to the back of the parking lot to the right

[5] Appellant was supposed to pick up the mother of his child, Brianna Ivester, for a date between 6 and 7:00 P.M., but did not show up. Tr. 458-459.

[6] Appellant claims he was unaware that Hunter, Lorenzo, and Jacob were driving behind him.

[7] Hunter testified Lorenzo said, "Stop, stop, stop, stop, stop!"

[8] Conflicting testimony was presented here. Appellant may or may not have turned his car around in the Cowpens Middle School parking lot before Lorenzo got in. Lorenzo could have also turned the car around to face away from downtown after Appellant got out of the vehicle. Either way, the car was facing away from downtown on Foster Street right after the shooting.

of the Center by that point.[9] Appellant turned left into the parking lot of the Center on foot, and then, while still fairly far away, pulled out his gun and tried to fire it at Dalton. The first bullet jammed, so he discharged that cartridge and then fired twice more, hitting Dalton once. A knife was found at the scene with two unknown individuals' DNA on it; Appellant claimed Dalton threatened him with it, but only Appellant's testimony supported that assertion at trial. Tr. 330, Tr. 338, Tr. 341, Tr. 359. Tr. 390-393, Tr. 432-434.

The bullet entered Dalton under his right arm at an upward angle and lodged in his third cervical vertebra, 4-5 inches down from the top of his neck. His right arm was higher than the pistol that killed him, so he could have been moving toward or cowering away from the weapon when he was hit.[10] The only thing certain was that he was turned with only his right side toward Appellant when the bullet struck him. Appellant saw Dalton fall,[11] but instead of calling 911, he ran back to where Lorenzo had the car ready in the road, and the two sped off. Appellant did not have a concealed weapon permit to carry a gun outside of a car or a home. Multiple neighbors who lived right across the street from the Center heard the gunshots, saw Appellant's car (a gold sedan with a black trash bag over its rear driver's side window), and Appellant, who was wearing a lime green hoody, running in the road toward and sitting in the car. It was still light outside when the shooting occurred. Tr. 127-155, Tr. 269-273, Tr. 360, Tr. 392-393, Tr. 442; State's Exhibits 6-7, 12-17, 21-39, 41-48 (photographs of the scene and Appellant's vehicle.)

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[9] When looking at the Center from the street, the Center is to the left of its parking lot, and Cowpens Middle School is further up the hill next to the parking lot on the right, closest to downtown. Tr. 99-110; State's Exhibit 3 (photograph showing the road, the Center, and the homes of the witnesses); State's Exhibit 44 (aerial photograph.)

[10] SLED's forensic pathologist testified Dalton could have been moving backward, dropping elevation, bending over, or bending his knees at the time he was hit. Tr. 359-362.

[11] Neighbors rushed over to performed CPR on Dalton, but he passed away at the scene.

Lorenzo drove down the hill then turned left off Foster onto Marion Court right across the street from the Center. He sped down it at a high speed, then switched seats with Appellant at the end of the cul-de-sac. The two then roared backed down the street and turned left onto Foster in the direction from which they came, planning to go to Appellant's father's house. Appellant called his mother and girlfriend around 8:00 P.M. while on the way, and snapchatted Maria Calderon: Lorenzo's niece and the girl Appellant was "talking to" at the time (a form of a romantic relationship involving sex). Appellant was wearing a lime green hoody in the Snapchat photo. He told Maria he loved her and then said, "I messed up." "I shot Dalton." Maria asked him if he had killed him, and he said, "I took care of some business." Brittni Gossett was with Maria at the time and confirmed that Appellant did say those things. Tr. 160-169, Tr. 289-303, Tr. 376-378, Tr. 392-394, Tr. 399, Tr. 419-420, Tr. 474-475.

Once they got to the father's house at *** Rosecrest Drive, Appellant changed and later admitted to throwing his clothes, shoes, the gun, and the plastic bag from off of his car window into a trash can outside of the house. He said he'd seen people do things like that on TV shows and knew he had to get rid of his clothes because an eyewitness (Mrs. Brewster) had seen him and what he was wearing. The mother of his one and a half-year-old son was there in the living room when Appellant and Lorenzo arrived. Appellant gave Brianna money for their son, told her he loved her, and left to go find his son who was with Appellant's mother at the time. Appellant was carrying a black cloth bag that was zipped up. Tr. 148-155, Tr. 280, Tr. 380. Tr. 399, Tr. 406. Tr. 425-426, Tr. 445, Tr. 459-462, Tr. 467, Tr. 471.

