LAW OFFICE OF

TRICIA A. BLANCHETTE

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SC Court of Appeals

April 28, 2023
VIA E-FILING & US Mail

The Honorable Jenny Kitchings
Clerk, South Carolnia Court of Appeals
1220 Senate Street
Columbia, South Carolina 29211

RE: David Jamar Benjamin v. State; App. Case No. 2019-000528

Dear Ms. Kitchings:

The above referenced appeal is scheduled for an oral argument on May 9, 2023. Pursuant to Rule 208(b)(7), SCACR, I would like to submit the following citations as supplemental authority in this matter. I submit that they are pertinent and relevant authorities that have come to my attention due to recent decisions of the this Court following the submission of the Briefs and in preparation for argument on the matter of prejudice.

1. State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert granted*, S.C. Sup. Ct. Order dated September 8, 2022.
2. State v. Johnson, Op. No. 5950 (S.C. Ct. App. filed November 9, 2022), cert granted, S.C. Sup. Ct. Order dated April 20, 2023.
3. State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020).
4. Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011).

I have enclosed a copy of the cases with this letter. Thank you for your assistance with this matter. Please contact me if any additional information is needed. I have copied opposing counsel via electronic mail.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Cruise Mitchell, Assistant Attorney General (via email)
David Benjamin

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435 S.C. 528
868 S.E.2d 414

The STATE, Respondent,
v.
Montrelle Lamont CAMPBELL, Appellant.

Appellate Case No. 2018-000115
Opinion No. 5885

Court of Appeals of South Carolina.

Heard September 15, 2021
Filed December 22, 2021
Rehearing Denied February 24, 2022

Appellate Defender Lara Mary Caudy and Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General William Joseph Maye, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

KONDUROS, J.:

[868 S.E.2d 416]

[435 S.C. 531]

Montrelle Lamont Campbell appeals his convictions for murder and attempted murder. He contends that because attempted murder is a specific intent crime, the trial court erred in charging the jury that malice may be inferred when a deadly weapon is used. Additionally, he maintains that because no evidence supported an accomplice liability charge, the trial court erred by instructing the jury on "the hand of one is the hand of all" theory of accomplice liability. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On September 17, 2015, Katrina Brown was at her apartment in Gadsden Green[1] with her sister Kerri Brown and her friend Tonya Mosely when a woman named Kadeshia arrived around 11:30 p.m. Kadeshia was an old friend of Kerri's, but Katrina knew her. While the women were visiting, a man knocked on Katrina's door and told Kadeshia that someone was waiting for her outside. Kadeshia told the man to "[t]ell them I'm coming" but continued her conversation in Katrina's apartment. Eventually, Kadeshia's brother, Campbell, walked into Katrina's apartment without permission. Campbell, also known as "Troll," sat down without saying anything.

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Katrina asked Campbell to leave because she did not know him,[2] and Campbell eventually left without saying a word. Katrina and Kadeshia then had a verbal altercation because Katrina believed Kadeshia should have apologized. Shortly after Kadeshia left, Katrina walked outside to smoke a cigarette. While Katrina was outside, Campbell hit her, knocking her to the ground. Campbell then stood over her and looked prepared to hit her again. Instead, Campbell moved back into the middle of the street while Kerri and Tonya helped Katrina up. Katrina, Kerri, and Tonya then followed Campbell into the middle of the street and "had a few words" with him. The women went back inside Katrina's apartment after she noticed Campbell looked prepared to reach for something inside of a car.

The next night, September 18, 2015, Katrina hosted a party at her apartment in Gadsden Green. The party ended around 6:30 a.m. on September 19, 2015, when a gunman shot at least fourteen bullets from a rifle into Katrina's apartment. The bullets struck Kerri in her head, Katrina's cousin Tierra Brown in her arm, and Katrina's friend Antwan Frost in the chest. Kerri and Tierra survived but Frost did not.

Because no one saw the shooter, police asked Katrina if she knew whether anyone wanted to harm her. Katrina testified she did not have a

conflict with anyone in the neighborhood other than Campbell. While processing the crime scene, police recovered fourteen rifle shell casings and obtained security camera footage of the area around the time of the shooting from multiple locations.

The security footage showed a gold Buick parking on Nunan Street. Police determined Tomeka President owned the gold Buick in the security footage and identified Trivell "Vell" Richardson and Andrew "Ace" Rivers as the individuals exiting the car. The footage showed Richardson and Rivers walking toward Gadsden Green and Richardson eventually walking back to the car followed by a third individual holding a rifle. Richardson and Campbell were both charged with murder and two counts of attempted murder for the shooting at Katrina's apartment.

[868 S.E.2d 417]

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At Campbell's trial, President testified that Campbell was at her Austin Lakes apartment in North Charleston when she went to sleep around 11:45 p.m. the night before the shooting. President also stated Campbell was not there when she woke up the next morning[3] and her car and car keys were missing.

Richardson testified[4] he was at the Austin Lakes apartment complex in North Charleston during the early morning hours[5] on the day of the shooting when Campbell approached him in President's gold Buick. Campbell asked Richardson to go with him to get cigarettes, and Richardson got in the car. However, Richardson recalled that instead of stopping at the gas station, Campbell got on the interstate and drove downtown.

After parking on Kennedy Street, Campbell exited the car, told Richardson to park it on Nunan Street, and began walking towards Gadsden Green. Richardson asked Rivers, who was on Kennedy Street when they arrived, to ride with him while he parked the car. Richardson and Rivers began walking towards Gadsden Green after parking the car on Nunan Street.

Richardson explained that he called Campbell to ask where he should leave the car keys because Richardson was uncomfortable being in Gadsden Green and wanted to leave. As Richardson and Rivers were walking toward Gadsden Green, Richardson said they heard gunshots. Richardson stated he returned to the car but Rivers ran in the opposite direction. While Richardson was trying to start the car, Campbell got in with a rifle and told him to "go." Richardson testified he then drove back to Austin Lakes in North Charleston.

Following the close of the State's case, the trial court denied Campbell's motion for a directed verdict. Campbell did not testify but presented testimony from Peggy Blake, who lived across the street from Katrina at the time of the shooting.

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Blake testified she heard the shooting and saw a black man wearing a hoodie and holding a "sporty rifle" get into a lime green car that drove away. However, police were unable to find a lime green car on the security camera footage.

Following the close of Campbell's case and the State's rebuttal, Campbell renewed his motion for a directed verdict, which the trial court also denied. The trial court then held a charge conference and informed the parties it planned to charge the jury that malice may be inferred by the use of a deadly weapon and instruct the jury on the hand of one is the hand of all theory of accomplice liability. Campbell first objected to the accomplice liability jury instruction, arguing no evidence implicated a second party. Campbell also objected to the inferred malice jury instruction, asserting it was inappropriate under *Belcher* .[6] After the trial court stated that *Belcher* did not apply because Campbell presented no evidence of mitigation such as self-defense, Campbell maintained his objection, arguing that "attempted murder does have a different burden. Since it[s] burden is higher, I think having that instruction

basically is counter somewhat to that different burden."

The State argued both it and Campbell presented sufficient evidence for an accomplice liability charge because the charge has an any evidence standard. Regarding Campbell's objection to the inferred malice charge, the State "ha[d] nothing further to add" but asserted that the charge was proper. Ultimately, the trial court noted Campbell's objections but decided to give both the inferred malice and accomplice liability instructions.

The trial court charged the jury that "[m]alice aforethought may be expressed or

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inferred .... Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a

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deadly weapon ...." The trial court also instructed the jury regarding accomplice liability:

> [I]f a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose .... If two or more people are acting together ... assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.

Following deliberations, the jury convicted Campbell of murder and attempted murder. The trial court sentenced him to life in prison for murder and thirty years' imprisonment for each attempted murder charge with the sentences running concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus* , 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Marin* , 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Mattison* , 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan* , 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Inferred Malice

Campbell argues the trial court erred by giving an inferred malice jury instruction because attempted murder is a specific intent crime and requires both express malice and a specific intent to kill pursuant to our supreme court's ruling in *State v. King* , 422 S.C. 47, 810 S.E.2d 18 (2017). We agree.

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"A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015). "[A] specific intent to kill is an element of attempted murder as codified in section 16-3-29." *King* , 422 S.C. at 56, 810 S.E.2d at 22.

In *Burdette* , our supreme court held the trial court erred by giving an inferred malice jury instruction because, pursuant to *Belcher* , "[t]here was evidence presented at trial that tended to

reduce, mitigate, excuse, or justify" the defendant's killing of the victim. 427 S.C. 490, 495, 832 S.E.2d 575, 578 (2019). The supreme court further "consider[ed] whether the permissive inference charge may be given in any setting, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice." *Id.* at 502, 832 S.E.2d at 582 (emphasis omitted).

The supreme court noted "[i]t is always for the jury to determine the facts, and the inferences that are to be drawn from th[o]se facts." *Id.* (quoting *State v. Cheeks* , 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). The supreme court observed that "[w]hen the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, ... the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *Id.* The supreme court determined that "[e]ven telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence." *Id.* at 502-03, 832 S.E.2d at 582.

The supreme court concluded that "[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence" and held that "[r]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice

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may be inferred when the deed is done with a deadly weapon." *Id.* at 503-05, 832 S.E.2d at 582-83. Additionally, the supreme court stated that its ruling was effective in all cases pending

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on direct review or not yet final if the issue was preserved. *Id.* at 505, 832 S.E.2d at 583.

In the present case, the trial court instructed the jury that malice could be inferred by the use of a deadly weapon over Campbell's objection. *Burdette* made clear that trial courts cannot instruct the jury that malice may be inferred by the use of a deadly weapon, regardless of the evidence presented. Although our supreme court decided *Burdette* after Campbell's trial, its holding applies to all cases that were pending on direct appeal if the issue was preserved, which it was in this case.[2] *Id.* Accordingly, the trial court erred by giving the charge.

