

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

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

Opinion No. 5846 (S.C. Ct. App. filed August 11, 2021)
2017-GS-06-00066

THE STATE,

PETITIONER,

v.

DEMONTAY MARKEITH PAYNE,

RESPONDENT.

Appellate Case No. 2021-001097

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Barnwell County
Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMONTAY MARKEITH PAYNE,

APPELLANT

APPELLATE CASE NO. 2017-002014

RECORD ON APPEAL

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
STATE'S EXHIBITS #2 – 7 (PHOTOGRAPHS)**

State of South Carolina
County of Barnwell

Court of General Sessions

State	)	
	)	
	)	Transcript of Record
v.	)	2017-GS-06-00066
	)	
Demontay Markeith Payne	)	
	)	
<u>Defendant.</u>	)	

September 18-19, 2017
Barnwell, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge; and a jury.

A P P E A R A N C E S:

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Attorneys for the State

Joshua Koger, Esquire
Attorney for the Defendant

Bethanie K. Creppon
Circuit Court Reporter

1 close attention.

2 This is not TV, this is the real world. And I
3 think you'll -- even though it's a difficult
4 situation, it's a civic duty that most people, once
5 it's over, said, and done, it was interesting, I'm
6 glad I was able to do that. So I challenge you to
7 take it in that light and make it an interesting
8 experience. It's a very, very serious
9 responsibility.

10 Any objections to my opening remarks by the
11 State?

12 MR. MILLER: Not from the State, Your Honor.

13 THE COURT: Mr. Koger?

14 MR. KOGER: None from the Defense, Your Honor.

15 THE COURT: All right. Mr. Miller?

16 MR. MILLER: Thank you, Your Honor. May it
17 please the Court.

18 THE COURT: Yes, sir.

19 MR. MILLER: Mr. Koger.

20 Ladies and gentlemen of the jury, this case is
21 about a fight; it was an ongoing argument and it
22 ended with Demontay Payne shooting and killing
23 Devante Odom. They started arguing verbally earlier
24 in the night. You're going to hear testimony that
25 the victim, Devante, left, walked away, walked up

1 the street. And you'll hear testimony that the
2 defendant, Mr. Payne, got into his car and drove in
3 a manner that would allow him to catch up to
4 Mr. Odom.

5 And you'll hear testimony from people who claim
6 to have seen what happened next. You'll hear that
7 Demontay Payne pulled out a gun and started shooting
8 at Mr. Odom whose reaction was to turn and run away.
9 You may hear from witnesses that have a different
10 version of what happened.

11 But this is the thing about this case:
12 Mr. Koger is a fine lawyer and there are things that
13 we try to, as we are preparing a case against each
14 other, we try to figure out where is the fight,
15 where is the dispute. And I submit to you, ladies
16 and gentlemen, that Mr. Koger is going to ask that
17 the dispute be in one place. He's going to ask that
18 the dispute be, did Devante Odom, the victim, have a
19 gun? And, ladies and gentlemen, I submit to you it
20 doesn't matter if he had a gun.

21 This is not a case of self-defense. This is a
22 case of a defendant who had a dispute with somebody
23 pulling a gun on him, shooting him in the chest,
24 shooting him in his right side, shooting him in his
25 back, and then shooting him again in the back of his

1 leg as he's running away. Ladies and gentlemen,
2 that's not self-defense. Whether he's got a gun or
3 not, that is not self-defense.

4 So you heard the Judge talk to you about
5 credibility and believability. And one of the ways
6 that you as jurors determine credibility or
7 believability, it doesn't matter if it's the witness
8 that's up there on the stand or your spouse or one
9 of your children, one of your friends or roommate,
10 you always in your lives look at the evidence. What
11 does the evidence show? Because that's going to be
12 the crucial factor.

13 If you hear it from the stand but the evidence
14 just doesn't match up to that, that's how you judge
15 the credibility, you know you're not hearing the
16 truth from the stand. If, on the other hand, you
17 hear it from the stand and all of the evidence
18 matches up and it all makes sense to you, then
19 that's someone who has credibility, that's someone
20 who has believability.

21 Unfortunately, ladies and gentlemen, you know,
22 we say, a lot of times, this case is not like CSI on
23 television. And the greatest thing about CSI or the
24 biggest problem with cases not being that way is on
25 those shows you almost always see the crime happen,

1 you watch it, they show you the crime as it's going
2 on. And then you cheer for the prosecutors,
3 depending on what kind of show it is. Maybe if it's
4 one of the old lawyer shows, you're cheering for the
5 defendant because that's how the TV is set up to
6 work.

7 But the real world where we're sitting right
8 now and the real world back in 2015 is people try
9 not to shoot other people whenever they're on
10 camera. There's no video recorder out there. There
11 was absolutely no recordings of anything that
12 happened during this incident, so we have to bring
13 in witnesses and those witnesses have to tell you
14 what they saw, they have to tell you what they
15 heard, they have to tell you what they were thinking
16 at the time. But we can still put the case
17 together.

18 And the reason we can still put the case
19 together is because we also got physical evidence.
20 And that physical evidence is going to guide you, it
21 is going to make it very -- not easy, because it's a
22 serious and a difficult case. But it's going to
23 make you very comfortable with the fact that you
24 know what happened out there.

25 And whether or not Devante Odom had a gun isn't

1 going to change your determination. And the reason
2 for that is the oath that you just took. I've
3 always thought that oath was interesting because it
4 gets so many different words in unusual patterns
5 that by the end of it, it's kind of hard to
6 determine what you took an oath to do. What you
7 took an oath to do is listen to all of the
8 testimony, consider all of the evidence, and then
9 apply it to the law that the Judge is going to tell
10 you.

11 And you heard the Judge say, you've taken an
12 oath to accept the law as I tell you it is. That
13 means if you have some idea that the law should be
14 different or is different, then you're supposed to
15 set that aside, you've taken an oath to set that
16 aside, I'm going to apply the facts and the
17 evidence.

18 Whatever y'all, the jury, find the facts to be,
19 you're going to apply it to the law that the Judge
20 gives you, and then you'll see why it doesn't matter
21 if Devante Odom had a gun or not. Devante Odom was
22 not justifiably killed. He was shot, he was
23 murdered, and it was not in self-defense.

24 Ladies and gentlemen, the last thing before I
25 sit down, it is a little bit confusing. I kind of

1 want apologize in advance. And I know that all of
2 us in the courtroom, including the Judge, may be
3 doing this: We're referring to the defendant and to
4 the victim by their last names a lot of times. We
5 try to always refer to them by their last names
6 because their first names are so close to each
7 other.

8 You will hear Demontay, Devante, Vante, Montay.
9 We've had some other hearings in this matter that we
10 realize that this is an issue. So I would just ask
11 that as jurors, trying to keep it straight in your
12 own head, if you can remember Mr. Payne is the one
13 who is on trial and Mr. Odom is the deceased, then
14 we will try our best to make sure that we always
15 refer to them by their last names so that you can
16 keep it straight in your own head.

17 And when we get done, ladies and gentlemen,
18 there's not going to be a great big question out
19 there about what happened. Demontay Payne murdered
20 Devante Odom. And when we do get this case to you
21 and when you do go back there to deliberate, you're
22 going to have no question that's what happened. And
23 we'll ask you to return a verdict that finds him
24 guilty of murder as he's been indicted. Thank you.

25 MR. KOGER: May it please the Court.

1 THE COURT: Yes, sir.

2 MR. KOGER: Solicitor Miller.

3 MR. MILLER: Yes, sir.

4 MR. KOGER: It does matter whether Mr. Odom had
5 a gun on that particular evening. And the reason
6 why it matters is because Mr. Payne would not have
7 reacted the way that he did on that evening, fearing
8 for his life and acting in self-defense. Now, as
9 the Judge told you, and I think Solicitor Miller
10 might have remarked, that what is said in opening by
11 Mr. Miller and what is said by me is not evidence,
12 it is our version of things we want you to look at
13 in this particular case.

14 Now, it's going to be witnesses, it's going to
15 be numerous witnesses, that sit in this chair right
16 here, and they're going to attest that what they
17 know or don't know on that night of May 23rd, 2015.
18 It is true, as the Judge pointed out, that the true
19 facts come from this chair. But also, the true
20 facts come from what's submitted in evidence and
21 true facts also come from what is not in this chair
22 and what is not submitted in evidence. So it is a
23 total thing, it is the total package that you have
24 to listen to in this particular case.

25 Now, I notice the State's proposed witness

1 list, 12 people. And, of course, you'll be told
2 that you don't take into account the number of
3 witnesses when you're trying to come to the true
4 facts. But I want you to listen, I do want you to
5 listen. I agree with Solicitor Miller; I do want
6 you to listen to the witnesses that they submit and
7 that I'm going to submit from this witness chair
8 right here because, again, the true facts are going
9 to be determined, what is said, again, and what is
10 not said, and what is submitted, and what is not
11 submitted.

12 The State has a higher burden, as Judge Early
13 stated, of proving their case beyond a reasonable
14 doubt. And that is intentional because every person
15 in the United States of America, every person in the
16 state of South Carolina, every person in Barnwell
17 County that sits at this defendant table are due a
18 fair trial in relation to our constitution, the
19 Fifth Amendment, the Sixth Amendment, and the
20 Fourteenth Amendment. And anyone that sits there
21 deserves that particular attention.

22 Do not allow the State to not meet their
23 responsibility of proving their burden beyond a
24 reasonable doubt. Do not allow the State to skirt
25 that responsibility, that obligation.

1 On May 23rd, 2015, Demontay Payne reacted in a
2 way that he had no other choice, because Devante
3 Odom pulled the gun on him and shot at him. And
4 because where the shots had landed, listen to what
5 is going to come from this stand here and what is
6 not going to come from this stand, because if you
7 start something and find out you're in a difficult
8 situation, well, the law covers you on that on
9 self-defense. Listen very carefully to the
10 evidence, as been stated. It is your job, it is
11 your responsibility, it is your obligation to give
12 your fullest attention on this particular case.

13 And once the witnesses testify, once the
14 evidence is put in place, once all those things are
15 done, once you listen to the elements of
16 self-defense and put everything together, I'm
17 confident that you will determine this week, in the
18 next two or three days, that on May 23rd, 2015,
19 Demontay Payne acted in self-defense, he had no
20 other choice but to respond in that particular way
21 because he was confronted with someone with a gun.
22 He can act upon appearances, you'll find that out
23 later in Judge's instructions, and that you'll come
24 back not guilty for Demontay Payne on murder based
25 upon the law of self-defense. Thank you.

1 THE COURT: You may call your first witness.

2 MR. MILLER: Thank you, Your Honor. The State
3 calls Alicia Youmans.

4 ALICIA YOUMANS

5 being first duly sworn, testified as follows:

6 THE WITNESS: Yes.

7 THE CLERK: If you would, be seated, please,
8 ma'am, and state your full name for the record.

9 THE WITNESS: Alicia Youmans.

10 DIRECT EXAMINATION

11 BY MR. MILLER:

12 Q. Ms. Youmans, where are you from?

13 A. Barnwell.

14 Q. Do you still live in Barnwell County?

15 A. Yes, sir.

16 Q. And where do you work?

17 A. I work at Ashleigh Place Group Home.

18 Q. What do you do at Ashleigh Place Group Home?

19 A. I'm a direct-care staff supervisor.

20 Q. Do you know the defendant in this case,
21 Mr. Demontay Payne?

22 A. Yes.

23 Q. How do you know him?

24 A. We kind of grew up in the same neighborhood.

25 Q. Do you know the victim or did you know the

1 victim, Devante Odom?

2 A. Yes.

3 Q. How did you know Devante?

4 A. We grew up in the same neighborhood and he's a
5 close friend of my brother.

6 Q. So do you recall the night of May the 23rd of
7 2015?

8 A. Yes.

9 Q. And why do you recall that night?

10 A. Because I was sitting outside when it happened.

11 Q. And you say when it happened. Are you
12 referring to the murder that is the --

13 A. Yes, sir.

14 Q. -- subject of us being here?

15 A. Yes, sir.

16 Q. Okay.

17 MR. MILLER: Your Honor, we have an overhead
18 marked as State's Exhibit 1 and 5 --

19 THE COURT: 1 through 5 or 1 and 5?

20 MR. MILLER: Excuse me, and 6 of photographs --

21 THE COURT: 1, 5, and 6?

22 MR. MILLER: No, sir, one plus six additional,
23 so 1 through 7. And those have been shown to the
24 Defense and we have stipulated to their
25 admissibility.

1 THE COURT: All right. State's 1 through 7 is
2 admitted into evidence without objection.

3 MR. KOGER: Yes, Your Honor.

4 (State's Exhibit Nos. 1 - 7 admitted into
5 evidence.)

6 BY MR. MILLER:

7 Q. Ms. Youmans, I'm going to show you what's been
8 marked for identification as State's Exhibit 1. Can
9 you explain what this is here?

10 A. That's Highway 300.

11 THE COURT: Mr. Miller, I don't think all my
12 jurors can see it.

13 MR. MILLER: I was just going to have her
14 testify and then show it to them, Your Honor.

15 THE COURT: All right.

16 BY MR. MILLER:

17 Q. Now, this area here, we have -- what road is
18 this?

19 A. Emerald Lane.

20 Q. And what road is this here?

21 A. Wingo Estates.

22 Q. Okay. And when you were -- on May 23rd, 2015,
23 when you were out in this area that evening, where
24 were you located? Whose place were you at?

25 A. At [REDACTED].

1 Q. Can you point out which one is [REDACTED] here on
2 the --

3 A. (Indicating).

4 Q. Okay. So if you come off of Emerald Lane onto
5 Wingo Estates, it would be the second house on the
6 left; correct?

7 A. Yes.

8 Q. And who lives at [REDACTED] or who
9 did at that time?

10 A. Stacey Hartzog.

11 Q. And how did you know Stacey Hartzog?

12 A. I'm a friend of someone that was staying with
13 him at the time.

14 Q. Okay. And who was there at [REDACTED]
15 [REDACTED] before Mr. Odom got there? Was he there when
16 you got there? Was Mr. Odom there when you got
17 there?

18 A. No, sir.

19 Q. Okay. Who was there before he got there?

20 A. Mr. Payne and myself and my sister and our
21 friend.

22 Q. And, I'm sorry, what?

23 A. Our friend.

24 Q. Okay. So you got Mr. Payne, your sister --
25 what's her name?

- 1 A. Tyeisha Youmans.
- 2 Q. All right. Tyeisha Youmans, you, obviously,
- 3 and another friend?
- 4 A. Yes, sir.
- 5 Q. Was Mr. Hartzog there?
- 6 A. Yes, sir.
- 7 Q. Okay. What were you guys doing?
- 8 A. Me, my sister, and my friend were just sitting,
- 9 having some girl talk.
- 10 Q. Okay. And while you sat there engaging in the
- 11 girl talk, did Devante Odom come up?
- 12 A. Yes, sir.
- 13 Q. Explain to the jury how Devante would have or
- 14 did come up to [REDACTED].
- 15 A. He came from the back side.
- 16 Q. This is Coal Lane here?
- 17 A. Yeah. He came from Coal Lane way back through
- 18 the trailers and straight down.
- 19 Q. Okay. So across this field?
- 20 A. Yes, sir.
- 21 Q. And when he walked up to -- was he coming to [REDACTED]
- 22 [REDACTED]?
- 23 A. Yes.
- 24 Q. And when he walked up to you where you were,
- 25 where were you?

- 1 A. I was sitting on the porch.
- 2 Q. Who else was on the porch?
- 3 A. Me, my sister, my friend, and Mr. Payne.
- 4 Q. Okay. What was your friend's name?
- 5 A. Yvette.
- 6 Q. Yvette. Okay. So when Mr. Odom walks up, did
- 7 he speak to anyone?
- 8 A. He spoke to me, my sister, Yvette.
- 9 Q. Did he speak to Mr. Payne?
- 10 A. No, sir.
- 11 Q. What did he ask you?
- 12 A. For two cigarettes.
- 13 Q. And were you going to give him some cigarettes?
- 14 A. Yes.
- 15 Q. Where were your cigarettes that you were going
- 16 to give him?
- 17 A. In the house.
- 18 Q. Did you go into the house?
- 19 A. No, sir.
- 20 Q. Okay. Why not?
- 21 A. They began to argue and --
- 22 Q. Who is they?
- 23 A. Mr. Odom and Mr. Payne.
- 24 Q. Okay. Was this a verbal argument or was it
- 25 fighting?

- 1 A. Verbal.
- 2 Q. Okay. Do you know what they were arguing
3 about?
- 4 A. Not really.
- 5 Q. How did the argument end?
- 6 A. It ended with Mr. Odom walking away and
7 Mr. Payne got into his car.
- 8 Q. Okay. Let me -- these two get into an
9 argument. Was Mr. Odom welcome at Stacey Hartzog's
10 place?
- 11 A. I don't know.
- 12 Q. Okay. Was Mr. Payne welcome as Mr. Hartzog's
13 place?
- 14 A. I would say yes.
- 15 Q. Okay. So they get into this argument and then
16 Mr. Odom walks away?
- 17 A. Yes, sir.
- 18 Q. Where did he walk, if you can show the jury
19 here?
- 20 A. He walked back up Wingo Estates towards
21 Emerald.
- 22 Q. So he walks over here and then he's walking up
23 this road. Now, this is a gravel or dirt road,
24 Wingo Estates is?
- 25 A. Yes.

1 Q. And he's walking towards Emerald; correct?

2 A. Yes, sir.

3 Q. All right. How did -- let's go back a little
4 bit. How did -- the defendant, Demontay Payne, how
5 did he arrive at [REDACTED]?

6 A. He drove up in his car. He -- first he pulled
7 up over to [REDACTED] and he drove straight across
8 the yard to 59.

9 Q. Okay. [REDACTED] is this one, this brown
10 colored --

11 A. Yes, sir.

12 Q. All right. And so you said he pulled up here
13 and he drove straight across the yard to the front
14 of 59?

15 A. Yes, sir.

16 Q. Okay. So was there anybody with him in his
17 car?

18 A. No, sir.

19 Q. Do you know whose car it was?

20 A. I think it was his girlfriend's car.

21 Q. Okay. Was his girlfriend with him?

22 A. No, sir.

23 Q. All right. So he's here, Devante Odom comes
24 walking up, there's a verbal dispute between them --

25 A. Yes, sir.

1 Q. -- and then Odom starts walking. And what did
2 the defendant, Demontay Payne, do?

3 A. He got into his car and he pulled out of [REDACTED]
4 [REDACTED] onto Wingo Estates Road and drove up towards
5 Emerald.

6 Q. So he was going in the same direction as
7 Devante Odom at that point; correct?

8 A. Yes, sir.

9 Q. How far up the road did Devante get? Did he
10 make it all the way to Emerald?

11 A. He made to Emerald.

12 Q. Okay. Could you tell if he turned to the right
13 or turned to the left?

14 A. No. He --

15 Q. Or was it right there at the intersection?

16 A. He was right there at the intersection.

17 Q. Okay. Now, this time period that we're talking
18 about is about 9:00 at night. Do you recall what
19 the lighting conditions were?

20 A. There's a streetlight that sits on Emerald.

21 Q. A streetlight that sits here?

22 A. Uh-huh.

23 Q. Is it at the intersection or close to the
24 intersection?

25 A. It's at the intersection.

1 Q. Okay. And so could you see clearly what was
2 going on in the intersection?

3 A. Yes, sir.

4 Q. From [REDACTED]?

5 A. Yes, sir.

6 Q. Were you still there at [REDACTED]?

7 A. Yes, sir.

8 Q. All right. Who else was with you out -- were
9 you outside of Wingo Estates Road?

10 A. Yes, sir.

11 Q. Who else was with you outside?

12 A. After Payne pulled off?

13 Q. After Payne pulled off.

14 A. No one. My sister and Yvette had walked inside
15 the house.

16 Q. Okay. Explain to the jury what you saw happen
17 underneath that streetlight down there on Emerald
18 Lane.

19 A. Mr. Payne drove his car up to Emerald Lane, him
20 and Odom had another verbal dispute or whatever, he
21 got out of his car, they was still arguing or
22 whatever, and he turned to go back to his car. I'm
23 not sure if something was said or what happened, but
24 he -- when he turned back around to face Mr. Odom,
25 he began shooting at him.