Deputy James Rush from SLED went to look for the vehicle around 7:30 or 7:45 P.M. after helping to secure the scene. 10-15 minutes later, the deputy saw a gold vehicle speeding down a road with adhesive residue marks going around the driver's rear window, with no glass

was present. Deputy Rush initiated a traffic stop and found Appellant in the driver's seat and Lorenzo next to him. He discovered two firearms in the glove box, and a loaded magazine on the floorboard of the driver's side. A .9 mm semiautomatic pistol was in the glove compartment along with a Smith & Wesson semiautomatic .40 caliber pistol, and a .9 mm rifle was found in the trunk. Two boxes of ammunition were found in the glove box – one .9 mm and one .40 caliber. There was an unfired cartridge on the floorboard of the vehicle next to a detachable box magazine for a .9 mm Glock type pistol with a cartridge case. No magazines were in the pistols in the glove box. A book bag was in the rear passenger's side with .9 mm cartridge inside. Appellant claimed he did not own any .40 caliber weapons and that the .40 caliber ammo found in his glove box must have belonged to Lorenzo. Tr. 102-103. Tr. 183-188, Tr. 190-191, Tr. 230-232, Tr. 248-252, Tr. 311-324, Tr. 434-436; State's Exhibits 14-17 (photographs of the vehicle).

SLED Special Agent in Charge Harvey Owens arrived on the scene right after 8:00 P.M. The victim's money was strewn all around the parking lot, mostly to the right side of the Center where the dirt was. A most likely misfired .40 caliber Smith & Wesson projectile was found at the scene along with two other spent .40 caliber cartridge casings. Appellant's DNA was found on the unfired projectile. A black lighter and a folding knife were also found on the ground. DNA on the knife handle came back to two individuals, but not conclusively to the victim. None of the weapons found in Appellant's car matched the casings found at the scene. Appellant signed a waiver of rights form on May 6, 2017, said he was never on Foster Street on the day of the shooting, and then asked for an attorney. Tr. 120-121, Tr. 156, Tr. 243-245, Tr. 242-245, Tr. 259-260, Tr. 273-274, Tr. 307, Tr. 317-330, Tr. 396.

STANDARD OF REVIEW

"We review a ruling on a new trial based on a juror's alleged concealment during *voir dire*" for a prejudicial abuse of discretion. *State v. Tucker*, 423 S.C. 403, 410, 815 S.E.2d 467, 471 (Ct. App. 2018); *State v. Zeigler*, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005); *State v. Galbreath*, 359 S.C. 398, 402, 597 S.E.2d 845, 846-847 (Ct. App. 2004). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The appellate court reviews an immunity determination for an abuse of discretion. *State v. Manning*, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016). "[T]he abuse of discretion standard does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-167 (2007). An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Clark*, 339 S.C. at 389, 529 S.E.2d 528, 539 (2000).

ARGUMENT

I. To be entitled to a new trial, Appellant had to prove (1) Juror 92 was the person who went to church with Appellant; (2) The Juror *knew* she went to church with Appellant and intentionally concealed it during *voir dire*; and (3) That concealed information would have been material to a defense strike. No party subpoenaed the juror to the hearing on the motion or asked the judge to do so. Thus, Judge Cole did not abuse his discretion by denying the new trial motion, finding the defense did not prove the above three factors.

Appellant argues, at least in part, that Juror 92 intentionally concealed the fact that she went to Appellant's church eight years before the trial when she was 11 or 12-years-old (for 3-6 months) during *voir dire*. He also argues she intentionally concealed the fact that her grandfather was the victim of a violent crime even though the judge did not ask whether any venire person had grandparents who were victims of violent crimes.[12] Appellant did not realize the juror "looked familiar" and did not move for a new trial until after he was sentenced, even though he had watched her walk in and out of and sit in the courtroom for days during the trial.

Because of this alleged concealment, Appellant claims the Honorable J. Derham Cole abused his discretion by not sua sponte subpoenaing Juror 92 to the Appellant's hearing himself to help Appellant meet his burden of proving concealment. IBOA 12-18. Alternatively, he argues it was the State's job to subpoena the juror to the hearing. IBOA 18-19. Appellant lastly argues Judge Cole abused his discretion in his Order denying the motion for a new trial by (1) concluding Appellant had not met his burden of proving Juror 92 was *the* Nysha Jefferies who went to New Life Deliverance Center; and (2) concluding he had not met his burden of proving

[12] Before the violent crime question was asked, Judge Cole defined "immediate family" by saying "and for the purposes of all of my questions an immediate family member refers to a parent or a spouse or a child or a sibling – parent, spouse, child or sibling." Tr. 43. That list does not include "grandparent." Therefore, it is reasonable to conclude that one of the many possible and legitimately legal reasons Juror 92 did not answer the violent crime question was because "grandparent" was not on the list. Therefore, Appellant fails to meet his burden of proving intentional concealment on this issue.

intentional concealment. The State, combining Appellant's Issues 1, 1A, 1B, and 2, disagrees and submits Appellant's arguments are without merit.