The State argues any error by the trial court instructing the jury on inferred malice was harmless. The State asserts the jury could have found Campbell had express malice based on the evidence that Campbell had recently hit Katrina, Campbell drove across town in his girlfriend's car, and fourteen rounds were fired from a rifle into Katrina's apartment. We disagree.

"An erroneous instruction alone is insufficient to warrant this [c]ourt's reversal." *Id.* at 496, 832 S.E.2d at 578. "[E]rroneous jury instructions are subject to a harmless error analysis." *State v. Smith* , 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " *Burdette* , 427 S.C. at 496, 832 S.E.2d at 578 (quoting *State v. Middleton* , 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* at 496, 832 S.E.2d at 578-79 (quoting *State v. Kerr* , 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

In *State v. Brooks* , this court held the trial court's error in giving an inferred malice jury instruction was harmless because "the jury could have found that [the defendant]'s conduct

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showed a total disregard for human life, allowing the jury to infer malice from this conduct." 428 S.C. 618, 632, 837 S.E.2d 236, 243 (Ct. App. 2019), *cert. denied* , S.C. Sup. Ct. order dated Aug. 10, 2020. The court of appeals noted the defendant in *Brooks* displayed his gun, taunted his targets, ignored a hands up gesture by one of his targets, and ignored his friend's "no" plea. *Id.* at 630-31, 837 S.E.2d at 242-43. Additionally, the court of appeals interpreted the defendant's attempts to cover up his guilt as indications of malice. *Id.* at 631, 837 S.E.2d at 243.

In the present case, the evidence of express malice is significantly less than the amount in *Brooks* . The State contends Campbell's previous altercation with Katrina, Campbell driving across town to commit the crime, and someone firing a weapon fourteen times into Katrina's apartment is sufficient evidence of express malice to overcome the trial court's erroneous inferred malice jury instruction. However, Campbell's previous altercation with Katrina and Campbell driving across town is not a total disregard for human life like the defendant in *Brooks* displayed.

Moreover, we cannot state beyond a reasonable doubt that the erroneous instruction did not contribute to the verdict. The jury could have reasonably found malice partially based on the use of a weapon. Indeed, the jury may have found malice based solely on the use of a weapon. Therefore, the error in giving the inferred malice instruction was not harmless. Accordingly, we reverse the trial court giving the instruction.

II. Accomplice Liability

Campbell asserts the trial court erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the

[868 S.E.2d 420]

charge. Campbell argues neither party presented evidence he acted with another pursuant to a common design or plan. We agree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin* , 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *Sheppard v. State* , 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged to the jury is

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determined by the evidence presented at trial." *State v. Brown* , 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting *State v. Hill* , 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "If there is any evidence to support a jury charge, the trial [court] should grant the request." *Id.*

> [A] person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is done in the presence of and with the assistance of others, the act is done by all.

State v. Washington , 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020).

In *Washington* , our supreme court affirmed in part, reversed in part, vacated in part, and remanded to the trial court for a new trial this court's decision to affirm the conviction of a defendant who had been indicted for murder and convicted of the lesser included offense of voluntary manslaughter. *Id.* at 397, 848 S.E.2d at 781. The supreme court observed that the trial court's instruction "convey[ed] the gist of the accomplice liability theory" and was correct for a case that warranted the instruction. *Id.* at 406, 848 S.E.2d at 785.

The supreme court acknowledged, "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.' " *Id.* at 409, 848 S.E.2d at 787 (quoting *Barber v. State* , 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011)). The supreme court noted that "[f]or an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.' " *Id.* at 407, 848 S.E.2d at 786 (alteration in original) (quoting *Barber* , 393 S.C. at 236, 712 S.E.2d at 439). After observing that the record contained evidence the defendant was both the shooter and not the shooter, the supreme court reasoned that "[t]he question becomes whether there was equivocal evidence the shooter, if not [the defendant], was an accomplice of [the defendant]." *Id.*

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The supreme court compared Washington's case to *Wilds v. State* , in which this court affirmed the post-conviction relief court's grant of relief on the issue of accomplice liability. 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014). In *Wilds* , this court found the post-conviction relief court correctly determined the trial court erred in charging accomplice liability because neither party presented evidence that anyone besides the defendant was the shooter. *Id.* at 440, 756 S.E.2d at 791. The supreme court in *Washington* reasoned that, like the jury in *Wilds* , the jury in *Washington* may have doubted the possible accomplice's testimony he did not shoot the victim. *Washington* , 431 S.C. at 410, 848 S.E.2d at 787. Still, the supreme court found some evidence must have been presented that the only possible accomplice shot the victim to warrant an accomplice liability jury instruction. *Id.* Because no evidence of that kind was presented, the supreme court determined the trial court erred by instructing the jury on accomplice liability. *Id.* at 403, 410, 848 S.E.2d at 784, 787.

Here, the trial court erred by charging the jury on accomplice liability. Blake's testimony that she saw a man wearing a hoodie and holding a rifle leave the scene of the shooting in a lime green car is evidence that someone other than Campbell may have been the shooter, as Campbell was allegedly wearing a jersey and the video footage and Richardson's testimony indicate he left in President's gold Buick. Because Richardson's testimony presented evidence that Campbell was the

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shooter, like *Washington* , the question is whether the Record contains equivocal evidence the man seen by Blake was Campbell's accomplice.

Based on the evidence presented at trial, only Richardson could have been Campbell's accomplice. On the day of the shooting, Richardson rode with Campbell from North Charleston to Gadsden Green, parked the car for Campbell, and drove Campbell back to North Charleston. Like in *Wilds* and *Washington* , the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with Campbell to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and Campbell had joined together in a common plan or scheme to carry out the shooting. Indeed, Richardson testified he did not know Campbell was going to drive to Gadsden Green or why Campbell asked him to park the car on Nunan Street.

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Even if Richardson's involvement was equivocal evidence he and Campbell worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in Gadsden Green around the time of the shooting, it also showed him walking

without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car. Consequently, Richardson does not meet the description of the man seen by Blake.

Thus, neither party presented evidence that either Campbell was working with the man seen by Blake or that Richardson was the shooter. Therefore, the trial court erred by giving an accomplice liability jury instruction. Accordingly, we reverse the trial court and remand for a new trial on the murder and attempted murder charges.

CONCLUSION

The trial court committed reversible error by giving both inferred malice and accomplice liability jury instructions. Therefore, Campbell's convictions of murder and attempted murder are

REVERSED AND REMANDED.

HILL and HEWITT, JJ., concur.

Notes:

[1] Gadsden Green is a government housing community in Charleston.

[2] Katrina did not learn Campbell was Kadeshia's brother until the next day.

[3] President did not state what time she woke but testified she had to be at work by 7:00 a.m.

[4] Richardson was not tried with Campbell; he testified he was still facing charges but was hoping for leniency for testifying on behalf of the State.

[5] Richardson stated he left a strip club around 4:00 a.m. before going to Austin Lakes.

[6] *State v. Belcher* , 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("[I]nstructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse[,] or justify the homicide."), *overruled by State v. Burdette* , 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019) (holding "regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon").

[7] Campbell filed his notice of appeal on January 23, 2018, and *Burdette* was decided on July 31, 2019.

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The State, Respondent,
v.
Devin Jamel Johnson, Appellant.

No. 5950

Appellate Case No. 2019-000938

Court of Appeals of South Carolina

November 9, 2022

Heard April 7, 2022

Appeal From Charleston County R. Markley Dennis, Jr., Circuit Court Judge

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

KONDUROS, J.

Devin Jamel Johnson appeals his conviction of murder. He contends the trial court erred in admitting into evidence his statement to law enforcement, removing a juror midtrial, and instructing the jury on accomplice liability. We reverse.

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FACTS/PROCEDURAL HISTORY

On June 8, 2011, at 10:18 p.m., Akeem Smalls (Victim) was shot while in the courtyard breezeway of Building C at Georgetown Apartments in Charleston County, South Carolina. He died a short time later as a result of being shot. When Victim was shot, he was just outside of an apartment where Sharmaine Johnson lived at the time. Sharmaine[1] was Johnson's sister and Victim's girlfriend. At the time of the shooting, Victim owed Johnson $420.

All four of the fired shell casings discovered at the crime scene were identified as 9mm FC Luger casings. Officers discovered an unfired FC 9mm bullet with Johnson's fingerprint on it in a drawer of a nightstand in Sharmaine's apartment.

Officers interrogated Johnson regarding Victim's shooting. During the interrogation, Johnson initially denied being in Charleston at the time of the shooting. After a few hours of interrogation, Johnson admitted he had been at Georgetown Apartments at the time Victim was shot. Johnson also indicated someone named Creep[2] was with him at the time of the shooting. Johnson stated he saw the shooting, claiming a person named Dee shot Victim and that Johnson and Creep fled the scene out of fear.

Subsequently, officers obtained a search warrant for Johnson's cell phone records, including his historical cell site location information. Verizon provided Johnson's cell phone records, which included call history logs and text messages. The company also supplied cell site location data for outgoing and incoming calls. A grand jury subsequently indicted Johnson for murder and possession of a weapon during the commission of a violent crime.

At trial, the State requested the trial court charge the jury "'the hand of one is the hand of all' . . . because it 'ha[d not] been able to identify a co-defendant.'" *State v. Johnson*, 418 S.C. 587, 591, 795 S.E.2d 171, 173 (Ct. App. 2016) (alteration in original). "The court denied the request, stating it did not 'buy' the State's rationale that the evidence showed two individuals were involved in the crime." *Id.* The

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court explained that all of the testimony presented indicated Johnson was the shooter. *Id.* After deliberations began, "the jury asked, '[I]f the other individual pulled the trigger, can the

defendant still be guilty?'" *Id.* at 592, 795 S.E.2d at 173 (alteration in original). The trial court determined its prior decision not to charge "the hand of one is the hand of all" was incorrect; Johnson disagreed. *Id.* at 592, 795 S.E.2d at 173-74. "[T]he trial court offered [Johnson] the opportunity to reargue his closing argument before [it] recharged the jury," but Johnson declined and moved for a mistrial. *Id.* at 592-93, 795 S.E.2d at 174. The trial court charged the jury on "hand of one, hand of all" and mere presence. *Id.* at 593, 795 S.E.2d at 174. After the recharge, Johnson asserted the evidence did not support the new charge. *Id.* The jury convicted Johnson of both offenses-murder and the possession of a weapon during the commission of a violent crime. *Id.* at 590, 795 S.E.2d at 172.