1 Q. So. Do you have any idea what the distance is
2 between the porch there on [REDACTED] and
3 that intersection? Something --

4 A. Maybe about a hundred yards or so.

5 Q. So about the length of a football field?

6 A. Yes, sir.

7 Q. Okay. And I want to make sure that we
8 understand this: Mr. Payne catches up to Mr. Odom,
9 Mr. Payne is driving and Mr. Odom is walking.
10 Correct?

11 A. Yes, sir.

12 Q. Does Mr. Payne immediately get out of the car
13 or can you see them going back and back before he
14 gets out of his car?

15 A. I saw them going back and forth before he got
16 out of the car.

17 Q. And where did Mr. Payne stop his vehicle?

18 A. At -- kind of in front of [REDACTED]

19 Q. Okay. Now when he stops his vehicle and he
20 gets out, is he still continuing to argue with Odom?

21 A. Yes, sir.

22 Q. And when he goes -- he, Payne -- when Mr. Payne
23 turns around, you said he went back towards his car.
24 Did he get anything out of the car or could you
25 tell?

1 A. He never made it back to the car.

2 Q. He didn't get all the way back to the car. And
3 then what happened?

4 A. He turned around and just started firing at
5 Mr. Odom.

6 Q. What did Mr. Odom do when he started getting
7 shot at by Mr. Payne?

8 A. He started running.

9 Q. And could you --

10 THE COURT: I'm sorry. What? I --

11 THE WITNESS: He started running.

12 THE COURT: Started running?

13 THE WITNESS: Uh-huh.

14 BY MR. MILLER:

15 Q. And could you see what happened -- where
16 Mr. Odom went -- at that time and from where you
17 were, could you see where he went?

18 A. Yes, sir.

19 Q. And where did he go?

20 A. He ran back towards [REDACTED] in between [REDACTED] and the
21 house that sits beside it.

22 Q. All right. Let me go back to this. You said

23 [REDACTED] Now, that's [REDACTED]; correct?

24 A. Yes, sir.

25 Q. All right. So you got [REDACTED] here.

1 And are these houses over here the one you're
2 talking about?

3 A. Yes, sir.

4 Q. Okay. And this one would be [REDACTED] and this one
5 would be whatever the other number is?

6 A. Yes, sir.

7 Q. Okay. So he starts getting shot at somewhere
8 in the street, he takes off running. And you think
9 that he went between the houses; correct?

10 A. Yes, sir.

11 Q. Okay. What did you do whenever you saw this?

12 A. I just started screaming that Mr. Payne was
13 shooting Mr. Odom.

14 Q. Okay. Who were you screaming that to?

15 A. Who -- my sister and Yvette were inside the
16 house, so I was screaming to them.

17 Q. Okay. Did you at that point realize that
18 Mr. Odom had been hit?

19 A. No, sir.

20 Q. When did you realize that Mr. Odom had been
21 hit?

22 A. When I saw him fall to the ground and he
23 started waving his arm in the air.

24 Q. Okay. Did you call the police when you saw him
25 fall to the ground after hearing all these gunshots?

1 A. Yes, sir.

2 Q. And how did you call the police?

3 A. I dialed 911.

4 Q. From your cell phone?

5 A. From my cell phone.

6 Q. Okay. So did you have to go inside to do that?

7 A. No, sir.

8 Q. Okay. Explain to the jury what happened
9 whenever you called 911.

10 A. I just told them that someone had been shot and
11 that he needed some help. And they began to
12 question me about who did it, but I wasn't trying to
13 answer that question at that time.

14 Q. So when they asked you about what went on and
15 what happened, did you ultimately tell the 911
16 dispatcher who had shot Mr. Odom?

17 A. Not right then.

18 Q. Not the first time you called, but the second
19 time.

20 A. The second time, yes.

21 Q. Okay. And did you tell them what kind of car
22 you thought that Mr. Payne was driving?

23 A. Yes.

24 Q. And did you tell them what direction he'd
25 driven off in?

1 A. Yes, sir.

2 Q. And after getting all of this information from
3 you, the dispatcher told you to get in touch with
4 one of the officers that was there at the scene;
5 correct?

6 A. Yes, sir.

7 Q. And did you do that?

8 A. Yes, sir.

9 Q. And, ultimately, an investigator was sent out
10 to your house to get a statement from you; isn't
11 that correct?

12 A. Yes, sir.

13 Q. And when the investigator went out to your
14 house to get this statement from you, you cooperated
15 with the investigator?

16 A. Yes, sir.

17 Q. And you did a written statement as well?

18 A. Yes, sir.

19 Q. And in all of the statements, both verbal
20 statements and in the written statement, you
21 indicated that you saw Demontay Payne start shooting
22 at Devante Odom; isn't that correct?

23 A. Yes, sir.

24 Q. And in response to that, Devante Odom ran away?

25 A. Yes, sir.

1 Q. Did you see -- did you see -- from your vantage
2 point, did you see Devante Odom with a gun?

3 A. No, sir.

4 Q. Did you ultimately walk up Wingo Estates Road
5 to the area where Devante Odom was on the ground?

6 A. Yes, sir.

7 Q. By the time you did that, how many people had
8 gathered around?

9 A. Several.

10 Q. Was it more than five?

11 A. More than five.

12 Q. Did you see a gun when you got up to that area,
13 one laying on the ground?

14 A. No, sir.

15 Q. Okay. But you called the police and you stayed
16 there until the police got there and you talked to
17 the police on the scene and you gave them a
18 statement when they came to your house later that
19 night and you wrote a statement; isn't that correct?

20 A. Yes, sir.

21 Q. Now, you've known the defendant for a number of
22 years correct?

23 A. Yes, sir.

24 Q. You knew Mr. Odom for a pretty good long period
25 of time too?

1 A. Yes, sir.

2 Q. Do you have any particular allegiance to one of
3 them over the other one?

4 A. No, sir.

5 Q. In fact, wouldn't it be fair to say that prior
6 to this night that you liked both of them?

7 A. Yes, sir.

8 Q. Considered yourself friendly with both of them?

9 A. Yes, sir.

10 Q. I want to get you to identify a couple things
11 in these photographs. Do you know which trailer
12 that is?

13 THE COURT: Which photo?

14 MR. MILLER: This is State's Exhibit 4, Your
15 Honor.

16 A. [REDACTED].

17 Q. And State's Exhibit 5 is looking from that
18 front porch at [REDACTED] towards Emerald; correct?

19 A. Yes, sir.

20 Q. And there's a streetlight that looks like it's
21 in between these two places and then there's another
22 light that's down here and then it looks like
23 there's another light right there.

24 A. Yes, sir.

25 Q. So it's pretty well lit up at night even;

1 correct?

2 A. Yes, sir.

3 Q. And those lights were working that night,
4 weren't they?

5 A. Yes, sir.

6 Q. And, actually, if you look at State's Exhibit 6
7 next to State's Exhibit 5, that kind of looks like a
8 dot. But here in State's Exhibit 6, you can tell
9 that it's actually a streetlight; correct?

10 A. Yes, sir.

11 Q. Okay. In State's Exhibit 3, this paved road
12 would be Emerald Road; correct?

13 A. Yes, sir.

14 Q. And so when you were talking about [REDACTED],
15 that's this place here; correct?

16 A. Yes, sir.

17 Q. And you said that you thought that he had tried
18 to run between the trailers -- Mr. Odom had tried to
19 run between the trailers to get away?

20 A. Yes, sir.

21 Q. Okay. And State's Exhibit 2 here is again
22 showing that there's a streetlight that's right here
23 near the corner of Wingo Estates and Emerald;
24 correct?

25 A. Yes, sir.

1 Q. Okay.

2 MR. MILLER: Your Honor, I'd like to pass
3 these -- publish these photographs to the jury just
4 briefly so that they can see. This is State's
5 Exhibit 3, this is State's Exhibit 4, the [REDACTED]
6 [REDACTED] trailer.

7 BY MR. MILLER:

8 Q. This Wingo Estates Road and Emerald Lane, what
9 county is that in?

10 A. Barnwell.

11 Q. Thank you. Please answer any questions
12 Mr. Koger might have for you.

13 CROSS-EXAMINATION

14 BY MR. KOGER:

15 Q. Ms. Youmans, who started the argument?

16 A. I would say Mr. Payne initiated it.

17 Q. Mr. Payne initiated it?

18 A. Yes, sir.

19 Q. Okay. Now, how long was Mr. Payne there before
20 Mr. Odom arrived?

21 A. Maybe a good 10, 15 minutes.

22 Q. And you stated that you was out there with your
23 sister and, I think, Ms. Yvette?

24 A. Yes.

25 Q. Okay. And you said you were, I guess, three

1. were engaged in girl talk; correct?

2. A. Yes.

3. Q. Okay. And while y'all was engaging in girl
4. talk, Mr. Payne came over; correct?

5. A. Yes.

6. Q. What was Mr. Payne's demeanor at that time?

7. A. He was calm.

8. Q. He was calm. And I think you testified to,
9. that he was actually sitting -- was he sitting down
10. with y'all?

11. A. Yes.

12. Q. Okay. And I think you testified to, that you,
13. your sister, and Ms. Yvette was on the porch.

14. A. Yes.

15. Q. Okay. Was Mr. Payne on the porch or was he
16. down on the ground sitting on the step or sitting in
17. the chair or what?

18. A. He was sitting on the ground in a chair.

19. Q. Okay. All right. And was he engaging in girl
20. talk or what was -- I mean, what was that about as
21. far as what type of conversation, including
22. Mr. Payne, did y'all have for 10 or 15 minutes
23. before Mr. Odom came up?

24. A. None. He was just sitting there.

25. Q. He was just sitting there? He wasn't saying

1 anything to you?

2 A. No.

3 Q. He wasn't talking to anyone else?

4 A. No.

5 Q. Okay. Do you know how often Mr. Payne would

6 come to [REDACTED] visit?

7 A. Not really.

8 Q. Okay. But I think you testified to, he did

9 come over sometimes; correct?

10 A. Yes.

11 Q. Okay. All right. So he was sitting there, he

12 was not angry or anything, correct, he was calm?

13 A. Yeah, he was calm.

14 Q. He sitting there first?

15 A. Yeah.

16 Q. Okay. And, obviously, you didn't have an

17 objection to him being there because you didn't ask

18 him to leave or anything; correct?

19 A. No.

20 Q. He wasn't causing any problem with you and the

21 girl talk?

22 A. No.

23 Q. Okay. All right. Now, you testified to, I

24 think, 10 or 15 minutes later that Mr. Odom came

25 around the side of [REDACTED].

1 A. Yes.

2 Q. Did Mr. Odom visit that residence much?

3 A. I'm not sure. I don't know.

4 Q. Okay. Has he came to see you that often?

5 A. No.

6 Q. At [REDACTED]?

7 A. No.

8 Q. Okay. And he came to ask you for two
9 cigarettes?

10 A. Yes.

11 Q. Okay. And these cigarettes were located inside
12 [REDACTED]?

13 A. Yes.

14 Q. Okay. And you testified to, that somehow you
15 didn't go get them. Why was that?

16 A. Well, me, my sister, and Yvette were kind of
17 arguing back and forth about who was going to go get
18 them.

19 Q. Okay. Now, while y'all was arguing back and
20 forth about who was going to get the loose
21 cigarettes, Demontay Payne was still sitting there;
22 correct?

23 A. Yes.

24 Q. Okay. And you stated that an argument ensued,
25 that an argument started; correct?

- 1 A. Yes.
- 2 Q. Okay. And who started the argument?
- 3 A. I would say Mr. Payne did.
- 4 Q. And why would you say that?
- 5 A. Because he was sitting there and when Mr. Odom
- 6 walked up he lifted his shirt, showing his gun.
- 7 Q. Okay. And that's your testimony today --
- 8 A. Yes.
- 9 Q. -- he lifted his shirt, showing the gun?
- 10 A. Yes.
- 11 Q. Okay. Now, the State mentioned that you gave a
- 12 statement. Correct?
- 13 A. Yes.
- 14 Q. And you gave this statement soon after this
- 15 incident; correct?
- 16 A. Not soon after. Probably about 30, 45 minutes
- 17 later.
- 18 Q. But it was the same evening?
- 19 A. Yes.
- 20 Q. And, as was stated, you contacted law
- 21 enforcement?
- 22 A. Yes.
- 23 Q. And eventually during the evening, you spoke
- 24 with law enforcement; correct?
- 25 A. Yes.

1 Q. All right. And, as a matter of fact, a member
2 of law enforcement, I think Investigator Peterson,
3 came to your home; correct?

4 A. Yes.

5 Q. And y'all talked beforehand before you gave
6 your statement; correct?

7 A. Yes.

8 Q. Okay. And after y'all talked beforehand, you
9 actually gave a written statement?

10 A. Yes.

11 (Defendant's Exhibit No. 1 marked for
12 identification.)

13 Q. Okay. Defendant's Exhibit 1. Do you recognize
14 that statement here?

15 A. Yes.

16 Q. Okay. And is this the statement you gave on
17 May 23rd, 2015?

18 A. Yes.

19 Q. Okay. Read that statement for me.

20 THE COURT: Are you offering it into evidence?

21 MR. KOGER: Yes. I'm offering it into evidence
22 as Defendant's Exhibit No. 1.

23 THE COURT: Any objection?

24 MR. MILLER: No objection, Your Honor.

25 (Defendant's Exhibit No. 1 admitted into

1 evidence.)

2 BY MR. KOGER:

3 Q. And is that your signature on that statement?

4 A. Yes.

5 Q. And is there a time on that statement in which
6 you made the statement?

7 A. 11:12 PM.

8 Q. Okay. And can you read that statement for the
9 Court.

10 A. Yes.

11 "On May 23rd, 2015, I was sitting outside at
12 Wingo Estates talking with Montay Payne when Vante
13 Odom came up walking and asked me for two
14 cigarettes. As I was getting them, he and Montay
15 Payne had some exchanged words. I didn't hear what
16 they were saying. I only heard Vante Odom state to
17 Montay Payne you're going to have to show me you're
18 going to kill me.

19 "Devante walked up the road and Montay Payne
20 got into his car and drove up the road. He stopped,
21 they exchanged words. Montay got out of his car
22 swinging his arms. After that they got real close
23 to each other, and that's when Montay Payne pulled
24 out his gun and shot Devante Odom. He jumped back
25 into his car and left."

1 Q. Okay. And this statement was, again, gave soon
2 after the incident; correct?

3 A. Yes.

4 Q. All right. Now, is there any place in this
5 statement that you mention a gun being in the
6 waistband?

7 A. No, sir.

8 Q. Okay. So you -- so it's not in the statement?

9 A. No, sir.

10 Q. And wouldn't you agree that soon after this
11 happened, that would have been a very important
12 statement -- a very important fact to put in the
13 statement?

14 A. Yes, sir.

15 Q. Okay. And why didn't you put it in the
16 statement?

17 A. I don't know.

18 Q. Okay. And at the end right here, near the end,
19 can you read this little clause at the bottom of
20 this statement?

21 A. Which -- what are you referring to?

22 Q. I have read each page.

23 A. I have read each page of this statement
24 consisting of one page, each page of which bears my
25 signature. And corrections, if any, bear my

1 initials and I clarify [sic] that the facts
2 contained here are the truth and correct.

3 Q. So there's a certification clause at the bottom
4 of this statement?

5 A. Yes.

6 Q. And you certify that what you placed in this
7 statement are true and correct?

8 A. Yes.

9 Q. Okay. And you do agree that you did not put
10 anything in there about a gun being in the
11 waistband?

12 A. Yes.

13 Q. And you also read that Devante Odom said that
14 you' re going to have to show me you're going to
15 kill me; correct?

16 A. Yes.

17 Q. Okay. Is it still your testimony that Demontay
18 Payne started this here?

19 A. Yes.

20 Q. Okay. And Odom -- again, Payne was there. He
21 wasn't bothering anyone; correct?

22 A. No.

23 Q. And he wasn't bothering you?

24 A. No.

25 Q. And was sitting there, I suppose -- and maybe

1 not shooting the breeze, but he was there in a
2 peaceful manner?

3 A. Yes.

4 Q. And Odom came around --

5 A. Yes.

6 Q. -- correct? Okay.

7 Now, which direction -- you testified to
8 Mr. Odom going towards Emerald; correct?

9 A. Yes.

10 Q. Okay. Which direction he took? Did he walk
11 down Wingo? Which direction he took up to Wingo?

12 A. He walked down Wingo.

13 Q. He walked down Wingo. And approximately how
14 long did it take him to get down to Emerald?

15 A. Maybe two minutes. I don't know.

16 Q. Okay. And which route did Mr. Payne take to --
17 did he go on Wingo or did he go across the yard to
18 [REDACTED], his residence?

19 A. He went on Wingo.

20 Q. Okay. He went on Wingo?

21 A. Yes.

22 Q. Okay. Did he ever pull into his yard?

23 A. No, sir.

24 Q. Okay. Now, you stated about -- here today you
25 stated that Mr. Odom attempted to run between the

1 two mobile homes on [REDACTED]; correct?

2 A. Yes.

3 Q. Okay. But that's not in your statement either,
4 is it?

5 A. No.

6 Q. Okay. And I think when you initially called
7 law enforcement, the first call, they was asking you
8 about the incident and you didn't give any type of
9 information; correct?

10 A. No, sir.

11 Q. Okay. And you didn't identify the shooter at
12 that particular time?

13 A. No, sir.

14 Q. Okay. And you would agree that when you wrote
15 that statement, that Investigator Peterson stayed
16 quite a while with you; correct?

17 A. Yes, sir.

18 Q. And y'all actually talked about everything?

19 A. Yes, sir.

20 Q. Okay. And he actually read over that
21 statement; correct?

22 A. Yes, sir.

23 Q. And he actually witnessed that statement;
24 correct?

25 A. Yes, sir.

1 Q. And you agree that happened on that particular
2 night?

3 A. Yes, sir.

4 Q. And that statement -- since that particular
5 time, you've not given another statement?

6 A. No, sir.

7 Q. So that is your statement in the case; correct?

8 A. Yes, sir.

9 Q. And this happened over two years ago; correct?

10 A. Yes, sir.

11 Q. And you did not mention anything about a gun
12 being in the waistband of Mr. Payne or showing a gun
13 in that statement or in the subsequent statements;
14 correct?

15 A. No.

16 Q. Subsequent written statements.

17 A. No, sir.

18 MR. KOGER: Judge, may I beg the Court's
19 indulgence?

20 THE COURT: Yes, sir.

21 MR. KOGER: Thank you. I have no further
22 questions.

23 THE COURT: Mr. Miller?

24 REDIRECT EXAMINATION

25 BY MR. MILLER:

1 Q. Ms. Youmans, this was a couple -- this written
2 statement was given a couple hours after the
3 incident occurred; correct?

4 A. Yes, sir.

5 Q. And during that incident, you had just watched
6 one of your friends shoot and kill another one of
7 your friends; correct?

8 A. Yes, sir.

9 Q. And you'd been talking to the police?

10 A. Yes, sir.

11 Q. And, in fact, I want to clarify something here:
12 The first time you called dispatch, didn't they tell
13 you that they had people coming and hang up the
14 phone?

15 A. Yes, sir.

16 Q. And then isn't it true that dispatch called you
17 back?

18 A. Yes, sir.

19 Q. Did you answer that call?

20 A. Not the first one.

21 Q. But then you called dispatch again; correct?

22 A. Yes, sir.

23 Q. And you told them that you had missed their
24 call?

25 A. Yes, sir.

1 Q. And that's when you told them about -- answered
2 the questions that they asked; correct?

3 A. Yes, sir.

4 Q. And during that call, you actually said you
5 needed to kind of walk away from the group of people
6 before you started telling the police what you had
7 seen; correct?