The Sixth and Fourteenth Amendments to the U.S. Constitution guarantee a defendant a fair trial by a panel of indifferent and impartial jurors who are free from outside influences of all kinds. U.S. Const. amends. VI and XIV; *Estelle v. Williams*, 425 U.S. 501 (1976); *see also* S.C. Const. art. I §§ 3 and 14. To protect these rights, trial judges must question the venire panel about any bias or prejudice they may have for or against a party to the case. *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998). Each party may submit additional questions to the trial court beyond the standard to help them determine whether to exercise a peremptory strike or a challenge for cause. [13] *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982). "Where the trial judge grants counsel's request [to] ask a particular question on *voir dire*, counsel is entitled to a truthful answer to the question." *Gulledge*, 277 S.C. at 370, 287 S.E.2d at 490.[14]

"When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that information . . . would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenge." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1989) (emphasis added). "[T]he court should not grant a mistrial [or a new trial] based on a juror's concealment of information 'unless absolutely necessary.'" *State v. Coaxum*, 410 S.C. 320, 317, 764 S.E.2d 242,

[13] As Judge Cole noted, these questions must be based on reasonable and constitutional grounds and must be based on the facts of the case. Order Denying New Trial p. 1; *see also* 50 C.J.S. Juries, § 279, *Peremptory Challenge*, p. 1066.

14 It bears mentioning at this juncture that Appellant's trial counsel Richard Vieth did not submit any additional *voir dire* questions to Judge Cole; only the State and the co-defendant's counsel did. 05/12/2021 Hearing Tr. 23-24. Therefore, is Appellant entitled to a "truthful answer" to a question he did not ask? But we will not belabor the point.

245 (2014). The right to a new trial in "relating to improper juror silence during *voir dire* is not absolute." *Thompson v. O'Rourke*, 288 S.C. at 15, 339 S.E.2d at 506. "In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias." *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003); *Smith v. Phillips*, 455 U.S. 209 (1982) (emphasis added.) If a party disagrees with a trial court's ruling on the concealment issue, "the party need only demonstrate [on appeal] the error of the trial court's decision by proving the concealment was, in fact, intentional." *Coaxum*, 410 S.C. at 328, 764 S.E.2d at 245-246 (emphasis added).

Here, as the juror was not subpoenaed by any party to the hearing (and as no party directly, at least not officially, bore the burden to bring her to court), Judge Cole did not abuse his discretion by denying the motion. Even Appellant testified he did not know who the juror was, and admitted he'd had no interactions with her at New Life Deliverance Center. This Court should affirm.

A Post-Sentence Motion for a New Trial – Rule 29(b), SCRCrimP

The process for obtaining a new trial based on alleged juror concealment is as follows: First, the moving party must move for a new trial within a reasonable time after the grounds for the disqualification of a juror are discovered. Rule 29, SCRCrimP. Then, they must prove:

> **(1)** A juror did not give a truthful answer in response to *voir dire*;
>
> **(2)** They did not know the juror should be disqualified before the verdict;
>
> **(3)** A truthful answer could have supported a challenge for cause or could have been a material factor in the use of a peremptory strike; and
>
> **(4)** The moving party was not negligent in failing to learn of the grounds for disqualification sooner.

Long v. Norris and Associates, Ltd., 342 S.C. 561, 575-576, 538 S.E.2d 5, 13 (Ct. App. 2000).

As with all motions, the moving party bears the burden of proving they are entitled to what it is they are asking for. "In the face of a juror's intentional nondisclosure of pertinent information during *voir dire* . . . the party need only demonstrate the error of the trial court's decision [to deny a new trial] by proving the concealment was, in fact, intentional…" *Coaxum*, 410 S.C. at 328 (emphasis added).

> 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 strikes. 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 329, 764 S.E.2d at 246; *see also State v. Aldret*, 333 S.C. 307, 313, 315, 509 S.E.2d 811, 813-815 (1999) (underscoring the fact that the moving party bears the burden). "Whether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis." *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004). "The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." *Thompson v. O'Rourke*, 288 S.C. at 15, 339 S.E.2d at 506.

Burden of Proof

To define his burden of proof at the motion for a new trial, Appellant attempts to distinguish the cases involving internal juror misconduct issues (that have a clear and convincing evidence burden of proof) from the cases involving juror *voir dire* concealment issues (that have an allegedly undefined burden of proof). IBOA 14-15, *e.g*. He argues Judge Cole misapplied the procedure in *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811 (1999), arguing Justice Few – while still a Court of Appeals judge – wrote the defendant did not bear the burden of proving juror concealment at hearings on the matter in *State v. Miller*, 38 S.C. 47, 56-57 n.3, 727 S.E.2d 32, 37 n.3 (Ct. App. 2012); IBOA 14. The problem is, the Supreme Court of South Carolina

vacated the Court of Appeals' opinion in *State v. Miller*, 409 S.C. 312, 762 S.E.2d 394 (2014), rendering the point null and void.