Johnson appealed, arguing the trial court erred in "instructing the jury concerning 'the hand of one is the hand of all' because the evidence did not support the instruction" and the timing of the instruction prevented Johnson from addressing the theory in his closing argument, "rendering the trial fundamentally unfair."[3] *Id.* at 588, 795 S.E.2d at 171-72. This court reversed his convictions, finding the trial court's decision to later give the charge fundamentally prejudiced Johnson because he "crafted his closing argument in reliance on the trial court's adamancy" during the charge conference that it would not give the charge. *Id.* at 598, 795 S.E.2d at 177. The court addressed only that issue because it was dispositive. *Id.* at 590, 795 S.E.2d at 172.

The State retried Johnson beginning on April 1, 2019.[4] At the outset of the trial, the court held a *Jackson v. Denno*[5] hearing on the admissibility of Johnson's

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statement to David Osborne.[6] Johnson argued the statement was not admissible because it was involuntary due to a combination of factors: the length of time of the interview, his repeated requests for cigarettes, and references investigators made about his daughter. Following testimony from Osborne, the trial court found the statement admissible.

At trial, Tenika Elmore testified that at the time of Victim's death, she and Johnson lived together in Orangeburg. Elmore provided that at that time, she worked in North Charleston and Johnson would occasionally drive her or ride with her to work in her car, a blue 2008 Toyota Camry. The Camry was missing both passenger-side hubcaps. On the day of the shooting, Elmore, Johnson, and Johnson's six-year-old daughter traveled in Elmore's car to Charleston for Elmore to work. Johnson and his daughter dropped Elmore off, and she worked all day. Johnson was alone when he picked her up after work. Elmore believed he was supposed to pick her up at 11 p.m., but she said he was late, which was normal. After Johnson and Elmore picked up Johnson's daughter from his mother's house, they stopped at a gas station on the way back to Orangeburg. Elmore identified Johnson in photos shown to her during her testimony and confirmed that on that night, he was wearing the clothing shown in the photos. The video surveillance from the gas station showed Johnson wearing a white tank top[7] and dark pants on the evening of the crime.

Osborne testified that during law enforcement's investigation of Victim's killing, officers were interested in one portion of video surveillance from Georgetown Apartments showing a car backing into a parking spot and two men exiting the vehicle and walking toward Building C. Osborne indicated that about a minute before the shooting occurred, the two individuals walked towards the breezeway, which was the location of the shooting. The shooting occurred outside of the camera's view. Osborne provided that seconds after the shooting, the two individuals ran back to the car and fled the complex in it. He testified the pair was in a hurry when they came back to the car. He explained the vehicle depicted in the surveillance video was a blue Toyota Camry consistent with the color, make, and model of Elmore's car and both cars were missing the passenger side hubcaps. He provided he could tell the vehicle in the video was missing hubcaps because of

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the difference in shininess around the wheel area on the two sides of the car. According to Osborne, the driver of the car wore a white tank top and black pants. Osborne testified the only people that could be seen on the videos entering the breezeway area was a man with a dog and the two individuals from the car. He believed the breezeway was the only way to get to the interior of the apartment building without going through an apartment. Osborne was unsure if someone could come in from the pool area. On cross-examination, Osborne acknowledged many cars shown on the security video of the parking lot of the apartment complex had backed into parking spaces. He also agreed the apartment complex security cameras had several blind spots.

Osborne testified about the statement Johnson gave to him. Osborne indicated that for the first four hours of the interview, Johnson claimed he was in Orangeburg at the time Victim was shot. Osborne provided that during the interview, he left the room and allowed Johnson to use Osborne's cell phone. Osborne stated that after Johnson talked on the phone with his mother and Elmore, his story began to change-he admitted being at Georgetown Apartments and indicated he saw the shooting. Based on Johnson's statements, Osborne opined Johnson admitted to being the driver of the vehicle seen in the video.

Robert Holmes testified that he and Victim sold marijuana provided to them by Johnson. Holmes stated Victim stole marijuana valued at about $1,000 from Johnson. Holmes testified that about a week before the shooting, Johnson was looking for Victim and was unhappy with him. On cross-examination, Holmes acknowledged he had told Osborne that Victim had taken $500 worth of marijuana but later gave Johnson money for the marijuana. Holmes also admitted he told Osborne that Victim thought everything was fine between Johnson and himself after that.

Vanessa Morton testified that while watching the news on television, she learned law enforcement was looking for her son Diangelo Bumcum. She indicated she immediately called the police, who then came to her house. She provided Bumcum did not try to run, despite knowing the police were coming and he willingly went with them. Morton told police she would help them search her house and gave the police the clothing her son had been wearing. Police arrested Bumcum for Victim's murder. Morton testified police arrested her son because he was the last person seen with Victim. The charges against Bumcum were later dismissed, and he was released several months after his arrest. Morton identified her son in a photo from about ten minutes before the shooting and indicated he was wearing a white tank top.

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Bumcum testified that on the night of Victim's killing, he saw Victim on the porch outside an apartment in Building C of Georgetown Apartments. Bumcum provided he stopped to talk with Victim and their conversation was friendly. On cross-examination, he testified he went inside the apartment to use the restroom. He then left to go to another apartment building in the complex and about thirty to forty-five minutes later, learned Victim had been killed. Bumcum testified he worked at Jiffy Lube performing car services around the time period Victim was killed.

Detective Craig Kosarko testified that at the same time Osborne was questioning Johnson, he was questioning Bumcum. Detective Kosarko stated that at the end of the interview, he collected the shirt Bumcum was wearing during the interview because Bumcum stated he wore it on the day of the shooting. Osborne also participated in Bumcum's interrogation at times. Osborne testified that after talking to Bumcum, he looked at the video from the apartments again and observed someone walking from Building C to Building D about ten minutes before the shooting. He testified that due to the video quality, he had difficulty identifying details of the person's face but the body type of the person shown on the video was consistent with

Bumcum's. He indicated the person did not appear to be walking in a hurry. Osborne testified that Bumcum's shirt tested positive for particles of lead, which Osborne attributed to Bumcum's job. Osborne testified that lead is one of three types of particles that need to be detected to identify gunshot reside; the other two being antimony and barium. Osborne provided that all three substances must be present to have a positive test result for gunshot reside. Osborne provided that lead is prevalent in brake pads and Bumcum worked at Jiffy Lube. However, Osborne indicated he never asked Bumcum about it.

Osborne also testified that during the interrogation of Johnson, Detective Kosarko showed Johnson a picture of Bumcum. Osborne indicated that Johnson first stated he did not know the person in the photo. However, Osborne provided that later in the interview, once Johnson admitted being at the apartment complex, he identified Bumcum as the shooter.

Detective Kosarko testified that a series of text messages from Johnson to Terry Stevens from the day Victim was killed showed Johnson was attempting to get Stevens to help him with something. At 4:37 p.m., Johnson texted "i go wet dude ass up da nite." The final message to Stevens, at 9:34 p.m. stated, "i cnt wait on u i gotta handle my bizz."

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Detective Kosarko also testified the phone records showed that on the night Victim was killed, ten phone calls were placed to and from Johnson's phone number between 9:01 p.m. and 10:02 p.m. and no phone calls were placed between 10:03 p.m. and 10:34 p.m. Additionally, twelve phone calls were placed between 10:35 p.m. and 11:40 p.m. Detective Kosarko indicated that the phone records also showed Johnson called his sister, Victim's girlfriend, twice at 9:30 p.m. on the evening of the crime. The phone records show the person placing those two calls dialed *67 before dialing the number, which Detective Kosarko explained would prevent the phone number from displaying on the phone of the person receiving the call. The two phone calls lasted twelve seconds and twenty-eight seconds.

Detective Kosarko further testified about a series of text messages between Johnson and his mother the day following the shooting. Johnson's mother texted him asking if he was alright and he responded: "I want to b[e] alrite sha[y] got it all twist up rite now but i kno[w] [yo]u prayin[g]." Later that same day Johnson's mother texted him, "How you mean you want to alright[]. Deal with [yo]urself, maintain your cool let them figure it out you had[ ]nothing to do with it." One minute later, Johnson's mother sent him another text that stated: "Clear all [yo]ur texts."

Elmore testified that "to wet somebody up" means "[t]o shoot them." On crossexamination, when asked if she had stated that "wet or to get wet" also "means to get drunk or intoxicated," she responded, "That's an interpretation, yes." Additionally, she confirmed she had not "heard [Johnson] say get wet meaning to stab or shoot somebody." She agreed Johnson used that term to mean intoxicated. Holmes testified that "to wet somebody up" means to shoot the person. On cross-, redirect, and recross-examination, he explained the terms wet and "wet up" are two different things; that getting wet means to get drunk or intoxicated, whereas wetting someone up means to shoot that person. Additionally, Osborne testified that based on his experience, to wet somebody up means "you're going to shoot somebody," explaining "when you shoot somebody multiple times, they bleed and then they get wet." Osborne also clarified, "Wet somebody up is different than get wet. Get wet is getting high. Wet somebody up or wet them up is shoot somebody." Detective Kosarko also stated that to wet somebody up meant to shoot or kill someone, describing "when you shoot somebody, their clothes get wet from the blood."

During the State's case, an issue arose with a juror; initially, the trial court was concerned the juror possibly had fallen asleep and later, the juror informed the

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court he knew one of the witnesses who had testified.[8] After the court spoke to the juror and the parties argued about whether the juror should be excused, the trial court stated it was excusing the juror because the State provided it would have exercised a preemptory challenge if the juror had indicated during voir dire he knew one of the witnesses.