8 A. Yes, sir.

9 Q. Was this a stressful time for you?

10 A. Yes, sir.

11 Q. Were you comfortable with the police coming up
12 to your house at 11:00 at night after you had just
13 watched one friend shoot another friend and get a
14 statement from you?

15 A. Not really.

16 Q. But you did it anyway, didn't you?

17 A. Yes, sir.

18 Q. Why?

19 A. I felt like it was what I had to do, what I
20 needed to do.

21 MR. MILLER: Your Honor, that's all the
22 questions I have.

23 THE COURT: Ma'am, you may step down.

24 MR. KOGER: I have one question, Your Honor.

25 THE COURT: You know I don't do recross.

1 You may step down.

2 Next witness, please.

3 MR. COOPER: The State calls Brandy Williams.

4 MR. MILLER: Your Honor, with Mr. Koger's
5 consent, we would ask that Ms. Youmans, Alicia
6 Youmans, be released from her subpoena.

7 MR. KOGER: No objection, Your Honor.

8 THE COURT: Ma'am, you're released from your
9 subpoena. You're welcome to stay or welcome to
10 leave.

11 Who is this?

12 MR. COOPER: Brandy Williams.

13 THE COURT: Ms. Williams, come around, please.

14 THE CLERK: Raise your right hand, please.

15 BRANDY WILLIAMS

16 being first duly sworn, testified as follows:

17 THE WITNESS: (Nods head.)

18 THE CLERK: If you would, please, ma'am, be
19 seated and state your full name for the record.

20 THE WITNESS: My name is Brandy Williams.

21 DIRECT EXAMINATION

22 BY MR. COOPER:

23 Q. How are you doing, Ms. Williams?

24 A. All right.

25 Q. Where do you currently live?

1 A. Allendale.

2 Q. Okay. Where are you currently employed?

3 A. Barnwell Detention Center.

4 Q. Okay. Where were you working on May 23rd,
5 2015?

6 A. Barnwell County Detention Center.

7 Q. Okay. Is that where you work now?

8 A. No.

9 Q. Where do you work now?

10 A. Hampton County Detention Center.

11 Q. Do you recall the night of May 23rd, 2015?

12 A. Vaguely.

13 Q. Okay. Where were you on that night?

14 A. At my parents' house.

15 Q. Do you stay there some nights?

16 A. Some nights, I do.

17 Q. Why is that?

18 A. To take care of both of my parents, help them
19 out. My father is on dialysis, so I help them out.

20 Q. Okay. Ms. Williams, I'm going to show you
21 State's Exhibit No. 1. Okay. This is a satellite
22 image of Wingo Estates and Emerald Lane. Okay. Can
23 you point to me where your parents' house is on this
24 map? Here is Emerald Lane, it goes down to Wingo
25 Estates is the intersection, 300 is up here.

- 1 A. (Indicating).
- 2 Q. Right there, that little red roof?
- 3 A. Uh-huh.
- 4 Q. Is that where you were pointing?
- 5 A. Looks like it could be there, all this.
- 6 Q. Okay. All that property?
- 7 A. Uh-huh.
- 8 Q. What is the address of that property?
- 9 A. [REDACTED].
- 10 Q. Okay. What is the address next door, across
- 11 from that empty lot?
- 12 A. [REDACTED]
- 13 Q. Okay.
- 14 A. You said right here (indicating)?
- 15 Q. Yes, ma'am.
- 16 A. [REDACTED]
- 17 Q. That's [REDACTED]?
- 18 A. Yes.
- 19 Q. Okay. From that lot -- or your parents' yard
- 20 across that lot, can you actually see into [REDACTED]
- 21 [REDACTED]?
- 22 A. No.
- 23 Q. Okay. Why is that?
- 24 A. Because of the trees --
- 25 Q. Okay.

1 A. -- and the shrubs and everything that's next to
2 it.

3 Q. Okay.

4 A. So I can't see anything.

5 Q. What were y'all doing on that night at your
6 parents' house?

7 A. We were having a barbecue.

8 Q. What did y'all have?

9 A. Barbecue chicken, we had shrimp, corn, sausage.

10 Q. I wish I had been invited.

11 THE COURT: All right. Come on, move along.

12 Q. What did you do when you heard the gunshots
13 that night?

14 A. I called 911.

15 Q. Okay. What did you do after that?

16 A. After I called 911, I went over to the scene
17 and I witnessed a young black male laying on the
18 ground.

19 Q. Do you remember how many shots you heard?

20 A. Seven to nine shots.

21 Q. Okay. Who did you see next to the victim?

22 A. A black female and a black male. Black female,
23 she looked like she may be about -- a large size
24 female. And the guy, I would say, like a small
25 frame guy.

1 Q. Did you recognize either of those two
2 individuals?

3 A. No.

4 Q. Okay. Were you -- those were the only two
5 people are there?

6 A. Right.

7 Q. So you were the third person there?

8 A. Right.

9 Q. Okay. What did they say happen?

10 A. They said that he had been shot. They showed
11 me a wound that was on -- let me see how he was
12 laying. That would be his left side, left upper
13 side. He got shot there. And that's the only spot
14 I could see.

15 Q. Did they say anything else?

16 A. They said they didn't know who shot him, said
17 somebody got out the car, shot him, and they got
18 back in the car and they left, and they didn't know
19 which direction he went or the person went, they
20 just know it could have been like a black or blue
21 Chevy Impala.

22 Q. Okay. Did this woman or man that were there,
23 did either of them say that they knew who the victim
24 was?

25 A. They didn't tell me they knew who the victim

1) was.

2 Q. Okay. Did either of them say whether or not
3 they knew who the shooter was?

4 A. They didn't tell me they knew who the shooter
5 was. They didn't know who the shooter was. They
6 didn't tell me that.

7 Q. At what point, if ever, did you learn of the
8 victim's name?

9 A. After the incident; a day later, the next day.

10 Q. Okay. Do you remember what he was wearing?

11 A. A white T-shirt. It probably was a white
12 T-shirt --

13 Q. Okay.

14 A. -- and dark color pants.

15 Q. Did you do anything to help Mr. Odom?

16 A. I performed CPR.

17 Q. Are you certified in CPR?

18 A. Yes, I am.

19 Q. How long did you perform CPR?

20 A. Thirty minutes.

21 Q. How long would you say that you stayed out
22 there total?

23 A. I'd say after EMS arrived, I might have stayed
24 another ten minutes.

25 Q. Okay. Was there a large crowd when you left?

1 A. Yes, it was.

2 Q. Okay. Ms. Williams, in all of this time that
3 you were out there, did you ever see a weapon on or
4 near Mr. Odom?

5 A. I didn't. I didn't see a weapon.

6 Q. Specifically when you first got out there and
7 you were the third person there, did you ever see a
8 weapon?

9 A. I never saw a weapon.

10 Q. Thank you, Ms. Williams. Please answer any
11 questions the Defense has.

12 CROSS-EXAMINATION

13 BY MR. KOGER:

14 Q. Ms. Williams, did somebody assist you in doing
15 the CPR?

16 A. They did.

17 Q. Okay. And that person was -- what was the
18 method of their assistance? They was --

19 A. They were doing the chest compressions.

20 Q. Chest compressions --

21 A. Right.

22 Q. -- okay.

23 And you said that you was out there 30 minutes?

24 A. Yes.

25 Q. Okay. And within that 30 minutes, did other

1 people gather around?

2 A. They did.

3 Q. Okay. About how many people do you think
4 gathered around?

5 A. By that time, I would say about 10 to 15
6 people.

7 Q. Okay. And you say it took you 30 minutes. So
8 are you testifying that EMS -- it took them 30
9 minutes to come to the scene?

10 A. Yes.

11 Q. Okay. And I think you testified that you
12 stayed an additional ten minutes?

13 A. Yes..

14 Q. Okay. What time did the Sheriff's Office
15 arrive at the scene?

16 A. They arrived along with EMS.

17 Q. Okay. So you was at the scene performing CPR
18 for 30 minutes?

19 A. Yes.

20 Q. And you testified just to about 10 or 15 people
21 were also at the scene; correct?

22 A. Correct.

23 Q. Okay. But the Sheriff's Office was not at the
24 scene?

25 A. No.

1 Q. All right. And the scene was not secure?

2 A. That's right.

3 Q. Okay. There was no crime scene tape up at that
4 point?

5 A. No.

6 Q. And people were around the body?

7 A. Right.

8 Q. And they was walking back and forth about the
9 body?

10 A. Yes.

11 Q. Upset?

12 A. Around the scene. Yes.

13 Q. Okay. Around the scene. Okay. So, again, the
14 scene remained unsecure for 30 minutes?

15 A. Yes.

16 Q. Okay. Thank you. I have no further questions.

17 MR. COOPER: No redirect, Your Honor.

18 THE COURT: Thank you, Ms. Williams.

19 May she be released?

20 MR. KOGER: No objection, Your Honor.

21 THE COURT: You're released, ma'am. Thank you.

22 Next witness, please.

23 MR. MILLER: Your Honor, the State calls

24 Investigator Andy Chavis.

25 JAMES ANDREW CHAVIS

1 being first duly sworn, testified as follows:

2 THE WITNESS: I do.

3 THE CLERK: If you would, please, sir, be
4 seated and state your full name for the record.

5 THE WITNESS: James Andrew Chavis.

6

7 DIRECT EXAMINATION

8 BY MR. MILLER:

9 Q. Investigator Chavis, where are you currently
10 employed?

11 A. Barnwell County Sheriff's Office.

12 Q. And what is your title there? What do you do?

13 A. Well, now my title is just deputy. At that
14 time, I was an investigator.

15 Q. Okay. How long have you been employed at the
16 Barnwell County Sheriff's Office? When did you
17 start?

18 A. October 2006.

19 Q. Were you working on the night of May 23rd,
20 2015?

21 A. I was the on-call investigator.

22 Q. And what did you do that night?

23 A. That was a Saturday night. I was called from
24 central dispatch to respond to a shooting that
25 happened at Wingo Estates.

1 Q. When you got on the scene, was the victim still
2 there or had he already been taken to the hospital?

3 A. He'd already been taken.

4 Q. So what did you do after you arrived there,
5 victim has already gone to the hospital? What did
6 you do?

7 A. First thing I did was met with Sergeant Johnson
8 who is the road deputy on scene. He'd been on scene
9 for quite some time. It was already taped off. At
10 that time, I started my processing the scene.

11 Q. And explain that process a little bit for the
12 jury. What kind of things do you do?

13 A. Processing the scene on this type of crime
14 would consist of -- I start by photographing the
15 overall scene. That would be the very first thing
16 that I do.

17 Any type of evidence that is found is very
18 crucial. We mark that by -- like, this in
19 situation, finding shell casings, foot tracks,
20 footprints, that sort of thing.

21 Q. And how would you go about marking a piece of
22 evidence that you found in a particular location?

23 A. We have what's called flaggers. They're
24 basically metal numbers, little metal frames that's
25 put A, B, C, D, or we sometimes use flags and we'll

1 go through and flag each piece and that way we can
2 photograph each individual item.

3 Q. And then after you photograph it, do you
4 photograph it up close?

5 A. Yes.

6 Q. And then you collect it. How do you collect
7 it? Let's just use shell casings as an example.
8 How would you collect something like a shell casing
9 off of the ground?

10 A. After it's photographed -- of course I'm
11 wearing latex gloves and we use plastic -- something
12 like tweezers. And we try very careful not to
13 contaminate any type of evidence. We place that
14 into a plastic bag, it's sealed shut and signed and
15 dated. And normally that will stay in my possession
16 or into an evidence locker until it goes to the
17 proper place for processing.

18 Q. Were you the lead investigator on this case?

19 A. I was.

20 Q. As the lead investigator on a case, how do you
21 put a case file together?

22 A. You just -- again, you photograph, you collect
23 your evidence, you talk with witnesses, you get
24 witness statements -- in this case, Investigator
25 Peterson did help me and some other officers -- just

1 collect any kind of evidence you can, statements,
2 that sort of thing. You take it back to the office.

3 It's a pretty lengthy process: You write and
4 type up a synopsis, you enter the evidence onto the
5 computer, you upload your pictures and stuff, your
6 files and stuff up to a computer, you make files and
7 put them on discs, you have to have chain of custody
8 evidence reports of the items that you pick up and
9 collect from the scene, that sort of thing.

10 Q. Did you do all of that in this case?

11 A. I did.

12 Q. At some point did it come to your attention
13 that the photographs that you took with your camera
14 that night were not in the case file?

15 A. It did.

16 Q. What happened to those photos from your camera?

17 A. I do not know.

18 Q. What steps did you take to locate those missing
19 photos?

20 A. I searched the computer, the laptop that they
21 were uploaded to, I searched about six or seven
22 different thumb drives, I searched the case jacket,
23 searched another computer that we used in a
24 different room to where we upload and put case files
25 together.

1 Q. Were you able to locate any of the crime scene
2 photographs for that night?

3 A. I was not.

4 (State's Exhibit No. 8 marked for
5 identification.)

6 Q. I want to show you what's been marked for
7 identification as State's Exhibit No. 8 and I want
8 to ask you if you can identify these items. What
9 are those?

10 A. Those are .380-caliber shell casings.

11 Q. Were those collected at the scene that night?

12 A. They were.

13 Q. And did you mark the location of those items
14 after you located them at the crime scene?

15 A. Yes.

16 Q. And how did you mark those locations? Did you
17 use the flags you were talking about?

18 A. Yeah. I used metal placards that night.

19 Q. Okay. I want to refer you to State's Exhibit
20 No. 1 and just ask you, in general, where was it
21 that these .380 shell casings -- where were they
22 located? Where did you find them? And you can --

23 MR. MILLER: Your Honor, may he step down so he
24 can get closer to the map?

25 A. If I'm not mistaken, they were found right here

1 in front of this residence in the yard here.

2 Q. Okay. That's on Emerald Road. Are you talking
3 about -- Emerald Lane. Are you talking about the
4 residence that's on the Wingo Estates side or are
5 you talking about the residence that's on the other
6 side?

7 A. That's the residence that's on the other side.

8 Q. Okay. So these shell casings were all in the
9 road on Emerald Lane?

10 A. Some were on the road and there were a few that
11 were up in the yard a little.

12 Q. If you -- how many shell casings are here?

13 A. Six.

14 Q. And of these six shell casings, if you had draw
15 a circle around all of them together, how big of an
16 area are you talking about?

17 A. Six to eight feet.

18 Q. So they were relatively close together?

19 A. Yes.

20 Q. They were all on the Emerald Lane side of the
21 road; correct?

22 A. Correct.

23 Q. And some of them were in the yard in front of

24 [REDACTED] ?

25 A. Correct.

1 (State's Exhibit No. 9 marked for
2 identification.)

3 Q. I want to show you what's been marked for
4 identification as State's Exhibit No. 9 and ask you
5 if you can identify this item.

6 A. That's a .40-caliber shell casing.

7 Q. Where was that item located?

8 A. This item was located close to where they said
9 the victim was laying.

10 Q. All right. Now, you said close to where they
11 said the victim was laying. How did you know --
12 aside from being told by the other officers, how did
13 you know where the victim was?

14 A. By the officers showing me where he was laying,
15 and there was some blood there.

16 Q. Was there trash from the EMTs --

17 A. Yes.

18 Q. -- where they were trying to -- when they got
19 there?

20 A. Yes.

21 Q. So that was right there in that area; correct?

22 A. That's correct.

23 Q. And, again, you photographed this item at the
24 crime scene?

25 A. I did.

1 Q. And you packaged the item?

2 A. I did.

3 Q. And while that item was in -- that State's 9
4 was in your possession, did you make any changes or
5 alter it in any way?

6 A. No.

7 Q. How about State's Exhibit 8? Go back to those
8 shell casings. While they were in your possession,
9 did you change those or alter them in any way?

10 A. No, I did not.

11 (State's Exhibit No. 11 marked for
12 identification.)

13 Q. Okay. I want to show you what's been marked
14 for identification as State's Exhibit 11 and ask you
15 if you can identify this.

16 A. This is a -- what's called a GSR kit. It's a
17 gunshot residue evidence collection kit.

18 Q. And did you -- utilizing whatever is inside
19 there, did you perform the GSR test?

20 A. Yes, I did.

21 Q. Okay. Where did you -- who did you perform
22 that test on?

23 A. This test was performed on the victim Mr. Odom.

24 Q. And when did you do that? About what time?

25 A. The same night. It could have been over

1 midnight on the next date at that time. This was
2 performed at the morgue.

3 Q. Okay. After you left -- at some point you
4 leave the crime scene. After you left the crime
5 scene, where did you go?

6 A. After I left the crime scene, I went back to
7 the office to start uploading photos and files and
8 took the evidence there and locked it and secured it
9 in my office in a locked drawer.

10 Q. Did you ever go the hospital that night?

11 A. I think I went to the hospital prior to going
12 to the morgue. Yes.

13 Q. And did you take any photos at the hospital?

14 A. I did.

15 Q. And were those photos in with the case file
16 whenever you went to go collect all this stuff
17 together?

18 A. They were.

19 Q. Were those your photos or were they somebody
20 else's photos?

21 A. I took photos and the coroner also took photos.

22 Q. All right. So the photos that you took were on
23 your camera. Was it the same camera that you used
24 at the scene?

25 A. Yes, sir.

1 Q. And did those photos that you took on your
2 camera ever get downloaded of the -- at the
3 hospital?

4 A. Yes.

5 Q. Do you recall what day the autopsy was
6 performed in this case?

7 A. I know it was a -- that happened on -- the
8 shooting happened on Saturday night and it was a
9 Tuesday morning because Monday was a holiday. I
10 don't recall the exact date.

11 Q. Did you attend the autopsy?

12 A. I did.

13 (State's Exhibit No. 10 marked for
14 identification.)

15 Q. I want to show you what's been marked for
16 identification as State's Exhibit 10 and ask if you
17 can identify this.

18 A. It appears to be the .380 projectile that was
19 removed during the autopsy from the victim's body.

20 Q. Who did you get that item from?

21 A. Dr. Ross.

22 Q. And did you see where Dr. Ross got it from?

23 A. I did.

24 Q. Where did it come from? I think you just said
25 it, that she took it out of the victim.

1 A. Yes. She took it out of the victim's body. I
2 couldn't tell you exactly what part.

3 Q. Does it appear to be in the same condition as
4 it did on the day that you collected it?

5 A. Yes.

6 Q. What did you do with the bullet once you
7 collected it from Dr. Ross?

8 A. I collected this bullet and I collected the
9 victim's clothing, I believe, and I took it straight
10 to SLED from Newberry and entered the bullet into
11 evidence at SLED.

12 Q. All right. Let's go to 8, 9, and 11. Just so
13 we're clear, you took this to SLED after the
14 autopsy; correct?

15 A. Correct.

16 Q. 8, 9, and 11, were they taken to SLED?

17 A. They were, but not by me. They were taken by
18 Investigator O'Berry.

19 Q. And did you turn the items over to Investigator
20 O'Berry so she could take them up to SLED?

21 A. I did.

22 Q. In all of these things, there was no -- you
23 didn't do anything to alter them or change them or
24 tamper them in any way while they were in your
25 possession?

1 A. No, sir.

2 Q. Please answer any questions Mr. Koger might
3 have.

4 CROSS-EXAMINATION

5 BY MR. KOGER:

6 Q. Deputy Chavis, you testified to the approximate
7 location of the shell casings; correct?

8 A. That's correct.

9 Q. All right. But you would agree this is just,
10 say, an estimate on your part; correct?

11 A. Yes, sir.

12 Q. Okay. All right. And it is -- I would imagine
13 that it is case protocol to have photographs;
14 correct?

15 A. That's correct.

16 Q. Okay. Do you recall how many photographs you
17 took on that particular night?

18 A. I couldn't tell you exact number, but it was
19 probably a lot --

20 Q. Okay. May --

21 A. -- because we try to take as many photographs
22 as we can.

23 Q. Okay. Usually when it comes to a crime scene
24 of this nature with a murder, how many photographs
25 do you usually take?