To Respondents' knowledge, *State v. Covington* is the only South Carolina case that speaks directly to this issue. 343 S.C. 157, 164-165, 539 S.E.2d 67, 70-71 (Ct. App. 2000) (finding the burden of proof for proving alleged misconduct, "either on *voir dire* or in jury deliberations" is "a clear and convincing standard"). This Court did reference, however, both *State v. Aldret* and *State v. Covington* in its 2018 *State v. Tucker* opinion, alluding to the fact that the clear and convincing standard for the moving party is indeed alive and well. 423 S.C. 403, 413-414, 815 S.E.2d 467, 472 (Ct. App. 2018). "[I]n *State v. Aldret*, the South Carolina Supreme Court set the procedure trial judges must follow when deciding juror misconduct claims arising after verdict. . .; *see also State v. Covington* . . . (adopting *Aldret* procedure in a case involving alleged intentional concealment during voir dire)." *Id*. "As the party alleging misconduct, Tucker bore the burden of proving Juror A was biased or otherwise lacked ability to follow her oath." *Id*. Judge Cole did not reference a specific burden of proof in his Order, but Appellant only benefits if he applied a preponderance standard.

***State v. Woods* Intentional Concealment Test**

Our Supreme Court laid out a test defining a moving party's burden when claiming a juror intentionally concealed information in *State v. Woods*. A new trial is only required when:

> **(1)** The moving party proves the juror intentionally concealed the information; and
>
> **(2)** The information proved to be concealed would have supported a challenge for cause or would have been a material factor in the use of a peremptory challenge.[15]

[15] "As to allegations that a juror intentionally provided misleading false, or incomplete answers on *voir dire*, a new trial is only necessary where the purposefully concealed information would have been a material factor in the party's use of peremptory challenges or would have supported a challenge for cause." *State v. Covington*, 343 S.C. 157, 164, 539 S.E.2d. 67, 70 (Ct. App. 2000) (citing *State v. Kelly*, 331 S.C. 132, 146, 502 S.E.2d 99, 106 (1998)).

State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001).

Intentional Concealment

Intentional concealment "occurs when the question presented to the panel on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Woods*, 345 S.C. at 588, 550 S.E.2d at 284; *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004); *State v. Galbreath*, 359 S.C. 398, 404 n.2, 597 S.E.2d 845, 848 n.2 (Ct. App. 2004); *State v. Tucker*, 423 S.C. at 411, 815 S.E.2d at 471. Whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case-by-case basis." *Woods*, 345 S.E.2d at 588, 550 S.E.2d at 284; *Gulledge*, 277 S.C. at 370, 287 S.E.2d at 490. The decision to strike a juror for cause is within the sound discretion of the trial judge. *Woods*, supra; *Abofreka v. Alston Tobacco Co*., 288 S.C. 122, 341 S.E.2d 622 (1986).

"In the face of . . . intentional nondisclosure of pertinent information during *voir dire* . . . the party need only demonstrate the error of the trial court's decision [to deny a new trial] by proving the concealment was, in fact, intentional . . . ." *Woods*, 345 S.C. at 587-588, 50 S.E.2d at 284; *Coaxum*, 410 S.C. at 328. "If a juror intentionally withholds material information requested on *voir dire*, bias and prejudice are inferred from the concealment." "Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial judge inquire into prejudice." *Woods*, 345 S.C. at 589. "If the court finds no intentional concealment occurred the inquiry ends there." *Lynch v. Carolina Self Storage Ctrs. Inc*., 409 S.C. at 155, 760 S.E.2d at 116.

Unintentional Concealment

"Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Woods*, 345 S.C. at 588, 550 S.E.2d at 284. "If a juror's nondisclosure is unintentional, **the trial court may exercise its discretion** in determining whether to proceed … or declare a mistrial. Only when a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial court inquire into prejudice." *Coaxum*, 410 S.C. at 328-329, 764 S.E.2d at 246.

Of considerable weight here, "[u]nintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonable misunderstands the question posed." *Williams By and Through Wilford v. Barnes Hosp*., 736 S.W.2d 33, 36 (Mo. 1987) (quoted in *Woods* at 588-589, 550 S.E.2d at 285.) "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." *Doyle v. Kennedy Heating & Service, Inc*., 33 S.W.3d 199, 201 (Mo.Ct.App. 2000) (emphasis in original); *Woods*, 345 S.C. at 589, 550 S.E.2d at 285. "If the court finds no intentional concealment occurred, the inquiry ends there." *Lynch v. Carolina Self Storage Ctrs. Inc*., 409 S.C. 155, 760 S.E.2d 111, 116 (Ct. App. 2014). "[W]here 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; *State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).