Prior to the trial court charging the jury, Johnson asked the trial court if it planned to charge the jury on accomplice liability. The trial court stated it was going to charge the jury on "what is the hand of one." Johnson replied he was objecting to that language being included in the charge.

Following closing arguments, the trial court charged the jury. The charge included the following language:

> Now, in conjunction with the crime of murder, I would charge you of this principle of law. It's called the hand of one is the hand of all.
>
> If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts or act done in carrying out the common plan or purpose. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all.
>
> Now, prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of the crime. Mere knowledge or merely being present by another person and the crime is committed, that's not sufficient to convict a person of the crime.
>
> In order to convict the defendant -- even if the defendant was present when it is committed, is not sufficient to

> convict. You must -- guilt is -- to convict the defendant as a principal, a principal is proven by showing an actual or constructive presence at the scene as a result of a prior arrangement. Therefore, finding a prior arrangement, plan or common scheme is necessary for a finding of guilt as a principal.
>
> The State must prove beyond a reasonable doubt by competent evidence that the theory of the hand of one is the hand of all. A principal in a crime is one who either actually commits the crime or who is present aiding, abetting or assisting in committing the crime.
>
> When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more are acting with a common plan or scheme or intent are present at the commission of the crime, it does not matter who actually commits the crime. All are guilty.
>
> And of course, as with any other aspect, the State has to prove each of those facts that we just discussed beyond a reasonable doubt. That means you are firmly convinced.

After the trial court charged the jury, Johnson objected:

> I just wanted to note on the record that we are objecting to the hand of one/hand of all charge.
>
> We don't believe that the State has presented any evidence that the person that . . . Johnson was with that night was the shooter. I think the evidence that they presented exclusively in this case was the fact that . . . Johnson was the shooter, and I will say that I believe I gave a softball to . . . Osborne when I asked him whether or not he would serve a murder warrant on the person once he found out who he was and he did say no, that is tricky because he's a passenger and I would want to find out his involvement in this case before I did that.

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> So I think even their own State's witness said we don't have enough to say he's involved or not, and that's why I think the [c]ourt should have declined to read that hand of one/hand of all charge.

The trial court responded:

> And while I agree with you that certainly there was a lot of indication of that in this particular case, I truly believe the hand of one/hand of all is most appropriate, especially with the fact that we have -- well, the evidence.
>
> Of course, we have the evidence, if the jury believes it, of course, that . . . Johnson -- in taking instruction that the State has presented that he was intending to go kill him, go shoot him. Whether he died or not, I don't know if that was necessarily it. Probably making him bleed I think was what the typical literal statement of the vernacular, but that part of it and then getting somebody to assist him, that seems to imply I want to get somebody and maybe he didn't want to do it himself. Maybe he wanted somebody else to be the shooter, but he was going to assist. So I believe all of that really falls into that accomplice part of being participating and so I respect your position, but I think it's appropriate under the evidence of this case.

During deliberations, the jury sent a note that asked: "Does the 'hand of one' apply to the possession of a weapon during the commission of a violent crime?" In response, the trial court provided the jury with the following additional instruction:

> If the State has proved beyond a reasonable doubt that the murder has been committed, then in order to have a conviction for the hand of one/hand of all, the State would also have to prove beyond a reasonable doubt that . . . Johnson had possession of a firearm at the time that that murder was committed.

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> In other words, hand of -- you can't -- assuming just for the sake that there were two people and three people, whatever, the person -- in order to be convicted, the hand of one doesn't apply to anything but the murder. It does not apply to the -- to the firearm possession. You have to prove actual possession of that in order to return a verdict of guilty.

After returning to deliberations, the jury convicted Johnson of murder but acquitted him of the weapons charge. The trial court sentenced him to thirty-six years' imprisonment, with credit for time served of 2,604 days. Johnson filed a

motion for a new trial, arguing the trial court erred in charging the jury on accomplice liability. Following a hearing, the trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. Laney*, 367 S.C. 639, 643-44, 627 S.E.2d 726, 729 (2006)).

LAW/ANALYSIS

Johnson argues the trial court violated his due process rights by instructing the jury on the theory of accomplice liability, specifically the hand of one is the hand of all because the State presented no evidence Johnson acted in concert with another.[9]We agree.

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"Generally, the trial [court] is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "The law to be charged must be determined from the evidence presented at trial." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). If any evidence supports a jury charge, the trial court should grant the request. *Brown*, 362 S.C. at 262, 607 S.E.2d at 95. A charge is correct if it adequately explains the law and contains the correct definition when read as a whole. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). If jury instructions as a whole "are free from error, any isolated portions [that] may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). "A jury charge [that] is substantially correct and covers the law does not require reversal." *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603.

"To reverse a criminal conviction on the basis of an erroneous jury instruction, we must find the error was a prejudicial error." *State v. Bowers*, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022). "Prejudicial error in a jury instruction is an error that contributed to the jury verdict." *Id.* Should an appellate court find a jury charge erroneous, the court must then decide if the charge affected the jury's deliberations, contributing to the verdict. *See id.* If the appellate court has "any reasonable doubt as to whether the erroneous charge contributed to the verdict," it must reverse the conviction. *Id.* at 647, 875 S.E.2d at 611.

"[S]ome principles of law should not always be charged to the jury." *State v. Perry*, 410 S.C. 191, 202, 763 S.E.2d 603, 608 (Ct. App. 2014); *see also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) (stating some matters allowed during jury argument should not be included in the jury charge).

"Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002); *see also id.* at 205, 208 n.1, 573 S.E.2d at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial").

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"The doctrine of accomplice liability arises from the theory that 'the hand of one is the hand of all.'" *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (quoting 23 S.C. Jur. *Homicide* § 22.1 (2014)). "Under this theory, 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." *Id.* "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 to be guilty under a theory of accomplice liability." *Id.* at 472-73, 758 S.E.2d at 910. "Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct." *Id.* at 473, 758 S.E.2d at 910. "If 'a person was "present abetting while any act necessary to constitute the offense [was] being performed through another," he could be charged as a principal-even "though [that act was] not the whole thing necessary."'" *Id.* (alterations in original) (emphases omitted) (quoting *Rosemond v. United States*, 572 U.S. 65, 72 (2014)).

In *State v. Washington*,[10] our supreme court determined the trial court erred by instructing the jury on accomplice liability. 431 S.C. 394, 397, 848 S.E.2d 779, 781 (2020). The supreme court provided "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Id.* at 409, 848 S.E.2d at 787 (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438). The supreme court explained that "[f]or an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.'" *Id.* at 407, 848 S.E.2d at 786 (second alteration by court) (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 439). The supreme court noted the record in that case contained evidence the defendant was the shooter but also contained evidence he was not the shooter. *Id.* Accordingly, the supreme court held that "[t]he question becomes whether there was equivocal evidence the shooter, if not [the defendant], was an accomplice of [the defendant]." *Id.*

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The supreme court examined the case of *Wilds v. State*,[11] in which this court affirmed the finding that the trial court erred by giving an accomplice liability jury charge. *Washington*, 431 S.C. at 409-10, 848 S.E.2d at 787. The supreme court observed that this court in *Wilds* noted no evidence was presented that anyone other than the defendant was the shooter. *Washington*, 431 S.C. at 409, 848 S.E.2d at 787 (citing *Wilds*, 407 S.C. at 439-40, 756 S.E.2d at 390-91). The supreme court in *Washington* posited that the jury, like the jury in *Wilds*, may have doubted the testimony from the only possible accomplice that he did not shoot the victim. *Id.* at 410, 848 S.E.2d at 787. However, the supreme court found to warrant an accomplice liability jury instruction, some evidence must have been presented that the possible accomplice shot the victim. *Id.* The supreme court held because neither party presented such evidence, the trial court erred by giving the accomplice liability jury instruction. *Id.* at 403, 410-11, 848 S.E.2d at 784, 787-88.

Recently, in *State v. Campbell*, this court decided whether an accomplice liability instruction was improperly given.[12] 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert. granted*, SC Sup. Ct. Order dated Sept. 8, 2022. In that case, this court found the trial court had erred in giving the instruction and reversed the conviction. *Id.* at 541, 868 S.E.2d at 421. This court provided:

> Based on the evidence presented at trial, only Richardson could have been [the defendant's] accomplice. On the day of the shooting, Richardson rode with [the defendant] from North Charleston to [the location of the shooting], parked the car for [the defendant], and drove [the defendant] back to North Charleston. Like in *Wilds* and

> *Washington*, the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with [the defendant] to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and [the defendant] had joined together in a common plan or scheme to carry out the shooting. Indeed, Richardson testified he did not know [the defendant] was going to drive to [the shooting location] or why [the defendant] asked him to park the car on [a particular s]treet.

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Campbell, 435 S.C. at 540, 868 S.E.2d at 421.

This court further explained:

> Even if Richardson's involvement was equivocal evidence he and [the defendant] worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in [the shooting location] around the time of the shooting, it also showed him walking without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car.
>
> Consequently, Richardson does not meet the description of the man seen by [a witness].

Id. at 541, 868 S.E.2d at 421.

This court determined because "neither party presented evidence that either [the defendant] was working with the man seen by [the witness] or that Richardson was the shooter," the trial court erred by giving an accomplice liability jury instruction. *Id.*

"Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (omission by court) (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)).

The trial court here erred in giving the accomplice liability jury charge. The State's theory of the case was that Johnson and the passenger in his car killed the Victim. No eyewitness testified that he or she saw the Victim being shot. Johnson provided in his statement to the police that he saw one person shoot Victim, and he identified Bumcum as that shooter when law enforcement showed him a photo of Bumcum. The record shows a car with two men in it backed into a parking space, which Osborne suggestedthe individuals were "trying to get out in a hurry." The two individuals walked together toward the crime scene, remained for a few

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seconds, and quickly ran back to the car together and fled the complex. Osborne opined Johnson and another male were the individuals in the vehicle seen in the video. The car seen in the video is consistent with the car Johnson was known to be driving that night. From the video, the clothing of the driver of the car matched the clothing Johnson was wearing that night. Johnson admitted in his statement that he was at the apartment complex and present at the shooting. Cell phone data also placed Johnson at the complex. Further, Johnson admitted Creep was with him at the time of the crime. The State's entire theory of the case was that Johnson was the shooter.