1 A. It could have been somewhere between 50 and
2 100.

3 Q. Okay. All right. And, again, you testified to
4 that we don't have those photographs?

5 A. We do not.

6 Q. And those photographs would have shown the
7 exact location of the shell casings; correct?

8 A. They would have.

9 Q. All right. And they would have shown, I think
10 you testified to, the flagging that is used. It
11 would have showed where that was located or placed;
12 correct?

13 A. Yes.

14 Q. All right. It would have showed where -- any
15 type of miniature highway cones? It would have
16 showed that; correct?

17 A. If there were any used.

18 Q. Any used. Okay. It would have showed the
19 exact -- it would have been closer pictures of the
20 exact location of the shell before it's picked up;
21 correct?

22 A. That's correct.

23 Q. Okay. Now, how many years have you been in law
24 enforcement, Deputy Chavis?

25 A. Seventeen.

1 Q. Seventeen. Okay. And, of course, you are an
2 investigator and have been trained as an
3 investigator; correct?

4 A. Yes, sir.

5 Q. Okay. And you would agree that shell casing
6 placement is not an exact science; correct?

7 A. I'm sorry?

8 Q. That shell casing placement that which shells
9 land is not an exact science; correct?

10 A. I don't know that I really understand your --

11 Q. Okay. If shell casings are ejected from a
12 firearm and hit hard a surface such as road, they
13 can bounce someplace; correct?

14 A. I'm not a firearms expert. I can't testify to
15 that.

16 Q. Okay. You can't testify to it?

17 A. I cannot.

18 Q. Okay. Have you ever -- in your experience,
19 have you ever did any type of scene reconstruction
20 of that nature to try to ascertain where the
21 position of a shooter may be?

22 A. I have not.

23 Q. Okay. Fair enough.

24 Now, you testified to, that when you arrived at
25 the scene, the scene was already secured and taped

1 off?

2 A. That's correct.

3 Q. But you didn't arrive at the very beginning;
4 correct?

5 A. No, sir. I didn't get there until probably
6 approximately maybe 45 minutes to an hour.

7 Q. All right. And at that time, how many people
8 were around?

9 A. Several law enforcement officers. There were
10 very few people still there. I do recall two people
11 sitting on a porch in front of -- on Emerald Lane at
12 a residence. I don't recall the merits right
13 offhand.

14 Q. Okay.

15 A. And Scott Peterson left at some point. I asked
16 him to go talk to Ms. Youmans because I was tied up
17 processing the scene.

18 Q. Okay. But ideally, law enforcement would like
19 to get to a crime scene as soon as possible?

20 A. We would like to.

21 Q. Okay. And you would agree that a crime scene
22 being open for 30 minutes is not standard?

23 A. Is not standard?

24 Q. Is not standard protocol to have a crime scene
25 open for 30 minutes if you can get there sooner.

1 A. I mean, we like to get there as quick as we
2 can.

3 Q. Okay. Well, you would admit that it is an
4 opportunity that, if you got the crime scene open
5 for 30 minutes, that it could be opportunity for
6 contamination -- crime scene contamination; correct?

7 A. Absolutely.

8 MR. KOGER: Your Honor, may I beg the Court's
9 indulgence?

10 THE COURT: Yes, sir.

11 MR. KOGER: Thank you, Deputy Chavis.

12 REDIRECT EXAMINATION

13 BY MR. MILLER:

14 Q. Deputy Chavis, were there any shell casings
15 that were collected from -- referring to State's
16 Exhibit 1, this is the corner house here on the
17 corner of Emerald Lane and Wingo Estates Road. Were
18 there any shell casings that were collected from
19 this yard?

20 A. No, sir, not even from that side of the
21 roadway.

22 MR. MILLER: No further questions.

23 THE COURT: All right. You may step down.

24 MR. MILLER: Your Honor, we have one more very
25 brief witness. I think we can probably get her done

1 A. The cartridge cases, SLED's Item 2 through 7,
2 were swabbed and forwarded to the DNA department.

3 Q. Okay. And did you have any results?

4 A. That would be the DNA analyst. I don't
5 actually analyze the DNA.

6 Q. Okay. So you just pass it on?

7 A. Correct, yes, sir.

8 Q. Thank you.

9 A. Thank you.

10 THE COURT: Anything on redirect?

11 MR. COOPER: No, Your Honor.

12 THE COURT: You may step down, ma'am. Thank
13 you for coming.

14 MR. COOPER: Your Honor, may Ms. Herrera be
15 excused?

16 MR. KOGER: No objection, Your Honor.

17 THE COURT: She certainly may.

18 MR. COOPER: State calls Mr. Tyler Sturkie.

19 TYLER STURKIE

20 being first duly sworn, testified as follows:

21 THE WITNESS: I do.

22 THE CLERK: If you would, please, sir, have a
23 seat and state your full name for the record.

24 THE WITNESS: Tyler Sturkie, S-T-U-R-K-I-E.

25 DIRECT EXAMINATION

1 BY MR. COOPER:

2 Q. Mr. Sturkie, where are you currently employed?

3 A. I'm employed by the South Carolina Law
4 Enforcement Division.

5 Q. What is your title there?

6 A. I'm a forensic scientist in the trace evidence
7 department.

8 Q. What are your duties?

9 A. My duties are to specifically analyze gunshot
10 residue and fire debris evidence.

11 Q. How long have you been employed at SLED?

12 A. A little over three and a half years.

13 Q. What is your educational background and
14 training as it relates to the field of gunshot
15 residue examination?

16 A. I received a Bachelor of Science degree in
17 chemistry from Newberry College. When I was hired
18 by SLED, I began a year-long training program in the
19 gunshot residue analysis that consisted of written
20 and practical examinations on the theory and
21 practice of gunshot residue.

22 I've also attended outside courses at the Hooke
23 College of Applied Sciences in courses titled
24 Gunshot Residue Identification, Scanning Electron
25 Microscopy and Advanced X-ray Microanalysis.

1 Q. Mr. Sturkie, have you ever testified as an
2 expert witness in the courts in South Carolina?

3 A. Yes, sir, I have.

4 Q. How many times have you done that?

5 A. Twelve.

6 MR. COOPER: Your Honor, at this time the State
7 moves that Mr. Sturkie be declared as an expert in
8 the field of gunshot residue analysis.

9 MR. KOGER: No objection, Your Honor.

10 THE COURT: Thank you.

11 All right. Ladies and gentlemen, what that
12 simply means is that being qualified as an expert
13 witness, he will be allowed to render opinion
14 testimony. And I'll explain that to you when we
15 instruct you on the law at the conclusion of the
16 case.

17 BY MR. COOPER:

18 Q. Mr. Sturkie, I'm going to show you what's been
19 marked as State's Exhibit No. 11. Do you recognize
20 that?

21 A. Yes, sir, I do. This is SLED's Lab No.
22 L1507110, Item No. 1.

23 Q. How do you recognize that exhibit?

24 A. It has my initials, TSS, and the date in which
25 I sealed this item of evidence.

1 Q. What is that?

2 A. This is a GSR kit collected from Devante Odom.

3 Q. How did this exhibit come into your possession?

4 A. The GSR kits are typically taken by the
5 investigator or a police officer from the agency.
6 That agency will submit this evidence to SLED's lab
7 into our evidence control. It will be assigned a
8 lab number and an item number. This particular item
9 number had a gunshot residue analysis request for
10 it, and it was sent to the trace evidence department
11 in order to be analyzed.

12 Q. Prior to your testimony, did you review the
13 SLED chain of custody for this exhibit?

14 A. Yes, sir.

15 Q. Explain to the jury briefly how this item of
16 evidence got from Investigator O'Berry dropping it
17 off at SLED into your possession.

18 A. When Investigator O'Berry brings it to SLED's
19 evidence control, again, it will be assigned a lab
20 number and an item number. It will then go to
21 certain departments depending on the request. This
22 request was for gunshot residue which falls under
23 the trace evidence department. I will then go down
24 to evidence control, pick it up it and put it into
25 my custody, and then will bring it up to my

1 department in order to analyze it.

2 Q. Was that evidence sealed when you first
3 received it?

4 A. Yes, it was.

5 MR. COOPER: Your Honor, the State moves to
6 admit State's Exhibit No. 11 into evidence.

7 MR. KOGER: No objection, Your Honor.

8 (State's Exhibit No. 11 admitted into
9 evidence.)

10 BY MR. COOPER:

11 Q. Did you analyze the evidence in that box?

12 A. Yes, sir.

13 Q. Do you mind explaining to the jury what gunshot
14 residue is?

15 A. Gunshot residue is composed of the burned and
16 unburned particles from the primer, the propellant,
17 and the projectile of a discharged firearm. Gunshot
18 residue will then be expelled from any of the
19 openings in that firearm, and it can land on the
20 shooter's hands in the vicinity or any object within
21 that vicinity of the discharged firearm.

22 When we're looking for gunshot residue, we're
23 looking for tiny, tiny particles, usually one to ten
24 micrometers in size, and they have to be a round or
25 molten shape and contain the elements of lead,

1 barium, and antimony. If a particle fits these two
2 criteria, the shape and its elemental composition,
3 then it is considered gunshot residue.

4 Q. What type of analysis did you perform on that?

5 A. For Item 1, I performed a gunshot residue
6 analysis.

7 Q. How did you do that?

8 A. To analyze gunshot residue, or GSR for short,
9 we use a scanning electron microscope coupled with
10 an x-ray detector. And what the microscope does is
11 it will let us view the particle itself. These
12 particles are, again, very small in size and cannot
13 be seen with the naked eye, so it requires some sort
14 of magnification, and this scanning electron
15 microscope allows us to do so.

16 The x-ray detector then allows us to view the
17 elemental composition of that particle or what
18 elements it contains. Gunshot residue needs to
19 contain the elements of lead, barium, and antimony,
20 and this x-ray detector allows us to view what
21 elements are present.

22 Q. What was the result of your analysis?

23 A. For my Item No. 1, when we receive the GSR kit,
24 it contains four particle lifts: The right palm,
25 right back, left palm, and left back for each hand.

1 I will then analyze all four of those areas and
2 include them into my results. The right palm and
3 right back will be combined to form right hand
4 results and the same for the left hand.

5 Item 1.1, which is the right hand from the GSR
6 kit, the results were particles of gunshot residue,
7 particles consistent with gunshot residue, and
8 particles associated with gunshot residue were
9 found. And for the left hand, particles of gunshot
10 residue, one particle consistent with gunshot
11 residue, and one particle associated with gunshot
12 residue was found.

13 Q. Does the presence of gunshot residue on a
14 person's hands mean that they fired a gun?

15 A. When we find gunshot residue, I can tell you
16 one of three things: One is that individual fired a
17 weapon, two is that individual was in the vicinity
18 when a weapon was fired, or three, the individual
19 touched an object that had gunshot residue on it.

20 Q. If an officer wanted to conduct a gunshot
21 residue test, how long do they have after they
22 believe a person was exposed to gunshot residue to
23 actually collect that test?

24 A. Gunshot residue is a very fragile piece of
25 evidence. We have a timeframe in our protocol of

1 six hours from time of shooting to the time of
2 collection in which we'll analyze for gunshot
3 residue. This is because once gunshot residue is
4 deposited onto the hands of an individual, certain
5 factors can lead to the possible removal of gunshot
6 residue: Wind, rain, other environmental factors,
7 activity of that individual such as wiping of the
8 hands, sweating, anything can have that potential to
9 remove any GSR that may have been present to begin
10 with.

11 For a deceased individual, there is no
12 timeframe. All body functions have ceased for that
13 individual, therefore that individual can no longer
14 remove any GSR themselves, only by outside factors.

15 Q. Why is that standard in practice?

16 A. It has been shown through our tests and in the
17 scientific community that beyond six hours, the
18 likelihood of any gunshot residue being present is
19 very, very low.

20 Q. Did you ever receive a gunshot residue kit from
21 the defendant, Mr. Payne, in this case?

22 A. No, sir, I did not.

23 Q. Please answer any questions the Defense has.

24 THE COURT: Mr. Koger?

25 CROSS-EXAMINATION

1 BY MR. KOGER:

2 Q. Mr. Sturkie, just to clarify, there was a
3 gunshot residue kit did on the deceased, Devante
4 Odom; correct?

5 A. Yes, sir, that is correct.

6 Q. Okay. And from the results, you stated that
7 there was gunshot residue found on both the right
8 and left hand; correct?

9 A. Yes, sir.

10 Q. Okay. Now, you testified to that when you
11 analyzed the hand that you analyzed the back of the
12 hand; correct?

13 A. Yes, sir.

14 Q. Okay. And the palm?

15 A. Yes, sir.

16 Q. Okay. And as listed here as right hand, when
17 you list right hand and left hand, that includes the
18 back and palm?

19 A. Correct.

20 Q. Okay. And as you stated on the stand in your
21 report, you stated that gunshot residue can come
22 from discharging a firearm; correct?

23 A. Yes, sir.

24 Q. Being in the vicinity to the discharge of a
25 firearm; correct?

1 A. Yes, sir.

2 Q. And coming in contact with a surface that has
3 gunshot residue on it; correct?

4 A. That is correct.

5 Q. All right. Is there any significance to
6 discharging a firearm coming first in that listing
7 of causes?

8 A. No, sir, it is not. We list all three of those ,
9 because we cannot tell which of those three are more
10 likely. With a deceased victim, we do expect to
11 find gunshot residue because they have been struck
12 by a bullet. Gunshot residue can follow the bullet
13 up to a certain distance, and we would expect to
14 find GSR on a victim who has been deceased by a
15 gunshot wound.

16 Q. But a deceased victim can actually discharge a
17 firearm; correct?

18 A. I'm sorry?

19 Q. I mean, before a victim is deceased, they can
20 actually have gunshot residue because they
21 discharged a firearm?

22 A. Certainly. Yes, sir.

23 Q. Okay. And any significance to -- well, let me
24 ask you this question: Have you ever -- I think you
25 said you've been doing this for a while right here.

1 Has there ever been a situation that gunshot residue
2 was found on the back of the hand and not on the
3 palm?

4 A. Yes, sir, there has been.

5 Q. And what's the significance of gunshot residue
6 being found on the back and not the palm?

7 A. There is no significance found to differ
8 between the palm and the back. There a lot of
9 scenarios that can be brought up as to why it's on
10 the palm versus the back, but because GSR is such a
11 fragile evidence, it can be removed, transferred
12 from the palm to the back, from an object to a hand,
13 so it's very difficult to tell as to why it's on the
14 back versus the palms, therefore we only say that it
15 is found or it is not found.

16 Q. Would it be more likely that if it is found on
17 the palm, that it could have been caused by a gun
18 discharge?

19 A. Yes, sir. If GSR is found on the hands, it is
20 likely to have been either from the person firing
21 the weapon or being in the vicinity to that
22 discharged firearm.

23 Q. I'm talking about on the palm.

24 A. Palm or back.

25 Q. Thank you. I have no further questions.

1 MR. COOPER: No redirect, Your Honor.

2 THE COURT: All right. May he be released?

3 MR. KOGER: Yes, sir.

4 THE COURT: Thank you.

5 THE WITNESS: Thank you.

6 THE COURT: Next witness, please.

7 MR. MILLER: Your Honor, the State calls James
8 Green.

9 JAMES GREEN

10 being first duly sworn, testified as follows:

11 THE WITNESS: Yes, ma'am.

12 THE CLERK: If you would, please, sir, be
13 seated and state your full name for the record.

14 THE WITNESS: James Green.

15 DIRECT EXAMINATION

16 BY MR. MILLER:

17 Q. Agent Green, where are you currently employed?

18 A. I'm employed by SLED.

19 Q. What is your title?

20 A. I'm a forensic firearms examiner, a forensic
21 scientist.

22 Q. And what are your duties as a forensic firearms
23 examiner?

24 A. I examine firearms and firearm-related evidence
25 to see if they come from a common source.

1 Q. How long have you been employed at SLED?

2 A. About 12 and a half years.

3 Q. And what is your educational background and
4 training as it relates to the field of firearms
5 identification?

6 A. I have a Bachelor's and a Master's of Science
7 and Criminal Justice from the Charleston Southern
8 University and I also went through and successfully
9 completed the SLED firearms and tool mark course
10 instruction which is about a
11 three-to-three-and-a-half-year training program in
12 an apprentice-type fashion studying under
13 court-qualified firearms examiners learning to do
14 what I do now.

15 Q. Have you ever testified as an expert witness in
16 the courts of South Carolina?

17 A. Yes, sir.

18 Q. Approximately how many times have you testified
19 as an expert witness?

20 A. Fifty-eight.

21 MR. MILLER: Your Honor, the State now moves
22 that James Green be qualified as an expert in the
23 field of firearms identification.

24 MR. KOGER: Without objections.

25 THE COURT: All right. He'll be qualified to

1 render opinion testimony in this area.

2 BY MR. MILLER:

3 Q. Mr. Green, I'm going to show you what's marked
4 for purposes of identification as State's Exhibit
5 No. 8. Can you identify that, please.

6 A. Ladies and gentlemen of the jury, what I'm
7 doing now is looking at the evidence of State's
8 Exhibit 8. Whenever stuff is submitted to the
9 firearms department, like these cartridge cases,
10 what we'll do is we'll take a Dremel tool under an
11 electric scribe and scribe the lab number, the item
12 number, and the examiner's initials on it. So if
13 you see me rolling the evidence around, that's what
14 I'm doing now is looking for my markings.

15 Yes, sir. These are the .380 caliber cartridge
16 cases that I examined in this case.

17 Q. And how did that evidence come into your
18 possession?

19 A. A sealed package was brought to me by
20 Ms. Verona Herrera.

21 MR. MILLER: Your Honor, the State moves to
22 admit State's Exhibit No. 8 into evidence.

23 MR. KOGER: Without objection, Your Honor.

24 (State's Exhibit No. 8 admitted into evidence.)

25 BY MR. MILLER:

1 Q. Mr. Green, did you analyze those items that are
2 in State's Exhibit 8?

3 A. Yes, sir.

4 Q. How do you do that?

5 A. The main tool of a firearms examiner is -- in
6 our toolbox, so to speak, is a comparison
7 microscope. And what that is, is it is two
8 microscopes connected by a single optical bridge
9 that lets us look at different objects at the same
10 time.

11 So what I did was -- in this instance, no
12 firearm was submitted, so my main question was to
13 find out if State's Exhibit 8, if they were all
14 fired by one gun, two guns, or three guns. So what
15 I did was I looked under the comparison microscope
16 and I determined that all of these cartridge cases
17 were fired by the same firearm.

18 Q. I'm going to now show you what's been marked
19 for the purposes of identification as State's
20 Exhibit 9. Do you recognize that exhibit?

21 A. Yes, sir. State's Exhibit 9 is a fired .40 S&W
22 cartridge case that was also submitted in this case.

23 Q. And you recognize that the same way as you
24 recognize the other ones, from your markings that
25 you put on it?

1 A. Yes, sir.

2 Q. Okay. How did that exhibit come to your
3 possession?

4 A. It was also packaged with State's Exhibit 8 and
5 it was in the same package that Ms. Herrera brought
6 to me.

7 MR. MILLER: Your Honor, the State would move
8 State's Exhibit 9 into evidence.

9 MR. KOGER: Without objection, Your Honor.

10 (State's Exhibit No. 9 admitted into evidence.)

11 BY MR. MILLER:

12 Q. Did you analyze State's Exhibit 9?

13 A. Yes, sir.

14 Q. And how did you do that?

15 A. I did it the same way I did with State's
16 Exhibit 8; I looked at it under the comparison
17 microscope. And a .40 S&W caliber is much larger
18 than a .380 auto caliber, so it was not fired by the
19 same gun. A .380 would literally slide down the
20 barrel of a .40 and a .40 would not fit in a .380.

21 So what I did was I just looked at it and saw
22 that it had marks on it that may be suitable if a
23 firearm was submitted at a later date.

24 Q. So you didn't have a gun to compare -- you
25 didn't have a gun to see if it had fired State's

1 Exhibit 8, you didn't have a gun to see if it had
2 fired State's Exhibit 9, but you were able to
3 conclude there's no way that one gun could have
4 fired both State's Exhibit 9 and the cartridges from
5 State's Exhibit 8?