"[T]he court of appeals has previously read *Stone*[16] and its progeny to essentially eliminate the trial court's ability to remove a juror for an unintentional concealment, no matter how

[16] *State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247-248 (2002)

relevant the information disclosed would have been to exercising a peremptory strike." *Coaxum*, 410 S.C. at 329, 764 S.E.2d at 246. "Our previous decisions have not focused on the need for this prejudice analysis, and the court of appeals has periodically omitted it when considering cases involving a juror's unintentional nondisclosure during voir dire." *Coaxum*, 410 S.C. at 329, 764 S.E.2d at 246.

Material to Exercising a Strike

Whether a trial court moves on to consider this prong of the *Woods* test depends on what they concluded the moving party proved with regards to concealment. "A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case. The decision to strike a juror for cause is within the sound discretion of the trial judge. *Woods*, 590/285; *Abofreka v. Alston Tobacco Co*., 288 S.C. 122, 341 S.E.2d 622 (1986). "[T]he 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, 247-248 (2002) (citing *Woods*, 345 S.C. at 586-588, 550 S.E.2d at 284). If a party proves both intentional concealment of information, and that the information would have been material to their exercise of either type of strike, only then is prejudice is inferred and a new trial is required. *Long*, 342 S.C. at 574; *Thompson v. O'Rourke*, supra; *Woods*, supra.

Here, Appellant alleges all he had to do was allege intentional concealment, and then the burden shifted to the trial court (or, alternatively, the State), to "hail" the juror into court to prove the misconduct, because prejudice is automatically inferred. IBOA 15-16. He claims because a presumption of prejudice eventually applies under certain conditions, he did not have to first prove prong one. However, as he cites on page 23 of his brief, "Complaints of counsel do not

constitute evidence." *State v. Johnson*, 350 S.C. 543, 548, 567 S.E.2d 486 (Ct. App. 2002). Case law is clear that the party alleging concealment must *first* prove the concealment was intentional, and then must *also* prove the information would have been material to their exercise of a strike before the presumption of prejudice appears. *Woods,* supra.

Voir Dire and The Motion for a New Trial Hearing

Judge Cole rightly held the Appellant failed to prove intentional concealment, unintentional concealment, or that the allegedly concealed information would have been material to a strike. Order at 5-6. When addressing the venire panel pre-trial, Judge Cole told them he would introduce individuals to them who might be involved in the trial, in order "to find out if [they had] any connection whatsoever" with them. Tr. 31-32. One of the questions he asked was: "Does any member of the jury panel or any members of your immediate family – and for the purpose of all my questions an immediate family member refers to a parent or a spouse or a child or a sibling – . . . . Do you or any members of your immediate family attend or have you ever attended New Life Deliverance Worship Center? Tr. 43-44. Juror 92 did not respond. *Id*.

Post-trial, Appellant argued she did not respond to the question because she wanted to conceal that information for a malicious purpose. 05/12/2021 New Trial Tr. 5-6. Testimony was presented at the hearing on the new trial motion that Appellant contacted his father and told him Juror 92 "looked real familiar." 05/12/2021 New Trial Tr. 98. He admitted, however, that although he had watched the jurors coming in and out of the courtroom during the whole trial because "his life was on the line," he did not notice her until polling occurred post-verdict. 05/12/2021 Tr. 102-103. Appellant's father, the pastor of New Life, testified he spent multiple months scouring 7-8 years of church video footage and photos in order to attempt to confirm Juror 92's attendance at his church. *Id*. at 36-58. Of all that footage, Juror 92 was only located

twice, and Appellant's father admitted he did not know or recognize the juror; nor was there a paper record of her ever attending the church. *Id*. at 53. Appellant testified he sat to the left side of the stage during church events with a laptop (doing sound, etc.) and did not "mix and mingle" much. He confirmed he had never "mixed or mingled" with Juror 92 at the church. *Id*. at 91-103.

Trial counsel Richard Vieth testified he did not submit *voir dire* questions, and when asked whether the New Life question would have been material to his decision to exercise a strike, he said, "Well, I think you inquire from the client if they knew [the juror.] And if not, I would have asked the question, was there a particular reason that you left?" He later said that, actually, he "would [have] want[ed] someone that went to the church to be on that jury most of the time" because it would have likely been in his client's best interests. 05/12/2021 New Trial Tr. 23-25. He confirmed that he had provided the full list of potential jurors to Appellant and his family before trial for them to review, and that they had not recognized Juror 92's name or had pointed her out before or during the trial. *Id*. at 20-29. There was a brief discussion regarding whether the juror had harbored resentment against Appellant, but it was revealed that another lawyer had planted that idea in Vieth's mind, not the Appellant. *Id*. at 21-22.