The State presented evidence Victim owed Johnson a debt. The State also introduced text messages that Johnson was going to wet someone up, which meant to shoot or kill a person. The Record contains no evidence that Johnson recruited anyone to actually shoot Victim; any evidence of recruiting as shown in the text messages is to assist or accompany Johnson.

An accomplice liability charge was not proper because the evidence is *not* equivocal as to whether Johnson or Creep was the shooter-all the evidence presented only went to Johnson being the shooter; no evidence was presented of Creep being the shooter. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439 ("Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted."). Additionally, although the record contains little evidence Bumcum was the shooter, to the extent that Bumcum could have been the principal, the State presented no evidence Johnson was working with him.

The weapons charge of which the jury acquitted Johnson states it applies when "a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime." S.C. Code Ann. § 16-23-490(A) (2015). The record establishes Victim died from being shot with a firearm. For the jury to acquit Johnson of the weapons charge, it must have found the State did not meet its burden of proving Johnson actually shot Victim and therefore, only found him guilty of murder due to the theory of accomplice liability. Therefore, the charge prejudiced Johnson.

CONCLUSION

The trial court erred by charging the jury on accomplice liability and that error prejudiced Johnson.[13] Accordingly, Johnson's conviction of murder is

REVERSED.

WILLIAMS, C.J., and VINSON, J., concur.

Notes:

[1] Sharmaine is also referred to as Shay in the record.

[2] Johnson told the officers he did not know Creep's last name or contact information but described a tattoo he had. He gave the officers the name of another person who knew Creep and through that person officers located a person known as Creep. However, officers did not believe this was the person Johnson claimed was with him when Victim was shot.

[3] Johnson also argued "the trial court erred in (1) admitting text messages and historical cell service location information obtained from his cellular service provider by a search warrant" and (2) admitting his statement to investigators. *Johnson*, 418 S.C. at 588, 795 S.E.2d at 171.

[4] In between the time this court issued the remittitur following the first appeal and beginning of this trial in April 2019, a second trial began. At oral argument, both parties were unclear as to what transpired at the second trial other than the State believed it ended in a mistrial.

[5] 378 U.S. 368 (1964).

[6] Osborne was a detective for the Charleston Police Department at the time of Victim's killing and investigated the case, which included interrogating Johnson. At the time of trial, he was no longer a detective; he was an assistant solicitor.

[7] The officers referred to the shirt shown in the video as a white tank top or "wife beater."

[8] The juror knew the witness by a different last name than the one the trial court listed during voir dire.

[9] As a threshold matter, the State submits that Johnson's assertion of a due process violation misunderstands the function of the Due Process Clause because the appropriate inquiry is whether the trial court abused its discretion in giving an accomplice liability instruction because this instruction is not required by the Due Process Clause. The fact that Johnson mentioned that his due process rights were violated by the jury charge is of no matter. Johnson provides that the standard of review applicable here is that of reviewing a jury charge and is for the abuse of discretion. He does not mention due process again.

[10] Johnson's brief mentions this court's *Washington* opinion and noted that the supreme court had granted the petition for certiorari and heard arguments. No opinion had been issued at the time of the filing of the briefs. Johnson provided the supreme court's opinion to this court as a supplemental authority.

[11] 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

[12] Johnson has provided this opinion as a supplemental authority.

[13] Because this issue is dispositive, we need not reach Johnson's issues regarding the voluntariness of his statement and the juror disqualification. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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431 S.C. 394
848 S.E.2d 779

The STATE, Respondent,
v.
Sha'quille WASHINGTON, Petitioner.

Appellate Case No. 2018-001878
Opinion No. 27992

Supreme Court of South Carolina.

Heard March 11, 2020
Filed September 2, 2020

Jack B. Swerling, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE JAMES :

[848 S.E.2d 781]

[431 S.C. 397]

Sha'quille Washington ("Petitioner") was indicted for the murder of Herman Manigault and was convicted of the lesser included offense of voluntary manslaughter. The court of appeals affirmed Petitioner's conviction. *State v. Washington* , 424 S.C. 374, 818 S.E.2d 459 (Ct. App. 2018). We granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision. We hold the trial court erred in giving an accomplice liability instruction, and we hold Petitioner was prejudiced by this error. Therefore, we affirm in part, vacate in part, and reverse in part, and we remand to the circuit court for a new trial on the charge of voluntary manslaughter.

[431 S.C. 398]

I. Factual and Procedural History

On August 25, 2013, a large crowd gathered at "A Place in the Woods," a nightclub in Huger, South Carolina. Herman "Trey" Manigault (the victim in this case) and his cousin, Larry Jenkins, were among those present. According to trial testimony, Manigault told multiple people that Petitioner and Larry Kinloch, Petitioner's uncle, were following him around the establishment and staring him down. Arianna Coakley, Manigault's girlfriend, testified Manigault told her he was about to "snap" because Petitioner kept looking at him. Aja Williams, the bartender, testified Manigault said to her, "[Kinloch] going to shoot me, they going to kill me."

At closing time, a multitude of club patrons, including Manigault, Jenkins, Kinloch, and Petitioner, exited the building to the parking lot. A fight ensued in the parking lot. Testimony as to the participants in the fight, the specifics of the fight, and the shooting of Manigault varied greatly between the State's witnesses, Petitioner's witnesses, and Petitioner's statement to law enforcement.

Jenkins testified he joined the fight after at least two people hit Manigault. He could not identify who those two people were, but he testified Petitioner was "out there" during the fight. Jenkins testified he heard gunshots near the end of the fight. He checked himself for wounds and saw Manigault on the ground. Jenkins testified he saw Petitioner holding a small silver revolver in his right hand and firing towards Manigault. He testified he was 100% sure Petitioner shot Manigault.

Ms. Coakley testified that moments before the shooting, Petitioner said something to Manigault. Coakley testified Manigault responded by asking Petitioner, "what's up" and Petitioner struck Manigault with his left hand. Coakley testified Manigault slid towards the ground and Petitioner continued to hit him. Coakley said she raised a glass beer bottle to hit Petitioner but backed down when Petitioner held a gun to her face and said, "I ain't playing, I ain't playing." Coakley testified Petitioner turned and ran, and then she heard four gunshots.

Petitioner's written statement to the police was read to the jury. Petitioner stated he arrived at the club around 2:00 a.m. and spoke to "a few ladies." He stated he walked outside, heard a commotion, and saw three people fighting. According

[431 S.C. 399]

to Petitioner, "the victim" (presumably Manigault) walked off, and an unknown person Petitioner termed "the suspect" fired a shot from a revolver at Manigault. Petitioner said he was four to five feet away from them at this point. Petitioner stated he was several feet further away from them when he heard two more shots. Petitioner stated he called the police the next morning to give a statement and clear his name after his grandmother informed him people accused him of shooting Manigault.

Kinloch testified for the State and initially denied any participation in the fight, but he eventually described his involvement as holding onto Larry Jenkins without throwing any punches. During its questioning of Kinloch, the State played a nine-minute post-shooting recorded phone conversation between Kinloch and his incarcerated brother Patrick. The solicitor quoted portions of the call while questioning Kinloch, but neither the recording nor a transcript of it was introduced into evidence. Kinloch, clearly a reluctant witness, testified he did not remember the phone call, and he did not respond to many of the solicitor's questions about the call. Apparently, Kinloch told his brother he initially fought a big, "light-skinned dude" (probably Jenkins) and then "got [Manigault] on the car. Me and

[848 S.E.2d 782]

him going back and forth. Dow, dow, dow [referring to three gunshots]." Kinloch also apparently told his brother he saw Petitioner shoot Manigault.

During cross-examination, Petitioner pressed Kinloch to admit he was the one who shot Manigault. Kinloch denied he shot Manigault. Petitioner asked Kinloch if he told Kenneth Quinton Grant and Darlene Washington (presumably Petitioner's grandmother) he shot Manigault. Kinloch denied this as well.

Petitioner called Erin Presnell, M.D., the forensic pathologist who conducted Manigault's autopsy, to testify as to Manigault's blood alcohol content at the time of autopsy. Before the jury, Petitioner asked Dr. Presnell, "What was the alcohol level --," and the State interjected, "Objection, Your Honor. 404," obviously a reference to Rule 404 of the South Carolina Rules of Evidence. The trial court then held an off-the-record bench conference[1] to discuss the issue. The trial court then

[431 S.C. 400]

excused the jury and sustained the State's objection, explaining, "There has been abundant testimony as to the fact that there was drinking or not drinking by the victim, and so I have excluded this testimony, but you may continue [with a proffer of the testimony]." During the proffer, Dr. Presnell testified Manigault "had a blood-alcohol level of .235," which she categorized as "high." She testified that while she "imagined" Manigault "acted intoxicated," she could not give an opinion as to "whether he was aggressive or subdued or what his actual mannerisms were." She testified such a high blood alcohol level could have resulted in impaired judgment. The record contains no argument from the parties as to why the testimony was or was not admissible, and the trial court did not further explain its ruling. The State argued to the court of appeals that the context of the trial court's ruling made it clear the trial court excluded the testimony as irrelevant under Rule 402, SCRE. The court of appeals held the testimony was irrelevant and further held that even if it was relevant, any probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. *Washington* , 424 S.C. at 406-07, 818 S.E.2d at 476. The court of appeals also held that even if the trial court erred in excluding the testimony, Petitioner suffered no prejudice because the jury found Petitioner guilty of only voluntary manslaughter,

which carried with it a finding Petitioner acted with sufficient legal provocation. *Id.* at 407, 818 S.E.2d at 476.