6 A. Correct. In addition to the differences in
7 caliber, there's also differences in class
8 characteristics. When a firearms examiner -- excuse
9 me. When a firearms company develops a firearm,
10 they have certain criteria that they want to have in
11 that firearm, like firing pin shape, firing pin
12 size, things like that.

13 State's Exhibit 8, they were all fired by the
14 same firearm and they had different class
15 characteristics in addition to the caliber from
16 State's Exhibit 9.

17 Q. I'm going to now show you what's been marked
18 for purposes of identification as State's Exhibit
19 10. And I'll just set these down here. Do you
20 recognize that?

21 A. Yes, sir. State's Exhibit 10 is a fired bullet
22 that was submitted in a different laboratory case
23 number than State's Exhibits 8 and 9.

24 Q. And are you aware of why there were two
25 different lab numbers for State's Exhibit 10 versus

1 8 and 9?

2 A. Not specifically in this case, but it happens
3 commonly when a coroner or a pathologist will submit
4 their evidence in one case and then the submitting
5 agency doesn't know, like, in this instance,
6 Barnwell County or Barnwell City, doesn't know the
7 lab number, so they just submit their evidence and
8 ask that it be and cross-referenced back to a
9 particular other case.

10 Q. Do you recall how you got that particular item
11 of evidence?

12 A. No, sir.. May I look at my chain of custody?

13 Q. Certainly.

14 A. I received State's Exhibit 10 from Ms. Jackie
15 Davis in our evidence control department.

16 Q. And explain to the jury briefly how the item of
17 evidence gets from being dropped off by a submitting
18 agency to you in your analysis.

19 A. When an agency is going to submit evidence to
20 the lab, most of the times they pre-log it in our
21 evidence tracking system and create a packing slip.
22 Then they'll show up to the laboratory with the
23 evidence, and at that time they would give it to our
24 evidence control department and a technician in that
25 department would log the evidence in, everything

1 would be sealed, they'd put it back into a common
2 storage area in the firearms section.

3 Whenever I was notified of an assignment -- I
4 would wait like a week or so and get a few so I
5 don't have to run down and get evidence every day --
6 I would go downstairs and they would retrieve it and
7 electronically and physically transfer it into my
8 custody. Then I'd go up to my evidence locker and
9 put it in my sealed -- or, excuse me, my secure
10 evidence locker until I have time to work the case.

11 Q. Was this evidence, Item 10, was it -- and I'm
12 sorry because this is State's Exhibit 10 and not the
13 SLED item number. But the State's Exhibit 10, was
14 that sealed whenever you received it?

15 A. Yes, sir.

16 MR. MILLER: Your Honor, the State would move
17 to admit State's Exhibit 10 into evidence.

18 MR. KOGER: Without objection, Your Honor.

19 (State's Exhibit No. 10 admitted into
20 evidence.)

21 BY MR. MILLER:

22 Q. Mr. Green, did you analyze State's Exhibit 10
23 as well?

24 A. Yes, I did.

25 Q. What did you do to analyze that?

1 A. In instances where we have fired bullets and no
2 firearms, like in this case, what I did was I looked
3 at the observable physical characteristics or what
4 we call the OPCs, and from that I can get the
5 caliber of the bullet. In this instance, it was a
6 .380 auto-caliber bullet.

7 Then I can look at the rifling specifications.
8 And what that is, is when a firearms designer makes
9 a firearm like a handgun or a pistol, like .380s
10 are, they put rifling in the barrel, and that
11 consists lands and grooves. Rifling is put in the
12 barrel of a gun; like watching football, the
13 quarterback throws a pass, it's in a nice tight
14 spiral, it goes where it wants to. Rifling has the
15 same effect on a bullet; it makes it spin on its
16 axis so it doesn't tumble through the air and it
17 makes it go further and makes it more accurate.

18 By looking at the lands and grooves, the widths
19 of those lands and grooves, and the number and the
20 twist, we're able to put that information into a
21 database given to us by the Federal Bureau of
22 Investigation or the FBI. And from those, then we
23 can possibly get a list of possible fire
24 manufactures that design firearms with rifling
25 specifications like those found on these bullets.

1 So for State's Exhibit 10, what I was able to
2 do was get all that information, put it into the
3 database, and give the investigating agency a report
4 that said State's Exhibit 10 was a .380 auto-caliber
5 bullet, and currently the only known manufacturer we
6 know of that makes firearms with rifling
7 specifications like that is Hi-Point Firearms.

8 Q. Going back to State's Exhibit 8, which is the
9 SLED Items 2 through 7, is it possible that the gun
10 that fired these shell casings -- produced the shell
11 casings in State's Exhibit 8 could have also
12 produced that projectile there?

13 A. Yes, sir, it is.

14 Q. No further questions. Please answer any
15 questions Mr. Koger has.

16 CROSS-EXAMINATION

17 BY MR. KOGER:

18 Q. Mr. Green, in your report, as you stated, you
19 tested the .40 caliber bullet; correct?

20 A. The cartridge case. Yes, sir.

21 Q. The cartridge case. Okay. And that was Item
22 No. 8 in your report; correct?

23 A. Yes, sir, it was.

24 Q. Okay. And how did you refer to Item No. 8 in
25 your report? And you can look through your report

1 as far as Item No. 8, the .40 caliber cartridge
2 case.

3 THE COURT: Wait a minute. Item 8 is -- you're
4 talking about Exhibit 9?

5 MR. KOGER: I'm sorry. We were using the
6 SLED --

7 THE COURT: All right. Exhibit 9 is Item 8.
8 It's getting confusing.

9 MR. KOGER: Okay.

10 THE COURT: Let's go by exhibit number during
11 trial. So we're talking about the .40 caliber --

12 MR. KOGER: That's correct. Yes, sir.

13 THE COURT: -- not the five or the six .380s,
14 this is the .40 caliber, Exhibit 9.

15 MR. KOGER: Okay.

16 BY MR. KOGER:

17 Q. And do you have your report in front of you,
18 Mr. Green?

19 A. Yes, sir.

20 Q. Okay. And Exhibit 9, and on your report it
21 would be Item 8, can you read the first line?

22 A. Yes, sir. It says: One fired .40 S&W caliber
23 cartridge case listed as, in quotes, collected from
24 beside victim's body.

25 Q. And you received the information that it was

1 collected from the side of the victim's body from
2 law -- from Barnwell County law enforcement or from
3 those who sent you the ammunition?

4 A. Yes, sir. That's how it's listed in the -- on
5 our evidence submission forms. When they filled the
6 initial paperwork out, that's how it was listed.

7 Q. Okay. I have no further questions.

8 MR. MILLER: No redirect, Your Honor.

9 THE COURT: Thank you. You may step down.

10 MR. MILLER: May Mr. Green be excused from his
11 subpoena?

12 MR. KOGER: No objection, Your Honor.

13 THE COURT: Thank you.

14 Next witness, please.

15 MR. MILLER: Your Honor, the State calls
16 Investigator Scott Peterson.

17 SCOTT PETERSON

18 being first duly sworn, testified as follows:

19 THE WITNESS: I do.

20 THE CLERK: If you would, please, sir, be
21 seated and state your full name for the record.

22 THE WITNESS: Ken Scott Peterson.

23 DIRECT EXAMINATION

24 BY MR. MILLER:

25 Q. Investigator Peterson, where do you work?

1 A. The Barnwell County Sheriff's Office.

2 Q. And what do you do for the sheriff's office?

3 A. I'm the chief investigator.

4 Q. As the chief investigator for the sheriff's
5 office, what do some of your job duties entail?

6 A. Supervision of the investigations, make sure
7 they get their time sheets on time and work's done.

8 THE COURT: Speak up a little louder, please.

9 Q. Anything else?

10 A. I work a full caseload, handle the bloodhounds,
11 take care of the CERT team duties.

12 Q. And as the chief investigator for the sheriff's
13 office, how long have you been in that position?

14 A. I think probably around the first part of 2015.

15 Q. And how long have you been in with sheriff's
16 office overall?

17 A. A little over 20 years.

18 Q. Were you working on May 23rd of 2015?

19 A. No, sir. I was called out that evening though.

20 Q. And when you say you were called out, do you --
21 were you the on-call investigator that night?

22 A. No, sir, I was not.

23 Q. Who was the on-call investigator that night?

24 A. Would have been Andy Chavis.

25 Q. And when you got called out, had Investigator

1 Chavis already been to the crime scene?

2 A. I believe he was already there.

3 Q. How do you assign a case as far as who's going
4 to handle a case whenever a situation happens,
5 whenever you have a crime reported?

6 A. We rotate on call, so usually whoever is the
7 on-call investigator that responds is usually the
8 one that works the case.

9 Q. And so what would you have been doing out there
10 at the scene that night?

11 A. Initially I was just called out for a -- to
12 help with the crowd. But by the time we had gotten
13 there, the crowd had already disbursed, so then I
14 was just helping them with whatever they needed help
15 with.

16 Q. And when you initially arrived at the scene,
17 did you contact any of the officers who had been
18 there already?

19 A. When I arrived, I talked with First Sergeant
20 Johnson.

21 Q. And when you're talking about First Sergeant
22 Johnson, is that Big Bird?

23 A. Yes, sir. He's now the chief of Barnwell City
24 Police Department.

25 Q. Okay. He's now the chief in Barnwell but he

1 was the first sergeant for the county at the time?

2 A. Yes, sir, he was.

3 Q. All right. And once you spoke to him, what did
4 you do?

5 A. I assisted him. I think we went and talked to
6 some people at the Payne residence.

7 Q. And that was [REDACTED]?

8 A. I believe so. Yes, sir.

9 Q. All right. And after you spoke to the people
10 at the Payne residence, what did you do next?

11 A. At some point I was asked to go meet with a
12 Ms. Alicia Youmans to take a statement.

13 THE COURT: Mr. Peterson, I need you to speak a
14 little louder for us.

15 THE WITNESS: Yes, sir.

16 Q. Just kind of yell at me like you're talking to
17 me over here.

18 THE COURT: Well, don't yell, but talk loud.

19 BY MR. MILLER:

20 Q. So when you went to go meet with Ms. Youmans,
21 who had informed you that she was a potential
22 witness in the case?

23 A. First Sergeant Johnson.

24 Q. Okay. So you go to talk to her. Kind of
25 explain to the jury what the process is whenever you

1 go to talk to a potential witness. How do you
2 generally want to handle things?

3 A. Well, when I arrived and met with her, I
4 basically asked her to tell me what she had
5 witnessed and I let her tell me everything. And
6 then after she explained everything, I asked her if
7 she'd give me a written statement, at which point
8 she did.

9 Q. And when you say that you talked to her
10 initially to find out, you know, tell everything
11 that happened, would you attempt to document that by
12 the use of a video recording?

13 A. Yes, sir. I had a body cam on at that time.

14 Q. And when you asked her for the written
15 statement, how does that process go? What do you do
16 as far as trying to get a written statement from
17 somebody?

18 A. After they've told me everything, I give them a
19 form and I let them fill it out and write down
20 whatever they want to put in their statement.

21 Q. I want to show you what's been marked -- or
22 entered into evidence as Defense Exhibit 1. Is that
23 a copy of the form there that Ms. Youmans actually
24 filled out that night?

25 A. Yes, sir, it is.

1 Q. And you were the officer that witnessed it?

2 A. Yes, sir, I am.

3 Q. During her video-recorded verbal conversation
4 with you about what she saw and what went on, how
5 long, approximately, you don't have to be specific,
6 but how long did you talk to her before you asked
7 her to do the written statement?

8 A. Probably less than ten minutes.

9 Q. Okay. And were there some details that were
10 relayed to you when she was speaking to you that
11 aren't in the written statement?

12 A. Yes, sir.

13 Q. Is that uncommon?

14 A. No, sir.

15 Q. Did you -- you said earlier that you went to
16 the Payne residence that night -- at some point that
17 evening during the course of the investigation. Was
18 the defendant there at the residence that night?

19 A. No, sir.

20 Q. Or when you got there, he wasn't there?

21 A. No, sir.

22 Q. Do you see the defendant -- or do you see
23 Demontay Payne in the courtroom?

24 A. Yes, sir.

25 Q. Can you identify him for the jury?

1 A. The gentleman sitting next to Josh Koger in the
2 blue jacket.

3 Q. Are you aware of the circumstances of Mr. Payne
4 being taken into custody on these charges?

5 A. Yes, sir.

6 Q. And do you know when Mr. Payne was taken into
7 custody on these charges?

8 A. It was probably around a week after the
9 incident occurred.

10 Q. And where was he taken into custody on these
11 charges?

12 A. I believe he turned himself in, in Allendale.

13 Q. In Allendale County?

14 A. Yes, sir.

15 Q. There were -- previous witnesses testified that
16 there were a number of people around, and you
17 actually said that you had initially gotten called
18 outlet for crowd control. Did law enforcement,
19 yourself included, attempt to locate other people
20 that were potential witnesses to the shooting event
21 that night?

22 A. Yes, sir.

23 Q. Aside from Ms. Youmans, was there anybody who
24 said "I saw what happened"?

25 A. Not to my knowledge.

1 Q. Now, showing you what's been marked
2 previously as -- or what's been entered into
3 evidence State's Exhibit 1, this is the overhead.
4 Where on this --

5 MR. MILLER: And, Your Honor, if he may step
6 down.

7 Q. Point out for the jury where the shell casings
8 that were collected by Investigator Chavis were
9 located generally on this map.

10 A. Around the edge of the highway on this side of
11 the road here and towards this residence here.

12 (Indicating)

13 Q. So if this is [REDACTED], it's on the edge of
14 the road on the [REDACTED] side of the road?

15 A. Yes, sir.

16 Q. Thank you. Please answer any questions
17 Mr. Koger might have.

18 CROSS-EXAMINATION

19 BY MR. KOGER:

20 Q. Investigator Peterson, there were also shell
21 casings in the road; correct?

22 A. I believe there was one on the edge of the
23 road.

24 Q. You believe it was on the edge?

25 A. Yes, sir.

1 Q. You don't recall any shell casings being on the
2 road?

3 A. The crime scene tape -- Sergeant Johnson's
4 vehicle was parked in the road with the crime scene
5 tape coming to his car, and everything was towards
6 the edge of the road in the yard where he was found.

7 Q. But this is only an estimation on your part at
8 this point; right?

9 A. That's where they were. That's where the cones
10 were.

11 Q. But we don't have any photographs to show that;
12 correct?

13 A. No, sir.

14 Q. Okay. Now, you stated that you were called in
15 for crowd control initially?

16 A. Initially, yes, sir.

17 Q. Okay. When you was called in for crowd
18 control, did he give you a number of how many
19 people -- an approximate number or was it just a --

20 A. It was a general text for us to come out --

21 Q. Okay.

22 A. -- anybody who could respond.

23 Q. All right. And --

24 THE COURT: I'm sorry. I couldn't hear your
25 answer.

1 THE WITNESS: It just was a text put out for
2 anybody who could respond to assist.

3 BY MR. KOGER:

4 Q. So it was not just to you but any available law
5 enforcement in the area?

6 A. Yes, sir.

7 Q. Okay. Now, Solicitor Miller wanted to the
8 circumstances in which Mr. Payne came into custody,
9 and you stated that he turned himself in.

10 A. To my knowledge, he turned himself in, in
11 Allendale.

12 Q. Okay. And one more question here: Now, you
13 dealt with Alicia Youmans as far as with giving her
14 statement; correct?

15 A. Yes.

16 Q. And you testified to that you spoke to her
17 approximately ten minutes before -- in the area
18 before she gave the statement; correct?

19 A. I'd say it was probably about ten minutes I
20 talked to her before I asked her to write a
21 statement.

22 Q. All right. And this is the statement that she
23 wrote; correct?

24 A. Yes, sir, it is.

25 Q. And is that your signature as the witness on

1 this statement here?

2 A. Yes, sir, it is.

3 Q. Okay. All right. And you actually -- I think
4 on the body cam you actually -- did you actually
5 read through the statement or did she read the
6 statements back to you?

7 A. I'd have to look at the thing. I most likely
8 read it.

9 Q. Okay.

10 A. That's what I usually do, read it after.

11 Q. So it's your usual protocol, your usual
12 procedure to read the statement after someone writes
13 the statement?

14 A. Yes, sir.

15 Q. And in that particular statement, did it
16 mention anything about Mr. Payne showing a gun?

17 A. She didn't write it in her statement.

18 Q. She didn't write it in her statement?

19 A. No, sir.

20 Q. Now that was back on May 23rd, 2015. Since
21 that particular time and before we started this case
22 this week, have you had any more interactions with
23 Alicia Youmans since she wrote that statement?

24 A. Not in regards to the statement, no.

25 Q. Not in regards to the statement?

1 A. No, sir.

2 Q. So you didn't approach her about writing a --
3 either a corrected or supplemental statement or
4 amended statement; correct?

5 A. No, sir.

6 Q. And she never came to you about giving a
7 supplemental, corrected, or amended statement?

8 A. No, sir.

9 Q. Thank you. No further questions.

10 REDIRECT EXAMINATION

11 BY MR. MILLER:

12 Q. In the week that passed between the time that
13 this murder occurred and the defendant turned
14 himself in in Allendale, did he ever contact the
15 Barnwell County Sheriff's Office to say "I was
16 defending myself"?

17 A. Not to my knowledge. No, sir.

18 Q. No further questions.

19 THE COURT: You may step down.

20 Next witness.

21 MR. MILLER: Your Honor, may we approach?

22 (Sidebar conference.)

23 THE COURT: Mr. Foreman, ladies and gentlemen
24 of the jury, after you left yesterday afternoon,
25 obviously one of the things I have to sort of go

1 over is where we stand with everything, and the
2 State now has one witness left. Normal procedure is
3 that the State calls all their witnesses and then
4 they rest, which means they've completed their case,
5 and then the Defendant goes into their witnesses.

6 The last witness that Mr. Miller will call is
7 the pathologist, the doctor who performed the
8 autopsy. It's not unusual when dealing with doctors
9 and their schedules -- she does autopsies for
10 agencies all over the state, so she normally does
11 her autopsies in the morning and then she's
12 available for court in the afternoon, and we knew
13 early on that she would not be here until 2:00.

14 Well, it's 10:30. I don't want to waste till
15 2:00 and make y'all wait. So Mr. Koger graciously
16 has agreed that he will go ahead and start his case,
17 the defense on his case, and then at 2:00 we'll take
18 Dr. Ross out of turn as if she were testifying right
19 now. So that's the way we're going to do it.

20 So I need y'all to step out just for a second.
21 I need to go over a couple matters with both sides,
22 come back in, and we'll start with the Defense and
23 go as long as -- until the lunch break or wherever
24 we stand. We have a 2:00 witness and then we'll be
25 getting into the very short rows at that time.

1 THE COURT: Just sitting out in the audience.

2 Anything else we need to put on the record,

3 Mr. Koger?

4 MR. KOGER: No, Your Honor.

5 THE COURT: Mr. Miller?

6 MR. MILLER: No, sir.

7 THE COURT: Bring the jury in, please.

8 (The jury enters the courtroom at 10:30 AM.)

9 THE COURT: Mr. Koger, you may call your first
10 witness.

11 MR. KOGER: I call Tyeisha Youmans.

12 THE COURT: Ms. Youmans, come around here,
13 please, ma'am.

14 TYEISHA YOUMANS

15 being first duly sworn, testified as follows:

16 THE WITNESS: I do.

17 THE CLERK: If you would, please, ma'am, be
18 seated and state your full name for the record.

19 THE WITNESS: Tyeisha Youmans.

20 DIRECT EXAMINATION

21 BY MR. KOGER:

22 Q. Ms. Youmans, where do you currently live?

23 A. [REDACTED]

24 Q. And where is that located?

25 A. In Barnwell.

1 Q. In Barnwell County?

2 A. Yes.

3 Q. Okay. Where did you go to school?

4 A. Barnwell High School.

5 Q. Okay. And what year did you finish?

6 A. 2012.

7 Q. Okay. And what are you doing now?

8 A. Working.

9 Q. Okay. And where do you work?

10 A. At Ashleigh Place Group Home.

11 THE COURT: Ma'am, you'll have to speak up.

12 Q. Ms. Youmans, do you recall the events of May
13 23rd, 2015?

14 A. Yes.

15 Q. Okay. And relay to the Court what happened on
16 that particular evening. Tell the Court what
17 happened on that particular evening.