The youth pastor at New Life was the only one who testified that he have interactions with a Nysha Jefferies at New Life and confirmed she had attended from 2011-2012. *Id*. at. 91-92. He testified he had never seen her with Appellant, as they were a few years apart in peer groups, and that Appellant sat at the front of the church during events "separate and apart" from the main group. *Id*. at. 64-83. During closing arguments, the State pointed out the conflicting testimony presented regarding the Nysha Jefferies' attendance at the church – the pastor said she had attended for 3-6 months from November 2010 to March 2011, but the youth pastor said he did not start as a youth leader until 2012. *Id*. at. 119. He highlighted the fact that Jefferies was an

11 or 12-year-old girl at the time, and might not have even known the name of the church she was being bussed to for "hip hop music, food, and entertainment." *Id*. at 40-43, 119-123. The defense argued that concealment was concealment, and a new trial was required. *Id*. at. 23-25.

In his April 7, 2022 Order denying the new trial motion, Judge Cole cited the right rule –

> [I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs when the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Order p. 2; *Woods,* supra (among other current and correct rules cited.)

Then, Judge Cole held the defense had failed to prove that Juror 92 was *the* Nysha Jefferies who attended New Life. Order p. 3. However, he stated he would "nevertheless address the issue presented as if the juror had been correctly identified so as to resolve the issue presented for purposes of appeal." *Id*. He then held the Appellant had failed to establish intentional concealment or that he was entitled to a new trial, highlighting both the fact that he had not been asked the bring the juror to the hearing, and that Appellant and his father both admitted to not knowing who Juror 92 was.[17] Order at 3-7. Because of this, he rightly held the

[17] Judge Cole's full and final conclusions were that the defense failed to prove:

- (1) Juror 92 is the young black female he has identified as the trial juror from photos, videos, and testimony presented at the hearing;
- (2) The juror "intentionally" failed to disclose the information of which inquiry was made during *voir dire*;
- (3) The juror actually had any relationship or connection with Ruttle;
- (4) The juror actually had any relationship or connection with Ruttle's father;
- (5) The juror actually "attended" or "ever attended" the New Life Deliverance Worship Center within a reasonable interpretation of the term;
- (6) Any information not provided by the juror was central or significant to the case;
- (7) Had the juror made a disclosure of the information claimed by the defendant to have been concealed, such fact would have reasonably supported a challenge for cause;

defense had failed to meet their burden of proving actual knowledge of a relationship and "the evidence presented to attempt to establish a connection was mere speculation." Order at 4. "It would be just as reasonable to assume . . . she had no personal knowledge of Ruttle." Order at 4-5. "He asserts the juror should have had knowledge of him, his father, or both because of her attendance although neither the defendant nor his father knew her . . . ." Order at 7.

Judge Cole's ruling was based on proper conclusions of law and had evidentiary support. He ruled that it was the Appellant's burden to prove intentional concealment and held he had failed to meet that burden because as the juror was not summoned to the hearing to answer for herself, there was not enough evidence to prove intent. Regarding whether it was unintentional concealment, he held that even if the juror was in fact the Nysha Jefferies who had attended New Life, whose attendance was limited to "one or more events," the subject of the inquiry was so far removed in time that her failure to respond was reasonable under the circumstances. Going further than he had to, he then moved to prong 2 of the *Woods* test and held the Appellant had failed to prove the allegedly concealed information would have been material in his use of a strike, highlighting how trial counsel testified he'd probably have wanted someone from New Life on the jury. Finally, he held that the issue was not material to the case, so prejudice could not be presumed. He followed the case law to the letter.

As mentioned, this Court affirmed the *State v. Tucker* trial court's decisions to deny the appellant's motion for a new trial and to deny even an evidentiary hearing on a claim of

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- (8) Had the juror made a disclosure of the information claimed by the defendant to have been concealed, that such fact would have been a material factor in the exercise of a peremptory challenge, as trial counsel testified, he would have considered it desirable for a juror who was a congregant at the Center to be seated for service in the trial; and
- (9) that under any scenario there exists a reasonable belief that the defendant was prejudiced by the nondisclosure of the information.

April 7, 2022 Order at 8.

intentional concealment that was far stronger than what is argued here. 423 S.C. 403, 407, 815 S.E.2d at 469. Tucker, also convicted of murder, alleged after he was sentenced that a juror had intentionally concealed a relationship with a witness and presented evidence that the two directly knew each other from work, that the witness was one of the juror's 347 friends on social media, and that they had contacted each other on social media a mere thirty-six weeks before the trial. *Tucker*, 423 S.C. at 411-412, 815 S.E.2d at 467, 471. Regardless, this Court held the trial court was within his discretion to deny a hearing and find Tucker had failed to prove intentional concealment, that the information would have have been material to a strike, or prejudice. *Id*.