Petitioner called Kevin Watson to testify, but the trial court refused to allow him to testify after concluding he disobeyed a pre-trial sequestration order. Three other witnesses called by Petitioner were Robin Williams, Tyson Singleton, and Kenneth Quinton Grant. Robin Williams testified she was talking to her cousin as they walked out of the club at closing time when she heard "a lot of fussing" and saw a young lady holding a glass bottle in Petitioner's face. According to Robin Williams, there was a van parked nearby. She testified there was a fight taking place on one side of the van, and Petitioner and the young lady were on the other side of the van. She testified Petitioner "never had a gun." She also testified she heard two gunshots about five seconds after she saw the lady

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holding the bottle in Petitioner's face and Petitioner "ran on the second shot." She testified she then heard two more shots about three seconds apart but Petitioner was not anywhere near where those two shots were fired.

Tyson Singleton testified he was talking to Robin Williams in the parking lot when he heard three shots fired in the parking lot. He testified he did not see who fired the shots because a van blocked his view. He testified he saw Petitioner "in the road" next to some woods before the first shot was fired and Petitioner was nowhere near where any of the shots were fired. He also testified he saw Kinloch inside the club before closing time but did not see him in the parking lot after closing.

Petitioner called Kenneth Quinton Grant, Petitioner's second cousin and—according to Grant—Kinloch's best friend, to

[848 S.E.2d 783]

testify about a conversation Grant claimed he had with Kinloch after the shooting. Grant testified he was not present at the club when the shooting occurred; however, he testified he saw Kinloch at Kinloch's house twenty to twenty-five minutes after the shooting, and Kinloch admitted to him he shot Manigault. The State objected on hearsay grounds, and the trial court asked Petitioner if there was an exception to the hearsay rule that would allow the testimony. Petitioner responded, "[Kinloch] already testified. My God." Petitioner also argued Kinloch's statement to Grant qualified as a present sense impression under Rule 803(1), SCRE. The trial court sustained the State's hearsay objection and instructed the jury to disregard Grant's statement. Despite this ruling, Petitioner again asked Grant whether Kinloch admitted to shooting Manigault, and Grant confirmed. The State again objected, and the trial court again sustained the objection and instructed the jury to disregard the testimony.[2] Before the court of

[431 S.C. 402]

appeals, Petitioner argued Kinloch's admission to Grant was a prior inconsistent statement and therefore admissible as non-hearsay under Rule 801(d)(1)(A), SCRE.

During the charge conference, the State first argued it was entitled to an accomplice liability instruction because the defense tried to suggest Kinloch shot Manigault. The State argued to the trial court, "I don't believe there's any evidence in the record that Larry Kinloch was the shooter, but there's certainly been multiple indications from the defense during this trial that he was." The "multiple indications" referred to by the State presumably consisted of (1) Petitioner's unsuccessful attempts to introduce Grant's testimony that Kinloch told Grant he shot Manigault and (2) Petitioner's cross-examination of Kinloch during which Petitioner pressed Kinloch (a) to admit he told Grant and Darlene Washington he shot Manigault and (b) to admit he was known on the streets as the shooter. The State also argued that if a person is involved in an altercation, a defendant who participates in the

altercation is criminally responsible for the end result. On this point, the State argued, "even if it was Larry Kinloch that ultimately did shoot the victim in this case, the defendant was part of the assault." Petitioner acknowledged he tried to introduce Grant's testimony that Kinloch told him he was the shooter, but Petitioner noted the trial court sustained the State's objections and instructed the jury to disregard Grant's testimony on that issue.

Over Petitioner's objection, the trial court charged the jury on accomplice liability. Two hours into deliberations, the jury asked the trial court for clarification of the law on reasonable doubt, accomplice liability, and voluntary manslaughter. A copy of the question is in the record, but the record does not reflect whether the trial court responded. Three hours later, the jury sent a note to the trial court stating it was deadlocked. The trial court gave the jury an *Allen* charge[3] and adjourned for the evening. Three hours into deliberations the next morning, the jury asked the trial court its second question, "Can we use [accomplice liability] to support legal provocation

[431 S.C. 403]

for parties acting in concert with victim? Would parties acting in concert with the victim constitute sufficient legal provocation towards actions against victim?" The trial court responded in writing, "You have been given all instructions on the law in my charge to you. Please continue your deliberations." Approximately two hours after its second question, the jury found Washington not guilty of murder but guilty of the lesser included offense of voluntary manslaughter.

Petitioner appealed and presented six arguments to the court of appeals: (1) the trial court erred in excluding Kenneth Quinton

[848 S.E.2d 784]

Grant's testimony on hearsay grounds; (2) the trial court erred in excluding Dr. Presnell's testimony; (3) the trial court erred in excluding the testimony of Kevin Watson; (4) the trial court erred in refusing to charge self-defense; (5) the trial court erred in instructing the jury on the theory of accomplice liability; and (6) the trial court erred in giving the jury an *Allen* charge. The court of appeals affirmed. *State v. Washington* , 424 S.C. 374, 818 S.E.2d 459 (Ct. App. 2018). This Court granted Petitioner a writ of certiorari on all issues except for the propriety of the *Allen* charge. As we will explain, the trial court erred in instructing the jury on accomplice liability, and Petitioner was prejudiced by this error. We therefore reverse Petitioner's conviction for voluntary manslaughter and remand to the circuit court for a new trial on that charge.

II. Discussion

A. Exclusion of Grant's Testimony

To give clear context to our holding that the trial court erred in instructing the jury on accomplice liability, we must first review the trial court's exclusion of the testimony of defense witness Kenneth Quinton Grant. Petitioner sought to elicit Grant's testimony that twenty to twenty-five minutes after the shooting, Kinloch told Grant he shot Manigault. However, the trial court excluded the testimony as inadmissible hearsay. Petitioner argues Kinloch's alleged statement to Grant that he shot Manigault was admissible as a prior inconsistent statement under Rule 801(d)(1)(A), SCRE. Petitioner also argues Kinloch's alleged statement to Grant satisfies both the present sense impression (Rule 803(1), SCRE)

[431 S.C. 404]

and excited utterance (Rule 803(2), SCRE) exceptions to the rule against hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Under Rule 801(d)(1)(A), a prior inconsistent statement of a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is [ ] inconsistent with the

declarant's testimony." Here, Kinloch was the "witness" and the "declarant" referenced in Rule 801.

When the State objected on hearsay grounds to Grant's testimony about Kinloch's statement to him, the trial court asked defense counsel, "Is there an exception?" Defense counsel responded, "[Kinloch] already testified. My God." The trial court sustained the objection but suggested defense counsel might be able to ask the question without eliciting hearsay. Defense counsel then asked Grant, "[Kinloch] said he did it?" The State again objected on hearsay grounds, and the trial court held an off-the-record bench conference, sustained the objection, and instructed the jury to disregard Grant's testimony on the point. Immediately afterwards, there was another bench conference. Then, defense counsel resumed questioning and again asked Grant if Kinloch told him he shot Manigault. After Grant answered in the affirmative, the trial court again sustained the State's hearsay objection and again instructed the jury to disregard the testimony. There is no record of the substance of the arguments or rulings that took place during these conferences.

The court of appeals questioned whether Petitioner's prior inconsistent statement argument is preserved for appellate review. *Washington* , 424 S.C. at 396-97, 818 S.E.2d at 471. The court of appeals correctly noted the importance of parties placing their arguments on the record to preserve them for appellate review and then concluded that even if the Rule 801(d)(1)(A) issue was preserved, the trial court did not abuse its discretion in excluding Grant's testimony because Petitioner had not laid a proper foundation under Rule 613(b), SCRE, while questioning Kinloch. *Id.* at 397-98, 818 S.E.2d at 471-72. We hold defense counsel's statement to the trial court that

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"[Kinloch] already testified. My God" did not preserve for appellate review the argument Kinloch's alleged statement was a prior inconsistent statement and therefore not hearsay under Rule 801(d)(1)(A). *See State v. Dunbar* , 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court

[848 S.E.2d 785]

will not be considered on appeal."). Consequently, we do not reach the issue of whether Petitioner laid a proper foundation under Rule 613(b) for the admissibility of Kinloch's prior inconsistent statement to Grant, and we vacate the portion of the court of appeals' opinion addressing the Rule 613(b) foundational issue.[4] Our holding on this issue shall not preclude Petitioner, during retrial, from seeking admission of Kinloch's alleged statement to Grant under Rule 801(d)(1)(A) and Rule 613(b).

Petitioner also contends the court of appeals erred in affirming the trial court's ruling that Kinloch's alleged statement to Grant was not admissible under the present sense impression exception to the rule against hearsay. We agree with the court of appeals' analysis of this issue[5] and therefore affirm. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz* , 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an

[431 S.C. 406]

error of law[.]" *State v. McDonald* , 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell* , 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Likewise, we agree with the court of appeals' rejection of Petitioner's argument that Kinloch's alleged statement to Grant was admissible under the excited utterance exception to the rule against hearsay. *Washington* , 424 S.C. at 401-04, 818 S.E.2d at 473-74.

B. Accomplice Liability Jury Instruction

Over Petitioner's objection, the trial court instructed the jury on the theory of accomplice liability, also known as the theory of "the hand of one is the hand of all." The instruction consisted of the following points: a person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is done in the presence of and with the assistance of others, the act is done by all. The foregoing is not the complete instruction given by the trial court, but it conveys the gist of the accomplice liability theory. Assuming an accomplice liability instruction was appropriate in this case, the instruction given by the trial court was correct.

The court of appeals held the trial court did not err in giving the accomplice liability instruction because "there was evidence presented at trial that could support a finding that Washington had an accomplice who was the shooter." *Washington* , 424 S.C. at 420, 818 S.E.2d at 483. The court of appeals observed that aside from evidence both Petitioner and Kinloch joined together to assault Manigault, there was evidence both Petitioner and Kinloch followed Manigault around the club that night. The court of appeals also cited witness testimony that Manigault and Kinloch were "fussing," and witness testimony that Petitioner was not anywhere near the fight when the shots were fired. Thus, according to the court of appeals, "there was equivocal evidence as to who shot

[431 S.C. 407]

[Manigault],

[848 S.E.2d 786]

and from which the jury could have found [Petitioner]'s accomplice was the shooter." *Id.* at 421, 818 S.E.2d at 484.