18 A. I was at my people house.

19 Q. Okay. And your people house. And what is the
20 address to your people house?

21 A. I think that's [REDACTED] -- I can't remember.

22 Q. Okay. [REDACTED]

23 A. [REDACTED].

24 Q. Okay. And you say your people. Who are your
25 people?

- 1 A. Stacey Hartzog.
- 2 Q. Okay. Talk up a little bit.
- 3 A. Stacey Hartzog.
- 4 Q. Okay. And who else was there at that
- 5 particular time?
- 6 A. My sister, Mr. Payne, and my aunt.
- 7 Q. Okay. And what is your sister name?
- 8 A. Alicia Youmans.
- 9 Q. Okay. And you said your aunt. What is your
- 10 aunt's name?
- 11 A. Yvette Walker.
- 12 Q. Okay. And when you say Mr. Payne, are you
- 13 referring to the defendant at the defendant table?
- 14 A. Yes.
- 15 Q. Okay. And where were y'all located at [REDACTED]
- 16 [REDACTED]
- 17 A. We was sitting outside.
- 18 Q. And do y'all have a porch at [REDACTED]?
- 19 A. Yes, sir.
- 20 Q. Okay. And if I ask you to look at State's
- 21 Exhibit No. 4, is that a photograph of [REDACTED]
- 22 [REDACTED] and the porch?
- 23 A. Yes, sir.
- 24 Q. Okay. All right. And you mentioned four
- 25 people. Where were you, if you can recall?

1 A. I just was parked somewhere around here.

2 (Indicating)

3 Q. Okay. You --

4 A. I was kind of -- my car was close to the tree a
5 little bit --

6 Q. Okay.

7 A. -- but y'all ain't got that.

8 Q. Okay. And where was your sister located?

9 A. She was by the porch.

10 Q. Okay. What portion of the porch?

11 A. I'm not really for sure.

12 Q. Okay. But she was by the porch?

13 A. Uh-huh.

14 Q. Okay. And where was Mr. Payne located?

15 A. He was by the porch too, sitting, like, right
16 here. (Indicating)

17 Q. Okay. So he was sitting in the chair?

18 A. Uh-huh.

19 Q. Okay. And you said Ms. Taylor or Ms. Yvette.

20 A. Yes.

21 Q. Where was she located?

22 A. She was at the top of the porch. I think her
23 and my sister both was at the top.

24 Q. Okay. They was sitting down or standing?

25 A. Standing.

1 Q. Okay. All right. So the four of you were out
2 there. When did Demontay Payne came up -- was he
3 out there at the very beginning when the other three
4 was out there or he came up?

5 A. No, he just came up.

6 Q. Okay. And did he walk up or did he drive up?

7 A. He was driving.

8 Q. Okay. In which direction he came from?

9 A. I can't recall cause --

10 THE COURT: Ma'am, you're going to have to
11 speak up.

12 A. I can't recall.

13 Q. Okay. And he lives at [REDACTED]?

14 A. Yes, sir.

15 Q. Okay. And in relation to -- and I'm going to
16 pull the appropriate picture here. State's Exhibit
17 No. 2, is that [REDACTED]?

18 A. Yes, sir.

19 Q. Okay. And I know the photograph doesn't take
20 it into account, but where would [REDACTED] be
21 located?

22 A. On this side.

23 Q. Okay. Off the picture?

24 A. Uh-huh.

25 Q. Okay. What happened next?

1 A. We was just sitting there chilling, and I had
2 went to my car to change my music because I had the
3 music playing, and at the time I was looking down in
4 my phone and stuff and I heard people sounding like
5 they was, like, arguing.

6 Q. Okay. Let me ask you this here. Back up just
7 a little bit. You said y'all was sitting or just
8 chilling. Y'all was conversating?

9 A. Uh-huh.

10 Q. Okay. Was Mr. Payne engaged in the
11 conversation or --

12 A. Yes.

13 Q. Okay. What was his demeanor at that time? Was
14 he upset? Was he angry? Was he calm?

15 A. He was calm.

16 Q. Okay. Was he in a good mood?

17 A. I would say he was.

18 Q. Okay. So -- now you testified to that you went
19 out to your car which was parked in front of ■

20 ■.

21 A. That's right.

22 Q. Okay. Now I'm going to pull this picture once
23 again to -- for you to approximate, this is State's
24 Exhibit No. 4, where your car was approximately
25 parked.

- 1 A. It was, like, parked facing the trailer.
- 2 Q. Okay.
- 3 A. Like, it made a T shape.
- 4 Q. Okay.
- 5 A. The car was parked.
- 6 Q. Okay. And why were you going to your car?
- 7 A. Just so I could change my music.
- 8 Q. Were you providing the music for, I guess, the
9 gathering?
- 10 A. Yes.
- 11 Q. Okay. Did you notice when Devante Odom came
12 up?
- 13 A. No. I didn't see him, like, initially walk up
14 because I was looking in my phone, I wasn't paying
15 no attention.
- 16 Q. Okay.
- 17 A. But I started hearing them, like, arguing, and
18 that's what made me look up and see what was going
19 on.
- 20 Q. Okay. So you heard some arguing. Do you
21 recall what was said in the argument or in the
22 exchange?
- 23 A. No.
- 24 Q. Okay. Once you looked up, what did you see or
25 what happened next?

1 A. I just got out and walked up to the porch and
2 was, like, trying to see what was going on.

3 Q. Okay. And when you walked to the porch, was
4 Devante Odom still there?

5 A. Yes.

6 Q. Okay. And was there still any interaction
7 between Mr. Odom and Mr. Payne? Was there still
8 some back-and-forth going?

9 A. Yeah.

10 Q. Okay. All right. And what did you notice
11 about the back-and-forth?

12 A. I mean, they wasn't necessarily arguing,
13 arguing, but they was just having words back and
14 forth.

15 Q. Okay. And how long did this exchange take?
16 How long did it occur?

17 A. Just a few minutes.

18 Q. Okay. A few minutes. Less than five minutes?

19 A. Something like that.

20 Q. Okay. And what happened next after -- how did
21 the exchange end and then what happened next?

22 A. I know Mr. Odom was saying he was going to walk
23 down the road -- to the top of the road.

24 Q. Okay. And you said the top of the road. Is
25 that the intersection of Emerald and Wingo Estates

1 Road?

2 A. Yes.

3 Q. And looking at the State's Exhibits, can you
4 point out what would be the intersection of Wingo
5 Estates and Emerald Road.

6 A. Down here. (Indicating)

7 Q. Okay. All right. Did you note whether
8 Mr. Payne lifted his shirt at that time and showed a
9 firearm?

10 A. No. I don't know nothing about that.

11 Q. Okay. All right. So after Mr. Odom went --
12 walked towards Emerald Lane, what happened next?

13 A. Payne got in his car --

14 Q. Okay.

15 A. -- to leave.

16 Q. Okay. And which direction did Mr. Payne go?

17 A. He went, like, towards --

18 THE COURT: I'm sorry. Got in his car to leave
19 and then what? I can't understand you.

20 THE WITNESS: He got in his car to go home, I
21 guess.

22 BY MR. KOGER:

23 Q. Okay. And where is home?

24 A. That's next door -- right next door to where we
25 were.

1 Q. Okay. Now to back up just a little bit, after
2 the exchange he had with Mr. Odom, did Mr. Payne say
3 anything to those that was out there after Mr. Odom
4 left about the back-and-forth?

5 A. No.

6 Q. Okay. And did Mr. Payne say anything to you
7 not about the back-and-forth before he left to get
8 in the car to leave?

9 A. No, sir.

10 Q. Okay. Now, he went right next door. What
11 route did he take to go right next door?

12 A. He turned out of the yard and got on the road
13 on Wingo and turned right back in his yard.

14 Q. Okay. And, again, using the aerial provided by
15 the State, State's Exhibit No. 1, right here, okay,
16 would that be [REDACTED]?

17 A. Yes.

18 Q. And would this be [REDACTED]?

19 A. Yes.

20 Q. Okay. And what route he took to get to [REDACTED]
21 [REDACTED] in his car?

22 A. He just turned from out of 59, out of that
23 yard, and turned down Wingo and turned right back in
24 his yard.

25 Q. And after he turned in his yard at [REDACTED]

1 Estates, what happened next?

2 A. Mr. Odom was, like, at the top of the road by
3 then. So whenever he got in the car, I guess they
4 started having words again because you could tell
5 that they was, like, had to be talking back and
6 forth.

7 Q. Okay. Now, where did the two of them got
8 together? You said Mr. Odom was at the top of the
9 road. Where was Mr. Payne?

10 A. He had walked into the road by then.

11 Q. Okay. All right. And in what direction --
12 well, in what spot, again, from the best of your
13 recollection, did they start having to exchange
14 words again?

15 A. They was standing in Emerald.

16 Q. Emerald. Can you point that out?

17 A. Like around in this area. (Indicating)

18 Q. Okay. What happened next?

19 A. Like I said, they was having words and I saw
20 Mr. Payne, like, swing on him, try to punch him.
21 But when he --

22 Q. Well, let me ask you this here: When you say
23 swinging on him, did Mr. Payne have anything in his
24 hand?

25 A. No.

1 Q. Okay. All right. But you saw a swinging
2 motion?

3 A. Yeah. I saw him, like, throw a punch.

4 Q. Okay. All right. And then after Mr. Payne
5 threw a punch, what happened next?

6 A. Mr. Odom had, like, moved back so he wouldn't
7 get hit, but pulled out his gun at that time.

8 Q. Okay. Now, how do you know Mr. Odom pulled out
9 a gun?

10 A. Because I could see it in his hand.

11 Q. Okay. And what type of -- can you give a brief
12 description or a description of the gun?

13 A. It was a handgun.

14 Q. Okay.

15 A. It was like -- it was kind of bright colored or
16 something like that.

17 Q. Okay. Okay. Kind of bright --

18 A. I just noticed it. Yeah.

19 Q. Okay. And what happened after Mr. Odom pulled
20 out the gun?

21 A. Mr. Payne, like I said, he had, like, his hands
22 like that, like I guess you don't want to fight or
23 something like that. And, like, they was still,
24 like, kind of having words, because he kind of
25 turned -- he turned around from him going back in

1 the direction of the house. But like --

2 Q. Now this house that you're talking about is
3 going back in the direction of [REDACTED] ?

4 A. Yes.

5 Q. Okay. Continue.

6 A. But Mr. Odom, he was, like, kind of like
7 trailing behind him some, that's why I say they had
8 to be still having words because Mr. Payne turned
9 around and they was still, like, having words.

10 Q. Okay. What do you mean Mr. Odom was trailing
11 him?

12 A. Like when Mr. Payne turned around walking in
13 the direction of the house, he was, like, coming
14 behind him.

15 Q. Did Mr. Payne ever get to his yard?

16 A. He got in the yard some.

17 Q. Okay. He got in the yard some?

18 A. Yeah.

19 Q. Okay. Was the two going back and forth between
20 the road and the yard?

21 A. You mean were they, like, walking back and
22 forth?

23 Q. Yeah, walking and having the exchanges back and
24 forth.

25 A. Yeah. You kind of confusing me.

1 Q. Okay. All right. Well, you go ahead and
2 tell -- okay. Go ahead. So what happened next?

3 A. Like I said, when Payne turned around, he was
4 walking back towards the house.

5 Q. Okay.

6 A. And Mr. Odom was kind of, like, following
7 behind him a little bit, but I could tell that they
8 was still, like, arguing. They had to be still
9 saying stuff to each other, 'cause Mr. Payne turned
10 around and was, like, facing him.

11 Q. Okay.

12 A. But, like, by the time they was facing, I know
13 they hadn't made it to the grass --

14 Q. Okay.

15 A. -- but it wasn't, like, far away from the road.

16 Q. Gotcha. Gotcha. Gotcha. The grass between
17 the intersection of Emerald and Wingo Estates?

18 A. The grass, like, I'll have to show you.

19 Q. Okay. All right. Using State's Exhibit No. 1.
20 Okay?

21 A. I'm talking about, like, the grass here, over
22 in this area. (Indicating)

23 Q. Okay. And that's over in this area?

24 A. That would be down -- yeah. That would be down
25 Emerald.

- 1 Q. Okay. Down Emerald. Is it closer to the
2 Emerald side or the [REDACTED] side?
3 A. Like, closer to [REDACTED].
4 Q. Okay. And then what happened next?
5 A. Mr. Odom started firing but Mr. Payne started
6 firing, like, right after that, it was consecutive.
7 So --
8 Q. How do you know that Mr. Odom fired first?
9 A. 'Cause I could see, like, whenever he fired, I
10 could see it coming from, like, his direction --
11 Q. Okay.
12 A. -- like, whenever he was shooting the gun.
13 Q. Okay. And what was Mr. Payne response to
14 Mr. Odom firing the gun first?
15 A. He fired back.
16 Q. Okay. All right. And what happened after
17 that?
18 A. They was shooting for, like, not that long, and
19 then in the middle of them shooting, Mr. Odom had,
20 like, turned around to run --
21 Q. Okay.
22 A. -- like, to get away, I guess.
23 Q. After the shooting started?
24 A. Yeah.
25 Q. Okay.

1 A. But, you know, in the process of him running,
2 like, Mr. Payne was shooting.

3 Q. Okay. Now, which direction did Mr. Odom go?

4 A. He went, like, towards the two trailers that's
5 on Emerald.

6 Q. Okay. And we'll point that out on one of the
7 State's exhibits right here. State's Exhibit No. 3,
8 are these the two trailers that are located on
9 Emerald Lane?

10 A. Yes.

11 Q. Okay. And which direction did he attempted to
12 run?

13 A. He was, like, trying to run in between them. I
14 thought he was trying to, like, run behind that
15 one --

16 Q. Okay.

17 A. -- because I think there's, like, a path back
18 there. (Indicating)

19 Q. Okay. And what happened next after the
20 exchange of gunfire?

21 A. When he stopped shooting, Mr. Payne, he just
22 got in his car and he left. And, like, I thought
23 that Mr. Odom had done ran between the two trailers,
24 but he had fallen on the ground.

25 Q. Okay. All right. And you actually -- did you

1 actually see Mr. Odom fall on the ground?

2 A. No. I didn't know that he had fallen. Like,
3 I --

4 Q. Okay.

5 A. -- kept looking because I was like, it look
6 like something on the ground, but I just wasn't
7 sure. And then I could hear him, like, gasping for
8 air.

9 Q. Okay. And then what was your next step?

10 A. I went down there to him.

11 Q. Okay. Now, when you went to -- down there with
12 Mr. Odom, how many other people was down there at
13 that time?

14 A. It was just a few of us at first.

15 Q. Okay.

16 A. And then, like, more and more people started
17 coming.

18 Q. And when you went to where Mr. Odom was, did
19 you notice anything by Mr. Odom?

20 A. Yeah. His gun was by him; it was, like, right
21 beside him.

22 Q. At that time?

23 A. At that time.

24 Q. Okay. And you heard testimony of a Ms. Brandy
25 Williams coming to his aid, administering CPR.

1 Okay. When did -- do you recall when she came to
2 the scene?

3 A. No. I don't know who that is.

4 Q. Well, did you -- did you stay long enough to
5 see someone trying to administer CPR to Mr. Odom.

6 A. I know there was talk of someone coming to give
7 CPR.

8 Q. Okay.

9 A. But, I mean, while I was there, no, nobody
10 was --

11 Q. You never saw anyone actually administering
12 CPR?

13 A. No, sir.

14 Q. Okay. Now, at the time that you got there, you
15 say there were a couple other people. Were these
16 people around Mr. Odom? How close were they to
17 Mr. Odom?

18 A. It was just a few of us, like, right there with
19 him --

20 Q. Okay.

21 A. -- because one person was trying to put some
22 pressure on one of his wounds and there was somebody
23 else there and I was there.

24 Q. Okay. So someone was trying to apply pressure
25 to the wounds, but no one was, at that time,

- 1 administering CPR?
- 2 A. No, not at that time.
- 3 Q. All right. And what happened next?
- 4 A. I stayed out there for probably, like, 10 or 15
- 5 minutes, and I got up and just left.
- 6 Q. Okay. And now, as far as your vantage point of
- 7 where you observed this happening, where were you
- 8 standing or located, again, when you observed the
- 9 shootings?
- 10 A. I was standing at [REDACTED] --
- 11 Q. Okay. And --
- 12 A. -- standing in the yard.
- 13 Q. Okay. And were you standing in front of the
- 14 porch or you was a little farther out into the yard?
- 15 A. I was, like, in front of the porch but not
- 16 directly in front of it. I was closer to my car.
- 17 Q. You were closer to your car?
- 18 A. Yeah.
- 19 Q. Okay. And where was your car parked again?
- 20 A. It was, like, down in this area.
- 21 Q. Okay.
- 22 A. The picture is kind of close.
- 23 Q. Okay. At the time that you were down there by
- 24 Mr. Odom, was law enforcement there?
- 25 A. No.

1 Q. Okay. And when you first got there, how many
2 people were there?

3 A. It was just a few of us at first.

4 Q. Okay.

5 A. When I left from there, it probably was about
6 30 people out there.

7 Q. And you left the scene after about how many
8 minutes?

9 A. About 10 or 15 minutes.

10 Q. And when you left the scene, there were how
11 many people out there?

12 A. Probably about 30.

13 Q. And at the time you left the scene and when you
14 left the 30 people, was law enforcement there?

15 A. No. When I went down the road, they was coming
16 down the road.

17 Q. But by the time you and the other 30 people
18 were there, law enforcement didn't have control of
19 the scene or anything?

20 A. No, sir.

21 Q. Is there any doubt in your mind that on May
22 23rd, 2015, that Mr. Odom shot the gun first?

23 A. No.

24 Q. Okay. And he shot at or he shot towards
25 Mr. Demontay Payne?

1 A. Yes.

2 Q. Okay. And that he attempted to run after he
3 shot the first shot towards Demontay Payne; correct?

4 A. Correct.

5 Q. Okay. Demontay Payne did not shoot the first
6 shot?

7 A. No.

8 Q. Thank you. I have no further questions.

9 CROSS-EXAMINATION

10 BY MR. MILLER:

11 Q. Ms. Youmans, do you recall testifying at an
12 earlier hearing in this case?

13 A. Uh-huh.

14 Q. You do recall that?

15 A. Yes.

16 Q. And do you recall, during that hearing, being
17 asked Mr. Koger: "Were people walking around the
18 body?" And your answer being -- do you recall
19 Mr. Koger asking you that question about people
20 walking around the body?

21 A. Yes.

22 Q. And you said there were some people walking
23 around the body of Mr. Odom?

24 A. Uh-huh.

25 THE COURT: You have to say yes or no, ma'am.

1 THE WITNESS: Yes.

2 BY MR. MILLER:

3 Q. And do you recall telling him, Mr. Koger, in
4 response to his question: "There were a couple of
5 people because one other person was trying to, like,
6 put some pressure on his wounds, and the other one,
7 she was trying to do CPR." Do you recall that?

8 A. Yes.

9 Q. So there was somebody doing CPR while you were
10 there; correct?

11 A. No. She was, like, there, but she wasn't doing
12 like no CPR, I guess. Because there was a woman
13 there -- like I said, I don't know who this Brandy
14 person is, but there was somebody there and I know
15 they kept saying that she was going to give him CPR.

16 Q. So what you're saying is, today, nobody was
17 giving him CPR, but at the prior hearing when you
18 testified, you said somebody was giving him CPR?

19 A. I guess.

20 Q. Okay.

21 THE COURT: You guess or did you?

22 THE WITNESS: I guess I did.

23 BY MR. MILLER:

24 Q. Would you like to read what you said?

25 A. No. That's fine.

1 THE COURT: Well, I want you to read it and I
2 want you to tell me what you're saying, please.

3 Mr. Miller, show her what she said and then you
4 can answer the question.

5 Ladies and gentlemen, this is a transcript from
6 a pretrial hearing that was heard a couple weeks ago
7 in this courtroom, the testimony from that witness
8 stand.