> Leaving credibility determinations in jury misconduct claims to trial judges means respecting their decision that they have enough evidence to weigh it at all, whether the witness' testimony is spoken or written. Assessing credibility often works best with live testimony, but a trial judge's senses still function when reviewing affidavits. One can judge credibility by appraising what and how people communicate, in person or on the page. The trial judge does not have to take the allegations as true and is free to gauge their reliability. A judge cannot, for example, be forced to concede the credibility of a witness' statement that the earth is flat; dressing nonsense up in an affidavit does not clothe it with eternal verity.

Tucker, 423 S.C. at 414, 815 S.E.2d at 472-473.

The same is true here. This Court should affirm.

II. Judge Cole properly exercised his discretion when he denied Appellant immunity, finding he had not proved by a preponderance that he was not without fault in bringing on the difficulty. The court is not required to accept an appellant's version of events. Judge Cole's conclusion that the State's version of events was more probable had evidentiary support and was not an error of law under *State v. McCarty*.

Appellant claims Judge Cole improperly denied Appellant immunity because (1) he imposed an elevated burden of proof on Appellant to establish immunity by using the now-taboo phrase "quintessential jury question" at the very end of his fourteen-page Order; (2) he committed an error of law by concluding "without fault in bringing on the difficulty" meant "doing an action that affords an opportunity for conflict;" and (3) based his conclusion on facts that lacked evidentiary support. IBOA 41-43. The State, **combining Appellant's issues 3, 4, and 5**, disagrees with these allegations of error. Appellant's arguments are without merit.

First, this Court has *already ruled* on the question of whether Judge Cole abused his discretion by finding Devin Ruttle failed to prove he was without fault in bringing on the difficulty by a preponderance of the evidence. Petitioner's co-defendant Lorenzo Calderon's appeal with this Court has already concluded. *State v. Daniel Calderon*, 2021 WL 4077014, Opinion No. 2021-UP-323 (Ct. App. 2021). Calderon raised the exact same immunity issue before this Court, and this Court held, "We find no error in the denial of immunity under the Act. Our review of the record shows the trial court applied the proper burden of proof, and the evidence supports its determination that Appellant's co-defendant was at fault in bringing on the difficulty." *Calderon*, 2021-UP-323 at 1 (emphasis added). Appellant Ruttle is still entitled to his day in court, but the question of whether res judicata, collateral estoppel, or issue preclusion should apply here is something to consider.

Next, the Protection of Persons and Property Act ("The Act") provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan*

hearing, finds the person was justified in using such force. S.C. Code Ann. §§ 16-11-410 to 450 (2015); *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (setting forth the procedure, standard of review, and burden of proof for an immunity determination).

To put it plainly, to obtain immunity, a defendant must either satisfy all four elements of self-defense by a preponderance, to the trial court's satisfaction, or three of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance "stated simply is that evidence which convinces us as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the elements of self-defense in determining whether a movant has met his burden:

> (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

If the judge finds a defendant has failed to satisfy one of the first two elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("It is an axiomatic principle of law that the defense has not been established if any one element is disproven.") However, if a trial court finds a defendant has only failed to prove reasonable fear, if the defendant was attacked while attempting to remove another from a dwelling, residence, or occupied vehicle that belonged to him, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the judge must apply it accordingly. S.C. Code §§16-11-440(A) and (B) (2015). However, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be

where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and must apply and analyze Section (C) at his hearing and prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. S.C. Code § 16-11-440(C) (2015); *State v. Jones*, 416 S.C. 283, 294-297, 301, 786 S.E.2d 132, 138-39, 142 (2016). If he proves all the above elements, the court must conclude he had no duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective. *State v. Douglas*, 411 S.C. 307, 320, 768 S.E.2d 232, 239 (Ct. App. 2014).

Appellant did not move for immunity from prosecution just like he did not submit any additional jury questions. Instead, his co-defendant Lorenzo Calderon moved for immunity from prosecution and Appellant merely joined in. Immunity Tr. 1-87. The hearing was held on August 28, 2019. Testimony was presented that the Center was open 24 hours a day for fitness, and that there were no barriers to the parking lot. Appellant testified he went to "make peace" with the victim on May 5, 2021 because he did not want to get in the middle of the victim and Lorenzo's "beef." However, when he approached the victim, he claimed the victim charged at him with a knife, which is why he fired his weapon in self-defense. *Id*. at. 21-46. He claimed it was just a coincidence that an angry Lorenzo was at the scene and had given him a weapon to take when approaching the victim. Appellant admitted he had gotten rid of his hoody, the weapon he claimed was Lorenzo's, his shoes, and the bag over his window directly after the shooting. *Id*.