For an accomplice liability instruction to be warranted, the evidence must be "equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State* , 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In this case, there was evidence Petitioner was the shooter. There was also evidence Petitioner was not the shooter. The question becomes whether there was equivocal evidence the shooter, if not Petitioner, was an accomplice of Petitioner. Based on the evidence presented in this case, Kinloch is the only possible person who could fall into the category of Petitioner's accomplice. Therefore, if the record contains no evidence Kinloch was the shooter, then the accomplice liability instruction should not have been given.

The State argues Arianna Coakley's testimony that Manigault told her, "[Kinloch] going to shoot me, they going to kill me" was evidence from which a jury could conclude Kinloch was the shooter. We disagree, as this statement was not evidence Kinloch ultimately did shoot Manigault.

The State contends the testimony of Robin Williams and Tyson Singleton that they saw Petitioner running unarmed from the scene as shots were fired elsewhere creates an inference that someone other than Petitioner was the shooter. That is certainly true, but their testimony does not create any inference Kinloch—again, the only possible accomplice of Petitioner—was the shooter.

The State argues Kinloch admitted to his brother during the jailhouse telephone conversation that he was "strapped"—armed with a firearm—while at the club. We disagree with the State's characterization of the conversation. First, there is nothing in the record defining the term "strapped." Even if the term means "armed," all we can glean from the record is that Kinloch told his brother Petitioner was strapped, and then said

to his brother, "[y]ou know how we do." There is no evidence Kinloch told his brother he was armed the night of the shooting.

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The State also contends Petitioner's aggressive cross-examination of Kinloch constituted evidence Kinloch could have been the shooter. The State points to Petitioner asking Kinloch on cross-examination to admit he—Kinloch—told Grant and Darlene Washington he was armed with a .357 Magnum and that he told both of them he shot Manigault. Kinloch denied these assertions. Similarly, Petitioner asked Kinloch to admit he—Kinloch—had been described "in the streets" as the shooter. Kinloch denied that assertion as well. While Petitioner very aggressively cross-examined Kinloch, the fact remains that counsel's questions and accusations were not evidence. Kinloch's refusal to admit to the statements and conduct attributed to him does not constitute evidence upon which the jury could rely to determine Kinloch was armed or that he was the shooter. Otherwise, the jury would be allowed to engage in speculation.

The State contends our reasoning in *Barber v. State* , 393 S.C. 232, 712 S.E.2d 436 (2011), supports its position that an accomplice liability instruction was proper in this case. We disagree. In *Barber* , the State presented evidence that Barber and three accomplices (Kimbrell, Walker, and Kiser) conspired to rob a drug dealer. The three accomplices testified Kimbrell remained outside the dealer's house while Barber, Kiser, and Walker went inside to do the deed. The accomplices testified Barber was armed with a .380 handgun, Kiser was armed with a rifle, and Walker was unarmed. The State also presented testimony that Kiser was the shortest of the three men who entered the dwelling. One of the robbers shot and killed the dealer and shot and wounded another man. Expert testimony established the shots fired inside the dwelling were from a .380 handgun. Two eyewitnesses inside the dwelling testified they could not identify the three intruders because the intruders' faces were covered. However, Barber elicited testimony that the shortest intruder (inferably Kiser) was armed with a rifle and that *both* of the other two intruders were armed with .380 handguns. *Id.* at 237, 712 S.E.2d at 439. This testimony placed a .380 handgun in Walker's hands, thus supporting the conclusion

[848 S.E.2d 787]

that either Walker or Barber was the shooter.

In *Barber* , we noted the propriety of an accomplice liability charge depended upon "whether there is any evidence that another co-conspirator was the shooter and Barber was acting

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with him when the robbery took place." *Id.* We held an accomplice liability instruction was warranted because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439.

On the record before us, Kinloch was the only person who could have been Petitioner's accomplice. There was evidence Kinloch and Petitioner acted in concert in following Manigault around the club and giving him dirty looks, there was evidence Petitioner and Kinloch (and others) fought with Manigault and Jenkins, and there was evidence Petitioner shot Manigault. However, for an accomplice liability instruction to have been warranted, there must be some evidence in the record that Kinloch shot Manigault. In *Barber* , there was evidence Barber shot the victims, and there was evidence Barber's accomplice, Walker, shot the victims. Here, there was no evidence Kinloch was armed with a firearm, and there was no evidence Kinloch shot Manigault. Kinloch was aggressively questioned as to whether he was armed and whether he shot Manigault. He denied both assertions. Was Kinloch telling the truth? Perhaps not. However, as we observed in *Barber* , an alternate theory of liability may not be charged to a jury "merely on the theory the jury may

believe some of the evidence and disbelieve other evidence." 393 S.C. at 236, 712 S.E.2d at 438.

Wilds v. State , 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), supports Petitioner's contention that an accomplice liability instruction was not proper. In *Wilds* , evidence was presented that Wilds and two confederates were walking down a street when Wilds spotted the victim and told his confederates he was going to rob the victim. The two confederates testified Wilds stopped to talk to the victim while they kept walking. They testified Wilds pulled a gun on the victim and demanded his wallet. Wilds then ordered his two confederates to beat the victim. They proceeded to do so, and Wilds shot the victim in the chest. *Id.* at 435-36, 756 S.E.2d at 388-89. In holding an accomplice liability instruction was improper, the court of appeals noted there was no evidence presented that anyone other than Wilds was the shooter and that his two confederates did not join in the robbery until after Wilds pulled a gun on the victim. *Id.* at 439-40, 756 S.E.2d at 390-91. The court of appeals observed, "Although the jury may have

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had doubts about [the two confederates'] testimony, an alternate theory of liability, such as 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 (quoting *Barber* , 393 S.C. at 236, 712 S.E.2d at 438).

Here, as in *Wilds* , the jury certainly may have doubted Kinloch's testimony that he did not shoot Manigault. However, since Kinloch was the only possible accomplice of Petitioner whose actions could result in criminal liability for Petitioner, there must be some evidence Kinloch shot Manigault. There was none.

The State also maintains the accomplice liability instruction was a proper "remedial instruction" in response to Petitioner's efforts to introduce inadmissible hearsay evidence from Grant that Kinloch told him he shot Manigault. There is no authority for the proposition that a "remedial" jury instruction may be given just in case a jury might consider evidence it has been specifically instructed by the trial court to disregard. Each time Grant testified Kinloch told Grant he shot Manigault, the trial court sustained the State's objection, ordered the testimony stricken, and instructed the jury to disregard it. Subsequently, the trial court began its instructions to the jury with this admonition:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record, you must disregard that testimony. Mr. Foreperson, as I instructed you, you are not to allow any testimony that was stricken from the record to even be discussed in deliberations.

In a slightly different context, we have held that "[i]f the trial judge sustains a

[848 S.E.2d 788]

timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." *State v. George* , 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). Similarly, we have observed, "[a]n instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them." *State v. Grovenstein* , 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (internal citations omitted). In this case, the jury was

[431 S.C. 411]

presumed to have followed the trial court's instruction to disregard Grant's testimony. We therefore reject the State's argument that the accomplice liability instruction was a proper "remedial instruction."

We also hold the trial court's accomplice liability instruction prejudiced Petitioner. The evidence that Petitioner shot Manigault was not

overwhelming, as several witnesses testified Petitioner was not armed and was not in the immediate area where the shooting occurred. The insertion of the accomplice liability charge into the case invited the jury to speculate whether Kinloch—the only possible accomplice of Petitioner—shot Manigault, when there was no evidence Kinloch was the shooter.[6]

C. Remaining Issues

The court of appeals affirmed the trial court's refusal to give a self-defense instruction. *Washington* , 424 S.C. at 410-15, 818 S.E.2d at 478-81. We affirm the court of appeals. Of course, if the evidentiary landscape changes during re-trial, the trial court shall follow the settled principle that "[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Gaines* , 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008).

The court of appeals affirmed the trial court's exclusion of Dr. Presnell's testimony regarding Manigault's blood alcohol level. *Washington* , 424 S.C. at 404-07, 818 S.E.2d at 474-76. Based upon the record before us, we affirm the court of appeals on this issue. However, on remand, the trial court

[431 S.C. 412]

shall consider the evidence as presented at that time and shall rule accordingly.

The court of appeals also affirmed the trial court's exclusion of the testimony of Kevin Watson. *Id.* at 407-10, 818 S.E.2d at 476-78. We find no error in the trial court's ruling and therefore affirm the court of appeals on this issue.

III. Conclusion

For the foregoing reasons, we reverse Petitioner's conviction for voluntary manslaughter and remand for a new trial on that charge.

AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, JJ., and Acting Justice D. Garrison Hill, concur.

Notes:

[1] During this trial, the trial court held over twenty off-the-record bench conferences after evidentiary objections had been made. After most of these conferences, neither the arguments of counsel nor the bases for the trial court's rulings were put on the record.

[2] While this is not an issue in this appeal, during his cross-examination of Grant, the solicitor repeatedly challenged the veracity of Grant's testimony by referring to pre-trial conversations the two had about Grant's account. Since we remand this case for a new trial, we are compelled to note the court of appeals' well-reasoned holding in *State v. Sierra* , 337 S.C. 368, 379, 523 S.E.2d 187, 192 (Ct. App. 1999), that it is generally improper for the prosecutor to impeach a witness by referring to out-of-court statements allegedly made by that witness to the prosecutor.

[3] *Allen v. United States* , 164 U.S. 492, 501-02, 17 S.Ct. 154, 41 L.Ed. 528 (1896) (allowing a supplemental jury instruction given by the trial judge to encourage a deadlocked jury to reach an agreement).