9 BY MR. MILLER:

10 Q. Starting at line 20 on page 55, the questions
11 asked by Mr. Koger.

12 THE COURT: You see where he's talking about,
13 ma'am?

14 THE WITNESS: Yes. You want me to read this
15 out loud?

16 THE COURT: He's going to read it to you.

17 BY MR. MILLER:

18 Q. So Mr. Koger asked: "People was walking around
19 the body?" And what was your response?

20 A. I said: "It was, like, a few people around, I
21 know I was one of them, who was right there close to
22 him.

23 Q. Okay. Continue.

24 A. Oh. "It was probably, like, two other people,
25 because one other person was trying to put some

1 pressure on his wounds."

2 Q. Okay.

3 A. "And the other one, she was trying to do CPR."

4 Q. So you said at that hearing that somebody was
5 actually doing CPR on him and somebody else was
6 putting pressure on his wounds; correct?

7 A. Uh-huh.

8 THE COURT: Is that yes or no?

9 THE WITNESS: Yes.

10 Q. You might need to hang on to that.

11 Now, let's go back so we're very clear on this:

12 You are testifying that you observed all of this
13 happening from the front yard at [REDACTED]

14 [REDACTED] correct?

15 A. Yes.

16 Q. And do you have any idea how long a distance it
17 is approximately from where the shooting occurred to
18 where you were standing in front of [REDACTED]

19 [REDACTED]

20 A. You told me it was like a football field or
21 more.

22 Q. Well, that's what I'm asking you: About a
23 football field? More?

24 A. Uh-huh.

25 Q. Okay. And your testimony is that when the

1 shooting occurred, that you saw a gun in Mr. Odom's
2 hand?

3 A. Yes.

4 Q. And that you saw Mr. Odom run towards the two
5 trailers on the other side of Emerald --

6 A. Yes.

7 Q. -- but you didn't realize that he had fallen in
8 between those two trailers until you heard him
9 gasping for air?

10 A. That's right.

11 Q. From over a hundred yards away?

12 A. Yeah. Like, I could hear him.

13 Q. And so how did you get from [REDACTED] to
14 Mr. Odom's body?

15 A. I just walked down there -- well, like, jogged.

16 Q. I'm asking you the route. Did you go out to
17 the road, Wingo Estates Road, and walk up the road,
18 the dirt road?

19 A. No. I went through the yards --

20 Q. So you went in a straight line?

21 A. -- at 59 and 25.

22 Q. Okay. So you went in a straight line towards
23 that direction; correct?

24 A. Yeah, basically.

25 Q. Why? Why did you go to him?

1 A. Why? Because I was trying to check on him
2 because I didn't realize he was there falling on the
3 ground.

4 Q. Now, you testified that when Mr. Payne left [REDACTED]
5 [REDACTED] he drove out -- he drove out onto the
6 road and then kind of made a right turn and went
7 back into his driveway at [REDACTED]; correct?

8 A. That's right.

9 Q. And when he parked -- that driveway kind of
10 makes an L shape?

11 A. Uh-huh.

12 Q. When he parked, was he in front of [REDACTED]
13 [REDACTED]

14 A. He was, like, towards the end of it, the end
15 that's closer to Emerald and, like, parallel to the
16 trailer.

17 Q. Okay. So going to State's Exhibit 1, if this
18 is the trailer, [REDACTED], you're saying he
19 was parked parallel to the trailer on the end
20 closest to Emerald Lane; correct?

21 A. That's right.

22 Q. Okay. And he got out of his vehicle?

23 A. Uh-huh.

24 Q. And he walked into Emerald Lane and confronted
25 Devante Odom? They had words?

1 A. Yes.

2 Q. And the first thing that you saw -- saw,
3 because you couldn't hear what they were saying or
4 what they were talking about, was -- your testimony
5 is that you saw Demontay Payne take a swing at
6 Devante Odom; correct?

7 A. Yes.

8 Q. And then you claim at that point Odom pulled
9 out a pistol; correct?

10 A. Yes.

11 Q. Payne leaves and goes back towards his car
12 towards the house?

13 A. Uh-huh.

14 THE COURT: Please say yes or no.

15 THE WITNESS: Yes.

16 BY MR. MILLER:

17 Q. And Devante Odom shot at Payne at that point;
18 correct?

19 A. Yes.

20 Q. And what did Payne do?

21 A. He shot back.

22 Q. When in the process of this did Payne -- hid he
23 shoot over his shoulder or was -- had he turned
24 around at some point?

25 A. I already had said he turned around.

1 Q. He turned around?

2 A. Like whenever he was walking back towards his
3 house --

4 Q. Uh-huh.

5 A. -- they -- I said they still was, like, having
6 words, they had to be, because Mr. Odom was, like,
7 falling behind him. But Mr. Payne turned around
8 back to him and they was still, like having words,
9 and then they started shooting.

10 Q. How far away from -- the car that was park
11 towards the end of the trailer, how far away from
12 the car was Mr. Payne?

13 A. Probably between five and ten feet maybe.

14 Q. Okay.

15 A. Not too far.

16 Q. Okay. Not too far? He was close to the car?

17 A. Not real close, but, like, not touching it.

18 Q. Okay. And how far away was Mr. Payne from
19 Mr. Odom?

20 A. Probably, like, five -- between five feet and
21 seven feet maybe.

22 Q. Okay. So we're talking about this far away?

23 (Demonstrating)

24 A. Yeah, maybe, something like that.

25 Q. And all of this is occurring in the yard at 25

1 Wingo?

2 A. At first it was in the road and then they came
3 back in the yard and it was on the grass a little
4 bit.

5 Q. So they were in the road whenever the defendant
6 took the swing at Odom?

7 A. That's right.

8 Q. But then they went into the yard before the
9 shooting started. So all the shooting happened in
10 the yard at [REDACTED]; correct?

11 A. Right there on the grass, not far away from
12 Emerald Road. They was, like, probably -- they was
13 some feet away from the road, but they was in the
14 grass a little bit.

15 Q. All right. Well, I'm showing you what's been
16 marked as State's Exhibit 2, and that's a picture of
17 the intersection of Wingo Estates and Emerald, and
18 that's [REDACTED].

19 A. Uh-huh.

20 Q. The car is all the way over here. And you said
21 he was parked parallel to the trailer. The car is
22 right over here.

23 A. Yes.

24 Q. So all of this happened in this area right
25 here?

- 1 A. No. They was, like, over this way some.
- 2 Q. They were more over towards where the driveway
- 3 comes out onto Emerald?
- 4 A. Yeah, something like that.
- 5 Q. Okay. Did anybody walk with you from [REDACTED]
- 6 [REDACTED] to the place where Devante Odom fell?
- 7 A. Yeah. There was this boy walking down the
- 8 road, walking down from Wingo, but I don't know who
- 9 he is. He just, like, kind of popped up right after
- 10 that happened. I was like, somebody got shot. And
- 11 we both heard him, like, gasping for air, and we
- 12 both went down there to him.
- 13 Q. You -- do you know who that person is?
- 14 A. No.
- 15 Q. You don't know his name?
- 16 A. Huh-uh.
- 17 Q. Who all was at [REDACTED], Stacey
- 18 Hartzog's trailer? Who was there that night?
- 19 A. Me, my sister, Mr. Payne came.
- 20 Q. I'm sorry. You?
- 21 A. I said me, my sister, Mr. Payne, he came --
- 22 Q. Right, the defendant came.
- 23 A. Yes. And my aunt was there.
- 24 Q. Okay.
- 25 A. Khalid was there too.

- 1 Q. You didn't mention Khalid the first time when
2 you were answering Mr. Koger's questions.
- 3 A. Yeah. I was --
- 4 Q. Who is Khalid?
- 5 A. -- trying to say that, but I couldn't.
- 6 Q. Why couldn't you?
- 7 A. Because he started talking.
- 8 Q. Okay. Well, if you got something to say and I
9 ask you a question, make sure you stop me so I can
10 let you answer it all the way. Okay?
- 11 A. Okay. I was going to say that.
- 12 Q. So you go up to Mr. Odom who is there on the
13 ground, there's people around. Did you stay until
14 the police got there?
- 15 A. No. When I left -- by the time I left from
16 over there and got back in my car and went back down
17 the road, the police was coming, like, up the road.
- 18 Q. And you didn't tell the police that you saw
19 what happened?
- 20 A. No.
- 21 Q. You didn't tell anybody you saw what happened?
- 22 A. No.
- 23 Q. When was the first time that you told somebody
24 you saw what happened out there?
- 25 A. When I talked to y'all and when I talked to

- 1 Mr. Koger.
- 2 Q. How long ago was that?
- 3 A. A month ago maybe.
- 4 Q. You and Mr. Payne are very close, aren't you?
- 5 A. Yes.
- 6 Q. In fact, when, for a period of time, Mr. Payne
- 7 was incarcerated pretrial on this charge, you
- 8 visited him in the Aiken jail, didn't you?
- 9 A. Yes.
- 10 Q. And talked to him on the phone, didn't you?
- 11 A. Sometimes.
- 12 Q. And since he's been in the Barnwell jail, you
- 13 visited him in the Barnwell jail as well, haven't
- 14 you?
- 15 A. A couple times.
- 16 Q. And talked to him on the phone as well, haven't
- 17 you?
- 18 A. A couple times.
- 19 Q. And when you end your phone conversation with
- 20 him, you tell him you love him and he tells you he
- 21 loves you as well?
- 22 A. Yeah.
- 23 Q. Did you have that kind of relationship with
- 24 Devante Odom?
- 25 A. No.

1 Q. And this person that you go from Barnwell to
2 Aiken to see in the jail and that you tell them that
3 you love them and they tell you that they love you,
4 when he gets arrested for a murder that you think is
5 self-defense, you didn't go to the police and tell
6 the police, no, no, y'all got it wrong, did you?

7 A. How you know that I feel like it's
8 self-defense?

9 Q. Well, that's what you're testifying to.

10 A. Well, just because -- I'm here because y'all
11 subpoenaed me. I could have went and talked to the
12 police. I didn't want to get involved with it.

13 Q. Okay.

14 A. I know both of these families.

15 Q. Well, let's make that clear: You know what
16 Alicia Youmans was saying about this situation?

17 A. I didn't know until --

18 Q. Because she's --

19 A. -- sometime after.

20 Q. -- your sister; right?

21 I'm sorry?

22 A. I said I didn't know until sometime after.

23 Q. But you didn't go tell anybody "my sister is
24 wrong"?

25 A. I don't know what she said to y'all.

1 Q. Did you ever touch the gun that you claim was
2 laying next to Mr. Odom?

3 A. No.

4 Q. Do you have any idea who did?

5 A. No, sir.

6 Q. How many people were around assisting Devante
7 while he was laying on the ground whenever you left?

8 A. Whenever I left, I reckon it was probably the
9 same people who was already --

10 THE COURT: No, ma'am, don't reckon. We're not
11 here to guess or speculate. If you know, tell us;
12 if you don't, please tell us.

13 THE WITNESS: Well, I don't know because I got
14 up and I left. I left the same people who was there
15 with me there. If somebody else came, I don't know.

16 BY MR. MILLER:

17 Q. When you left that night, you said as you were
18 driving away the police were coming up?

19 A. Yes.

20 Q. Was anybody with you in your car?

21 A. No.

22 Q. How did you find out that Mr. Koger wanted to
23 talk to you?

24 A. He got in contact with me.

25 Q. How did that happen?

1 A. I'm not sure I don't know how he got my
2 information or anything.

3 Q. No. I'm asking you, how did it happen? Did he
4 call you? Did he send you a letter?

5 A. He text me --

6 Q. He texted you?

7 A. -- and called me.

8 Q. Do you know where Mr. Payne was during the week
9 between the time that he shot Devante Odom and the
10 time he turned himself in to the Allendale jail?

11 A. No, sir.

12 Q. Did he talk to you?

13 A. No.

14 Q. Didn't call you?

15 A. No.

16 Q. You didn't talk to anybody about where he might
17 have gone?

18 A. No.

19 MR. MILLER: No further questions, Your Honor.

20 THE COURT: Mr. Koger?

21 REDIRECT EXAMINATION

22 BY MR. KOGER:

23 Q. Ms. Youmans, who did you meet in person with
24 first, me or the solicitor's office?

25 A. I met with them first. I think I talked to you

1 on the phone and then I met with them.

2 Q. Okay. So you met with them first, talked to me
3 on the phone, then met with them again?

4 A. Yeah -- wait, wait. Can you say that one more
5 time?

6 Q. Okay. Who did you talk with first in person
7 first in a meeting?

8 A. No. I talked to them in person; I talked to
9 you on the phone.

10 Q. Okay. And how did you know to talk to them in
11 person?

12 A. Because they gave me a subpoena.

13 Q. Okay. And who gave you a subpoena?

14 A. I think his name -- something Bamberg.

15 Q. Okay. And did the Solicitor's Office meet you
16 at your home or did you come up to the office to
17 talk to them?

18 A. I went to talk to them.

19 Q. Okay. And where did you go to talk with them?

20 A. I came here.

21 Q. Okay. And did you tell them the same things
22 that you testified here today in this courtroom?

23 A. Yes.

24 Q. And how long did you meet with them?

25 A. Probably about 30 minutes to an hour.

1 Q. Okay. And how many days after that did you
2 meet with me in person?

3 A. Only when we were here.

4 Q. Okay. And when was that?

5 A. That was last month.

6 Q. Okay. Thank you.

7 THE COURT: All right. You may step down.
8 Next witness.

9 MR. KOGER: Your Honor, may we approach?

10 THE COURT: Yes, you may.

11 (Sidebar conference.)

12 THE COURT: All right. Mr. Foreman, ladies and
13 gentlemen of the jury, y'all had a little break
14 earlier, but none of us have had one. We're going
15 to take a 15-minute break, come back about 11:30.

16 You want me to order your lunch or y'all just
17 want to go out for lunch? Pizza is the easiest or
18 y'all can go out to lunch, whatever y'all want to
19 do. Y'all make a decision when you go back there
20 and Ms. Rhonda will go back there and talk to you.

21 Don't discuss the case. We'll start back in
22 about 15 minutes. Thank you. Everybody else remain
23 seated.

24 (The jury exits the courtroom at 11:14 AM.)

25 THE COURT: All right. We'll stand at ease for

1 15 minutes. Thank you.

2 (Short break.)

3 THE COURT: Mr. Koger, have you had an
4 opportunity to speak with your client about
5 testifying?

6 MR. KOGER: Yes, Your Honor.

7 THE COURT: Has he made a decision?

8 MR. KOGER: Yes, Your Honor.

9 THE COURT: What is that?

10 MR. KOGER: He wishes to testify, Your Honor.

11 THE COURT: Any questions, sir, you want to ask
12 me?

13 THE DEFENDANT: No, sir.

14 THE COURT: All right. Bring the jury in,
15 please.

16 (The jury enters the courtroom at 11:37 AM.)

17 THE COURT: Mr. Foreman, ladies and gentlemen,
18 we're going to continue on. My plans are to run
19 till 12:30 and start back at 2:00 when Dr. Ross gets
20 here.

21 You may call your next witness.

22 MR. KOGER: I call Chief Brian Johnson.

23 THE CLERK: Chief, come around, please.

24 BRIAN JOHNSON

25 being first duly sworn, testified as follows:

1 THE WITNESS: I do.

2 THE CLERK: If you would, please, sir, be
3 seated and state your full name for the record.

4 THE WITNESS: Brian Johnson.

5 DIRECT EXAMINATION

6 BY MR. KOGER:

7 Q. Chief Johnson, how long have you been in your
8 current position?

9 A. As chief?

10 Q. As chief, yes.

11 A. About a year, I think -- well, as chief, six
12 months.

13 Q. Okay. And before you was chief, were you
14 employed with the City of Barnwell?

15 A. Yes, sir.

16 Q. And prior to being employed with the City of
17 Barnwell Police Department, were you employed with
18 Barnwell County Sheriff's Office?

19 A. Yes, sir.

20 Q. And how long had you been employed with the
21 Barnwell County Sheriff's Office?

22 A. Roughly 20 years.

23 Q. And at the time of this incident on May 23rd,
24 2015, were you employed with Barnwell County
25 Sheriff's Office?

1 A. Yes, sir.

2 Q. Okay. On that particular evening -- what was
3 your role on that particular evening in relation to
4 the investigation of this incident?

5 A. I was shift supervisor for the sheriff's office
6 that night. And...

7 Q. Okay. All right. And when did you -- in what
8 order did you arrive on the scene?

9 A. I think I was the first one there.

10 Q. Okay. All right. And when you arrived on the
11 scene, were there a lot of people on the scene?

12 A. Yes, sir.

13 Q. Okay. And do you recall what number?

14 A. No, sir. I couldn't give you an exact number.

15 Q. Okay. Maybe more than 20 people?

16 A. Yes, sir.

17 Q. Okay. And you had a body cam on that night;
18 correct?

19 A. Yes, sir.

20 Q. Okay. And do you recall referring to, when you
21 first got there, as -- as this scene as being
22 chaotic?

23 A. Yes, sir.

24 Q. And was the scene immediately secured when you
25 got there or it was unsecured for a particular

1 period of time?

2 A. Well, as I recall, there was a bit of confusion
3 on exactly where the crime scene was or the incident
4 location was. Once we finally got there, there was
5 a large number of people there and it was difficult,
6 to say the least, to secure the scene.

7 We actually even had to call for additional
8 units from Barnwell, Williston, and Blackville
9 actually sent units to help us, you know, control
10 the crowd and secure everything. And EMS even stood
11 by; they wouldn't come in until we secured it and we
12 got them in there to render aid and whatnot.

13 Q. And you just testified you were among the first
14 few to arrive on the scene. Did you start any
15 preliminary investigations in trying to maybe find
16 out who are the players in this incident, who may
17 have seen anything? Did you start that process?

18 A. Initially dispatch got information on a couple
19 callers who called the incident in. And I -- during
20 the chaos, once things calmed down and we were able
21 to get things calmed down, we talked to several
22 people.

23 I talked to some people that was sitting on a
24 porch on an adjacent property there. I talked to
25 them, but they didn't see anything. They said they

1 had just gotten there after we did. I talked to
2 dispatch and dispatch gave me the name of Alicia
3 Youmans. I called her back at some point and she
4 said she was a witness to this incident. And, all
5 in all, I got Investigator Peterson to contact her
6 and get a statement from her. But, yeah, there were
7 several people I talked to. I can't say for sure
8 who all --

9 Q. Do you recall receiving information during your
10 preliminary investigation that a Tyeisha Youmans --
11 a Ty Youmans was on the scene?

12 A. I do; not by memory, but what I wrote in the
13 report.

14 Q. Okay. And who gave you the information that Ty
15 Youmans was on the scene?

16 A. Just a second. I think Jerome Creech.

17 Q. Okay. And Mr. Creech told you that when you
18 arrived on the scene that Ty Youmans was on the
19 scene with Mr. Odom, correct, near the -- near
20 Mr. Odom -- or she was on the scene?

21 A. Mr. Creech said he saw a female standing by the
22 victim and another person he identified as Ty
23 Youmans --

24 Q. Okay. All right. So --

25 A. -- and then the shooting started.

1 Q. Okay. So Mr. Creech relayed to you that Ty
2 Youmans was on the scene?

3 A. Yes, sir.

4 Q. And did -- and at that particular time, she was
5 listed as a potential witness, Ty Youmans?

6 A. Yes, sir, I think so.

7 Q. Okay. And during your investigation, did you
8 ever get a chance to get in contact with Ty Youmans
9 and see what she knew or not knew about the
10 incident?

11 A. I don't think I did. The case was turned over
12 to the investigators.

13 Q. Okay. And the case was turned over
14 investigators on that particular evening?

15 A. Yes, sir. Andy Chavis responded to
16 investigate, Investigator Peterson showed up as part
17 of the dog team, help with crowd control and
18 whatnot, and he interviewed Ms. Alicia Youmans.