Investigator Owens testified about how Appellant was found miles away after the shooting and about how had lied to the police about his whereabouts. Appellant never told him he was in fear for his life or that he acted in self-defense. *Id*. at. 55-57. The State reminded the

trial court it had to determine the credibility of the witnesses and argued Ruttle was not credible. Immunity Tr. 71-73. The victim was not there to tell his story; but it was reasonable to infer the victim was acting in self-defense by the totality of the circumstances. *Id*. The State maintained that Ruttle had not proven he was without fault in bringing on the difficulty because he testified he allegedly had felt threatened by the victim less than a month earlier, and then the very next time he saw him, he went to talk to him armed with a pistol? *Id*. at 74.

Judge Cole was well within his discretion to disbelieve Appellant's version of the facts and find did not prove by a preponderance that he was without fault in bringing on the difficulty. In his fourteen-page September 5, 2018 written Order denying immunity, Judge Cole properly cited both Sections A and C of the Act, found only Section C applied, set forth the correct burden of proof, analyzed the elements of self-defense, discussed and analyzed the facts, made fact and credibility findings (finding Ruttle to be wholly not credible) and made a complete conclusion, finding Appellant had not met his burden of proof by a preponderance, which complies with our Supreme Court's most recent Stand Your Ground case *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022); Order pp. 1-14. His statement about *State v. Curry*'s "quintessential jury question" did not occur until the very end of the Order, after he had already made his ruling. He merely stated the current law at the time word for word, but the Order demonstrates Judge Cole did not send the case to the jury just because conflicting facts existed. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013). He properly weighed the facts and made conclusions of law.

A trial judge is not required to find the evidence presented inferred guilt or innocence to the exclusion of any other reasonable hypothesis. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "In order to establish self-defense, the accused must demonstrate an absence of

aggression or fault on his part in bringing on the difficulty which necessitated the use of deadly force." *State v. Grantham*, 224 S.C. 41 (1953). This Court should affirm.

III. Appellant argues that *State v. Burdette* and *State v. Smith* completely eviscerated all implied malice jury instructions in South Carolina when evidence has been presented that Appellant acted in self-defense. Appellant misstates the law. The issue is also not preserved.

Appellant claims that even though *State v. Burdette* only prohibited a jury charge of "malice may be inferred from the use of a deadly weapon," that *Burdette* and *State v. Smith* prohibited all implied or inferred malice jury charges when self-defense is an issue at trial. IBOA 47; *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *State v. Smith*, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020). This is error. First, this issue is not preserved for appeal as there was no contemporaneous objection made at trial. "A party must object at the first opportunity to preserve an issue for review." *State v. Sullivan*, 310 S.C. 311, 426 S.E.2d 766 (1993). A contemporaneous objection is required to preserve an issue for appellate review. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996). Second, the very wording of the statute defining murder guarantees that malice may be inferred. S.C. Code § 16-3-10 ("Murder is the killing of any person with malice aforethought, either express or implied.") Implied malice is here to stay.

Appellant misstates the law. *State v. Belcher* prohibited a jury charge of "malice may be inferred from the use of a deadly weapon" when evidence of self-defense (or mitigation) was presented at trial. 385 S.C. 597, 611-612, 685 S.E.2d 802, 809-810 (2009). Then, in 2019, our Supreme Court handed down *Burdette*, which prohibited the charge regardless of the evidence presented at trial. 427 S.C. at 502-505, 832 S.E.2d at 582-583 ("We . . . overrule our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant's use of a deadly weapon. Regardless of the evidence presented at trial, trial courts should not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon.")

State v. Smith only addressed an implied malice charge in the context of a felony attempted-murder case. Smith, 430 S.C. at 229-230, 845 S.E.2d at 496. Neither *Belcher, Burdette* nor *Smith* outlawed implied malice charges altogether.

Judge Cole's implied malice charge fully squares with the current and correct law of South Carolina. Tr. 574-577; S.C. Const. art. V, § 21 (1985) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.") He did not improperly emphasize a fact in evidence; he merely stated the law as it applied to the facts presented at trial. Even though a deadly weapon was used, he did not charge the jury that they may infer malice because of it. The State asked for a voluntary manslaughter charge but Appellant rejected it, so malice became the main issue for jurors to consider at trial. Tr. 493. Implied malice may be charged regardless of whether a defendant presents evidence of self-defense, as long as a trial court does not improperly elevate a fact in evidence and charge "malice may be inferred from the use of a deadly weapon." *Burdette*, 427 S.C. at 502-502, 832 S.E.2d at 582. Judge Cole followed the law. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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