[4] In many instances, bench conferences are necessary, and here, the trial court was attempting to maintain the flow of the trial by holding bench conferences instead of repeatedly sending the jury out of the courtroom. Even so, we stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers. As the court of appeals noted, "When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record." *Washington* , 424 S.C. at 397, 818 S.E.2d at 471 (quoting *Smalls v. State* , 422 S.C. 174, 182 n.3, 810 S.E.2d 836, 840 n.3 (2018)). We also note that on remand, it is possible Rule 801(d)(1)(A) and Rule 613(b) can be

properly employed to warrant the introduction of Kinloch's alleged statements to Grant and Darlene Washington. Ironically, if extrinsic evidence of Kinloch's alleged statement is introduced, it could render moot the dispute over the accomplice liability instruction.

[5] *See Washington* , 424 S.C. at 399-401, 818 S.E.2d at 472-73.

[6] Our determination of prejudice does not turn upon the fact that the jury asked two questions about accomplice liability. However, the questions merit mention. In its first question, the jury asked the trial court for clarification of the law of reasonable doubt, accomplice liability, and voluntary manslaughter. The record does not reflect the trial court's response, if any. In its second question, the jury asked the trial court if it could apply the theory of accomplice liability to parties acting in concert with Manigault, the victim. The trial court advised the jury it had been fully instructed on the law. The second question indicates the jury did not fully understand the accomplice liability theory, which has no application to those acting in concert with a victim.

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393 S.C. 232
712 S.E.2d 436

Sammyeil B. BARBER,
Respondent/Petitioner,
v.
STATE of South Carolina,
Petitioner/Respondent.

No. 26992.

Supreme Court of South Carolina.

Heard May 3, 2011.Decided June 27, 2011.Rehearing Denied Aug. 5, 2011.

[712 S.E.2d 437]

Tara Dawn Shurling, of Columbia, for Respondent–Petitioner.Alan M. Wilson, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Salley W. Elliott, Assistant Deputy Attorney General, and Ashley A. McMahan, Assistant Attorney General, all of Columbia, for Petitioner–Respondent.**Chief Justice TOAL.**

In this post-conviction relief (PCR) case, we granted a writ of certiorari to provide Sammyeil B. Barber, the criminal defendant, with a belated appeal pursuant to *White v. State,* 263 S.C. 110, 208 S.E.2d 35 (1974).[1] The direct appeal concerns the circuit court judge's jury charge on accomplice liability. Sammyeil B. Barber, the criminal defendant, argues the charge was improper because it was unsupported by the evidence presented at trial. We agree with the State that the charge was properly supported by the evidence presented at trial.

Facts/Procedural Background

The State alleged Barber and three others (Blake Kimbrell, Kenneth Walker, and Marcus Kiser) conspired to rob a minor drug dealer, Alan Heintz. The men gathered together and discussed the plans for the robbery, procured a semi-automatic handgun, and then drove to Heintz's house. Upon discovering more people than expected at the house, they left to procure a second firearm, a rifle. The men returned to Heintz's house and Kimbrell waited in the car while Barber, Walker, and Kiser went in to rob Heintz.

After entering the house and waking the occupants, the men demanded money and drugs. Heintz was dragged from the bedroom

[712 S.E.2d 438]

and ultimately drew a shotgun on the robbers. One of the suspects armed with a semiautomatic handgun shot and killed Heintz, and shot and wounded another man who was sleeping on the couch. The three men fled the premises, stealing only $30 and leaving their rifle behind.

Eventually, police located the four men in connection with the crime. Kimbrell, Walker, and Kiser all implicated Barber in the planning and execution of the robbery, and said he was the gunman who shot Heintz. They pled guilty and testified against Barber, each receiving 15–30 years. At Barber's trial, Kimbrell, Walker, and Kiser all testified Barber was armed with the semi-automatic handgun and had shot both victims. The State presented testimony that only two weapons were brought to the robbery—the semi-automatic handgun allegedly carried by Barber, who was described as the robber of middle height, and a rifle, carried by Kiser, the shortest. Barber did not testify at trial, but his defense counsel elicited testimony on cross-examination that Walker, the tallest of the three men and the first to enter the house, was also in possession of a semi-automatic handgun. Barber primarily asserted in his defense that he did not participate in the crime and that the other three men lied to the police, framing him for the murder, to obtain lessened sentences. Barber claimed Walker was the gunman.

The circuit court judge instructed the jury on accomplice liability over defense counsel's objection. Defense counsel argued the charge was improper because the evidence presented at trial did not support the charge, the State did not base

its prosecution on a theory of accomplice liability, and the indictment alleged Barber was the gunman. The judge noted the objection and stated on the record:

... I think that the charge is correct in this case. Even if the intimation of the defense that these persons are basically conspiring to make [Barber] the shooter, if [the jury] believe[s] that, but they also believe he was present, someone else did the shooting, but they're not sure who did the shooting, but it was done when all four were present, there with that intended purpose of robbery, he would still be liable under the theory of the hand of one is the hand of all in the case or accomplice liability, whatever you want to call it.

The jury deliberated for nearly three hours, then asked for an explanation of "the hand of one, the hand of all" charge and to what charges that rule applied. After receiving that instruction again, the jury deliberated further before returning with guilty verdicts on all charges: criminal conspiracy, possession of a pistol by a person under twenty-one, possession of a firearm during the commission of a violent crime, attempted armed robbery, armed robbery, first degree burglary, assault and battery with the intent to kill, and murder.

Issue

Did the circuit court judge err in charging the jury on accomplice liability?

Standard of Review

The trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison,* 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010).

Analysis

Barber argues the evidence presented at trial did not support a jury charge on accomplice liability as to the murder charge. We disagree.

In *State v. Funchess,* 267 S.C. 427, 229 S.E.2d 331 (1976), and other cases, this Court has held that a lesser-included offense may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence. Barber relies upon this reasoning to support his argument that similar speculation is insufficient to warrant a jury charge on an alternate theory of liability. Barber's proposition is correct.

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Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted.

"Under the 'hand of one is the hand of all' theory, 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." *Mattison,* 388 S.C. at 479, 697 S.E.2d at 584. To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place. *See State v. Dickman,* 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000).

We find evidence to support the conclusion that Barber was acting with the other men during the robbery. Because all of the men clothed themselves all in black and wrapped shirts around their heads so only their eyes were visible, the witnesses could only describe and differentiate

the men based on physical build, height, and the weapon carried. Kimbrell, Kiser, and Walker, however, all testified to substantially the same version of the planning and execution of the robbery—that Barber was involved and was the shooter.

The evidence presented at trial could also support a finding that one of the other robbers was the shooter. The State presented evidence that Kiser was the shortest of the three men and carried the rifle, Barber was of middle height and carried a semi-automatic handgun, and Walker was the tallest and carried no weapon. However, defense counsel elicited testimony that all three robbers were armed—one with a rifle and two with .380 handguns, the type weapon forensic experts testified fired all the shots in Heintz's home that evening. Defense counsel's cross of Coleman Robinson, the witness who had been sleeping on the couch when the robbery began, indicates all three men were armed:

Q: [quoting from Mr. Robinson's statement to the police days after the incident] After the door was open, first they pushed it wide and hit the wall. As soon as that happened, that person turned the lights on.

A: Yes.

Q: Without having to look for the switch. I just laid on the couch until this same person walked up to me and I noticed he was holding a gun in his left hand.

A: Yes.

Q: And that's the truth?

A: Yes.

...

Q: All right. And then later on you talk about the second guy. The second guy was a little shorter and looked younger. He was carrying a rifle.

A: Yes, sir

....

Q: Then you say the third guy was taller, about six feet, 160. He had a bunched up T-shirt around his head, too. He looked to be in his early twenties. He was carrying a pistol also.

A: Yes.

Kyle Robinson, Coleman's brother who was asleep in a bedroom when the robbery began, also testified that the tallest of the three, which would be Walker, was armed:

A: [On direct examination] Well, as I went to the [bedroom] door to see what was going on, my door was like halfway shut, so I looked through the little space and that's when I saw the guy go back there to Alan's room and he had a black pistol in his hand.[2]

...

A: And then by that time I kind of opened the door and I looked and I

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saw the gun at Coleman's head, my brother, and I saw him give his wallet up....

...

Q: Were you able to tell anything about the other two as far as size goes?

A: I remember seeing the guy that went in the back. He seemed to be the biggest of all of them.

Q: Okay. When you say big—

A: You know, tall. Just the tallest of all of them....

...

Q: [On cross-examination] And you saw a black guy holding a small semi-automatic handgun to [your] brother's head; is that right?

A: Right.

Q: He was a black guy about six feet tall, weighing 150 to 160; is that right?

A: That's what I said, but I was actually kind of wrong about that.

Q: So when you made this statement on the 15th, the day after it happened, you said he was six feet tall?

A: That's what he appeared to be, but the other guy was bigger.

...

Q: There was a shorter black guy pointing a rifle at [you]?

A: Yeah.

Q: And a third black guy went to the other bedroom and pulled Alan out. He was about six feet tall and weighed 180 pounds, and today you said he had a gun also?

A: Yes.

Further, defense counsel outright argued that Walker was armed with a .380, the type of gun that fired the shots at Heintz's house, suggesting that Walker was the shooter. Thus, the testimony offered at trial indicating there may have been two robbers armed with handguns is sufficient to warrant the jury charge.

Conclusion

Therefore, the testimony is equivocal as to whether or not Barber was the only person armed with the type of gun the forensic experts say fired all the shots that night. The circuit court judge did not err in instructing the jury on "the hand of one, the hand of all" theory of accomplice liability. Accordingly, the convictions and sentences are

AFFIRMED.

Notes:

[1] We also granted the State's petition for a writ of certiorari. Because we find there is probative evidence to support the PCR judge's determination that Barber was denied his right to a direct appeal, we dismiss that writ of certiorari as improvidently granted.

[2] All the witnesses at trial, through their testimony, corroborated that the tallest of the three robbers went into the bedroom to retrieve Heintz. Walker is the tallest of the three men, and he and Kiser testified that Walker went to get Heintz.