19 Q. Okay. But you did have information on that
20 night, May 23rd, 2015, that Ty Youmans was at the
21 scene?

22 A. Yes, sir.

23 Q. Thank you. I have no further questions.

24 CROSS-EXAMINATION

25 BY MR. MILLER:

1 Q. You said there were a number of people that
2 were out there, and when you went and talked to some
3 of those people that -- for example, the people on
4 the porch that told you they had pulled up after you
5 did, everybody out there was not uncooperative that
6 night, were they?

7 A. No.

8 Q. Was there anybody who was out there that night
9 who spoke to the police and said, I was here and I
10 saw what happened, besides Alicia Youmans?

11 A. Jerome Creech was one of them.

12 Q. What did Jerome Creech tell you about it?

13 A. He said he was there, that he saw a female
14 standing beside the victim, and another person he
15 identified as Ty Youmans, and then the shooting
16 started. And that was...

17 Q. Did anybody follow up with Jerome Creech?

18 A. I have no knowledge of that.

19 Q. Okay. Thank you no further questions.

20 REDIRECT EXAMINATION

21 BY MR. KOGER:

22 Q. Was Jerome Creech name given to the lead
23 investigator in this case as a potential or possible
24 witness?

25 A. I guess. They get a copy of the report once we

1 do them.

2 Q. So they had noticed that Jerome Creech was also
3 a potential witness that may need to be followed up
4 with?

5 A. Should have. Yes.

6 Q. Thank you. No further questions.

7 THE COURT: You may step down. You may be
8 released.

9 Next witness, please.

10 MR. KOGER: I call Demontay Payne.

11 THE COURT: Mr. Payne, come around. You're
12 already under oath, Mr. Payne.

13 DEMONTAY PAYNE

14 having been previously sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. KOGER:

17 Q. State your full name for the record.

18 A. My name is Demontay Markeith Payne.

19 Q. Okay. And where do you live?

20 A. I live currently at [REDACTED].

21 Q. Okay. And is that in Barnwell County?

22 A. Yes, sir.

23 Q. Okay. And how long have you been a resident of
24 Barnwell County?

25 A. Majority of my life.

1 Q. Okay. How long have you stayed at [REDACTED]

2 [REDACTED]

3 A. I'd say about -- since I was up to my 20s.

4 Q. And what is your current age?

5 A. Twenty-eight.

6 Q. And where did you go to school?

7 A. I went to school in Barnwell and Allendale.

8 Q. Did you finish school?

9 A. No, sir.

10 Q. How far did you go in school?

11 A. To the 11th.

12 Q. Okay. As far as in your recent employment
13 past, what type of jobs have you held?

14 A. I worked at Sarah Lee, Taco Bell, TJ Maxx in
15 Aiken.

16 Q. Okay. And that's the extent of your employment
17 history or are there any other jobs?

18 A. Yes, sir, it's some more. I was a janitor at
19 the church in Aiken and I was working at this
20 construction business doing janitor work.

21 Q. Okay. Do you recall what happened on May 23rd,
22 2015?

23 A. Yes, sir.

24 Q. Okay. And you realize that's why you're here
25 today; correct?

- 1 A. Yes, sir.
- 2 Q. Okay. Tell the Court what happened on that
- 3 particular evening.
- 4 A. On that particular evening, I was sitting down
- 5 talking to Tyeisha Youmans and Alicia Youmans and
- 6 Yvette Walker.
- 7 Q. And where were you sitting?
- 8 A. I was sitting at the bottom of the step in a
- 9 chair.
- 10 Q. The bottom of a step in a chair at what
- 11 address?
- 12 A. At [REDACTED].
- 13 Q. And State's Exhibit No. 4, is this a picture or
- 14 a photograph of [REDACTED]?
- 15 A. Yes, sir.
- 16 Q. And where were you exactly in this?
- 17 A. Right here. (Indicating)
- 18 Q. Okay. You were sitting in the chair?
- 19 A. Yes, sir.
- 20 Q. Okay. Where was Ms. Alicia Youmans?
- 21 A. She was right here. (Indicating)
- 22 Q. And Ms. Tyeisha Youmans?
- 23 A. She had to been right up in here --
- 24 THE COURT: Speak up for us.
- 25 A. She had to been right up in here by the car.

1 But Yvette -- Alicia and Yvette were by each other.

2 Q. Okay. And you said by her car. How was her
3 car parked at [REDACTED]?

4 A. The front of her car was towards the porch.

5 Q. Okay. All right. And what type of
6 conversation were you engaging with the other three
7 young ladies?

8 A. Just laughing and hearing them talk about
9 fellows. You know how girls get together and they
10 just little talk.

11 Q. And how long had you been there?

12 A. I had to been there over 20 minutes.

13 Q. Okay. Now, did you walk over there or did you
14 drive over there?

15 A. I drove.

16 Q. Now, you drove over from [REDACTED] or did you
17 drive over from another direction?

18 A. I drove from 25.

19 Q. Okay. All right. And what did you notice
20 after you were there conversating with the young
21 ladies?

22 A. That Mr. Odom had walked from behind the house
23 of 59.

24 Q. Okay. Now you said walked from behind the
25 house of [REDACTED]?

1 A. Yes, sir.

2 Q. Okay. And I'm going to pull another State
3 Exhibit here. This is the closest one. Again I
4 show you State's Exhibit No. 4. Which -- you said
5 from behind. Which direction he came?

6 A. From the right side.

7 Q. From the right side?

8 A. Yes, sir.

9 Q. So he came around the trailer?

10 A. He came in between because there's another
11 trailer right next to it.

12 Q. Okay. [REDACTED] Estates is located next door to
13 it?

14 A. Yes, sir.

15 Q. Okay. And when Mr. Odom appeared from that
16 direction, what happened next?

17 A. He came and asked Alicia Youmans to buy two
18 cigarettes.

19 Q. Okay. Two cigarettes?

20 A. Yes, sir.

21 Q. Okay. And at the time he asked Ms. Alicia
22 Youmans to buy two cigarettes, where was she
23 located?

24 A. She was sitting on the porch.

25 Q. And what was Ms. Alicia Youmans' response to

1 his request for two cigarettes?

2 A. She was going to get them.

3 Q. Okay. And where was she going to get them?

4 A. She had to go in the house.

5 Q. Okay. And did she go in the house to get them?

6 A. From my remembrance, yes, sir.

7 Q. And while she was going to get the cigarettes,
8 what transpired? What happened between you and
9 Mr. Odom?

10 A. Mr. Odom said -- he said something to me that I
11 can't quite remember. But we engaged in a verbal
12 argument or exchanged words, and that was it.

13 Q. Now, you said you can't quite remember what he
14 said to you. Do you remember how you responded to
15 what he said?

16 A. Yes, sir.

17 Q. Okay.

18 A. I remember telling him I ain't worrying about
19 it.

20 Q. Okay. Now -- so his exchange -- his
21 interaction with you, was it threatening? Was it
22 nice? What was the tone of the interaction between
23 you and Mr. Odom?

24 A. I was calm. But he was more like, okay, okay,
25 like, you know, I guess to like, we going to see

1 about it, this, that, and the third.

2 Q. Now, did Mr. Odom ever receive the cigarettes?

3 A. No, sir.

4 Q. Okay. And after the two of you had this
5 exchange or interaction, what happened next?

6 A. After that, the girls told him -- told him to
7 leave. He went to the top of the road up by my
8 grandmother's yard.

9 Q. Now, you said the girls. Is there a particular
10 one of the young ladies that asked him to leave?
11 You said the girls. Was it all three or just one?

12 A. I don't remember.

13 Q. Okay. What happened next?

14 A. And after he left, he went to stand to the top
15 of the road, like the edge of my grandmother's yard.

16 Q. Now, the top of the road, would that be the top
17 of Emerald and Wingo Estates?

18 A. Yes, sir.

19 Q. Okay. And using State's Exhibit No. 1, okay,
20 approximately where?

21 A. Right up in here, up in this part here.

22 (Indicating)

23 Q. Now, is it Coal Lane or Wingo Estates?

24 A. I'm sorry. I'm sorry. This is my
25 grandmother's yard, this is Emerald, and it's right

- 1 up in here. (Indicating)
- 2 Q. Okay. And this is what address again?
- 3 A. [REDACTED].
- 4 Q. And what is this address right here?
- 5 A. 59.
- 6 Q. And what is this address right here?
- 7 A. 73.
- 8 Q. Okay. And what happened next?
- 9 A. After that, the girls, they told me don't
- 10 follow him. I said, I'm not. I remember asking
- 11 Ms. Youmans, Tyeisha Youmans, to borrow a CD. She
- 12 told me I could borrow a CD. I got the CD, I put it
- 13 in the car, and I left and went to my grandmother's
- 14 house.
- 15 Q. Now, did you get the CD out of Tyeisha Youmans'
- 16 car or did she give it to you out of her car?
- 17 A. I got it out of there.
- 18 Q. Okay. And once you got the CD, what happened
- 19 next?
- 20 A. I left. I told her I was going home.
- 21 Q. And where is home again?
- 22 A. Next door.
- 23 Q. And did you walk home or did you drive home?
- 24 A. I drove home.
- 25 Q. Okay. All right. And what route did you --

1 and is that right next door?

2 A. Yes, sir.

3 Q. Okay. What route did you take to go next door?

4 A. I go through the -- between the yard.

5 Q. Okay. All right. And that this particular
6 time, where was Mr. Odom?

7 A. He was still at the top of the road right there
8 at the intersection by my yard.

9 Q. Okay. And then what happened next?

10 A. After that, as I was getting out the car, he
11 was coming towards, he fired, and I fired back.

12 Q. Now, as you was getting out the car, okay,
13 where, approximately, were your car, if you can
14 recall, was located on State's Exhibit No. 1?

15 A. At the edge of our trailer right up in here.

16 (Indicating)

17 Q. Okay. All right. Now, did you see Mr. Odom
18 coming?

19 A. I did.

20 Q. Okay.

21 A. Yes, sir.

22 Q. All right. And what happened next?

23 A. We exchanged words. After he fired, I fired
24 back in self-defense.

25 Q. Okay. Now, do you recall how you were

1 approached or how you fired back?

2 A. Like this. (Demonstrating)

3 Q. Can you step down and show the jury how you
4 responded to the gunfire from Mr. Odom.

5 A. After he shot, I was backing up shooting --
6 (Demonstrating)

7 Q. Turn for the jury.

8 A. After he fired at me, I was backing up shooting
9 like this here, not paying attention to where I was
10 shooting. (Demonstrating)

11 Q. Okay. And why were you backing up?

12 A. Because I was afraid for my life.

13 Q. Okay. And do you recall how many shots was
14 fired?

15 A. No, sir. But to the report --

16 Q. Have a seat.

17 A. Okay.

18 Q. Just to what you recall, do you recall how many
19 shots were fired?

20 A. Just to the report, that it was four shots that
21 hit him.

22 Q. Okay. Now, did you see the gun?

23 A. Yes, sir.

24 Q. Okay. What type of gun, to the best of your
25 recollection, was it?

1 A. It was chrome and black.

2 Q. Okay. And after the gunfire, did you see where
3 Mr. Odom ran or moved?

4 A. No, sir, because I was looking back running.
5 And then when -- after everything -- after all the
6 fire exchange, I was scared. I jumped in the car
7 and I pulled off and I looked to my left and I seen
8 him on the ground.

9 Q. Okay. All right. Now -- and what happened
10 next?

11 A. That was it. I turned myself in at the
12 Allendale Police Department.

13 Q. And did you turn yourself in immediately?

14 A. No, not then. I turned myself in to Allendale
15 because I was scared to turn myself in to Barnwell
16 County.

17 Q. How many days after the shooting did you turn
18 yourself in?

19 A. Probably six days.

20 Q. Okay. And they didn't have to come get you;
21 you turn yourself in?

22 A. I turned myself in.

23 Q. Why did you take six days to turn yourself in?

24 A. I didn't hear about arrest warrant until my
25 uncle told me.

1 Q. Okay. And when did your uncle tell you about
2 the arrest warrant?

3 A. Prior to -- the day before, he said he seen it
4 on the news, and then I seen it on Facebook.

5 Q. Okay. So up until that time, you didn't know
6 that there was an arrest warrant out for you?

7 A. No, sir.

8 Q. And how long after you discovered through
9 social media and through television or what have you
10 did you turn yourself in?

11 A. Sorry? What did you say?

12 Q. How long after you discovered there was a
13 warrant out for you, either through social media,
14 through television or what have you, did you turn
15 yourself in to Allendale?

16 A. Yes, sir.

17 Q. Okay. Did you turn yourself in the next day?
18 Two days later? How longer after that you --

19 A. I turned myself in that next day.

20 Q. The next day. Okay.

21 A. Yes, sir.

22 Q. Do you believe you was at fault on May 23rd,
23 2015?

24 A. No, sir.

25 Q. Okay. Do you believe you brought about the

1 difficulty that led to the death of Mr. Odom?

2 MR. MILLER: Objection, Your Honor.

3 THE COURT: Sustained. That's for the jury to
4 determine.

5 BY MR. KOGER:

6 Q. Why did you respond in the way you did?

7 A. Because he fired at me.

8 Q. Okay. And when he fired at you, what went
9 through your mind?

10 A. That the bullet was going to kill me or either
11 I was going to lose something that I would never be
12 able to get back.

13 Q. Okay. Could you have taken another course
14 other than responding the way that you did?

15 A. No, sir.

16 Q. Okay. And you had no other choice but to
17 respond the way that you did?

18 A. No, sir.

19 MR. KOGER: Your Honor, I beg the Court's
20 indulgence.

21 BY MR. KOGER:

22 Q. Is there any doubt in your mind that Mr. Odom
23 fired at you first?

24 A. No, sir.

25 Q. And is there any doubt in your mind that he had

1 a gun on that particular evening?

2 A. No, sir.

3 Q. And did you actually see the gun?

4 A. I seen, like, a bulge on his right side.

5 Q. Okay. But did you actually see him with a gun?

6 A. When he pulled and fired.

7 Q. Okay. And you was actually fired upon?

8 A. Yes, sir.

9 Q. Answer the questions that Solicitor Miller has
10 for you.

11 A. Yes, sir.

12

13 CROSS-EXAMINATION

14 BY MR. MILLER:

15 Q. When you testified previously in this matter,
16 you actually said that when Mr. Odom walked around
17 from behind [REDACTED], that you could
18 see the bulge on his side then and knew he was
19 armed, didn't you?

20 A. Yes, sir.

21 Q. So you knew he had a gun whenever this first
22 altercation at [REDACTED] happened?

23 A. Yes, sir.

24 Q. What were you arguing about?

25 A. I don't remember. I just remember him saying

1 certain words to me and I said I wasn't going to
2 follow him up, I wasn't worried about it.

3 Q. You don't remember what started the argument
4 that resulted in you shooting this man five minutes
5 later?

6 A. No, sir.

7 Q. So here's an armed guy who comes around the
8 trailer unexpectedly, gets into an altercation with
9 you and then walks away from the altercation;
10 correct?

11 A. Correct.

12 Q. And you know exactly where he's at, you know
13 he's standing up at the top of the road in the
14 intersection at Wingo Estates and Emerald; correct?

15 A. Correct.

16 Q. And you were all calm and he was all out of
17 control?

18 A. Correct.

19 Q. Well, if all that's true, why did the girls
20 have to tell you not to follow him?

21 A. I stay right next door. They told me not to
22 follow him up.

23 Q. Right. Why would they have to tell you that?
24 If he's walked off and he's gone and you're cool,
25 you're just sitting there having girl talk, why did

1 the girls feel it was necessary to tell you not to
2 follow him?

3 A. Because he went to the top of the road and
4 stayed there.

5 Q. So your testimony is that you drove straight
6 from [REDACTED], across the grass, and pulled
7 up over here in front of [REDACTED]; correct?

8 A. Yes, sir.

9 Q. You didn't go down to Wingo Estates Road and go
10 back into the driveway?

11 A. I don't remember that, sir.

12 Q. Where -- looking at State's Exhibit 2, was the
13 car parked parallel to the trailer, like the same
14 direction as the trailer, or was it parked facing
15 the trailer?

16 A. Same way as the trailer.

17 Q. Okay. Was it on the end closest to 59 or was
18 it on the end of the trailer closest to Emerald
19 Lane?

20 A. The car I was driving was by the house that I
21 live in.

22 Q. Right. And it's at 25?

23 A. Yes, sir.

24 Q. This is the picture. And this end is down
25 towards 59?

1 A. No, sir.

2 Q. Yeah. Hartzog's house is down there.

3 A. Yeah. Coming from Hartzog house, coming across
4 to go to my house, my car would be facing this way.

5 (Demonstrating)

6 Q. Okay. It would be facing towards Emerald Lane?

7 A. That's right.

8 Q. Okay. Did you pull up by the streetlight here
9 or did you pull up by the house?

10 A. In my yard we have a streetlight, and my car
11 might have been up a little farther, but I don't
12 remember. I remember it being right up in here,
13 close by the window.

14 Q. Right up there close to the window?

15 A. Yes, sir.

16 Q. And your testimony was that whenever you
17 stopped the car, he started shooting at you before
18 you got out the car?

19 A. When I got out the car, he was coming towards
20 and then he fired. That's what I said, sir.

21 Q. Were you all the way out of the car?

22 A. Yes, sir.

23 Q. Okay. So you're out of the car, standing
24 beside the car. Is the car door still open?

25 A. I don't remember. I think it was, sir.

1 Q. Okay. So you haven't gotten far enough away
2 from the car to close the door yet and he starts
3 shooting at you; correct?

4 A. Correct.

5 Q. How many times did he shoot at you?

6 A. I don't remember.

7 Q. He was walking towards you as you were getting
8 out of the car, he started shooting at you, and you
9 started firing and backing up; correct?

10 A. Correct.

11 Q. Well, how did you back up if you're standing at
12 the car with the door open and he's started shooting
13 at you? How did you back up while you were shooting
14 at him?

15 A. You said, sir -- but I'm going to answer your
16 question. When you're backing up not looking, you
17 can't see who you're shooting at or what you're
18 shooting, you just know you're shooting to get
19 someone away from you or anything that's firing at
20 you away.

21 Q. But you're standing at the car. You hadn't
22 even gotten far enough away from it to close the
23 door. Was it a two-door or four-door car?

24 A. Four-door car.

25 Q. So you're standing on the driver's side, you

1 hadn't even gotten far enough away from it to close
2 the door, and he starts shooting, according to you,
3 and so you're backing up. Were you backing up
4 towards the house?

5 A. Yes, sir.

6 Q. Okay. And you're firing these shots. So if
7 you're backing up towards the house, you'd be
8 backing up towards the porch at [REDACTED]; correct?

9 A. That's correct.

10 Q. And you weren't paying attention where you were
11 shooting?

12 A. No, sir.

13 Q. And how far away from you was Devante Odom when
14 he first fired at you?

15 A. He probably had been a little farther than you,
16 a little farther than you.

17 Q. Okay. A little farther than me?

18 A. I said -- come up a little. Probably right
19 there.

20 Q. Okay. This distance?

21 A. Yes, sir.

22 Q. That's how far away he was whenever he started
23 firing?

24 A. Yes, sir.

25 Q. And then you shot at him and you were backing

1 away?

2 A. I was backing up shooting, looking back.

3 Q. Okay. Then you drove away. But that wasn't
4 your car that you were driving, was it?

5 A. No, sir.

6 Q. That was your girlfriend's car?

7 A. Yes, sir.

8 Q. And how many times -- while shooting at you
9 from this distance, how many times did you get hit?

10 A. I didn't get hit any time, sir.

11 Q. You didn't get hit. How many times did your
12 girlfriend's car get hit?

13 A. I don't recall it being hit, sir.

14 Q. Okay. So you left and went to Allendale and
15 you say you didn't have any idea that there were
16 warrants out for your arrest until you saw on social
17 media that warrants had been issued for you; right?

18 A. I said my uncle told me and then I looked on
19 social media.

20 Q. Why did you not call the police and tell the
21 police, hey, there was a dead guy at [REDACTED]
22 [REDACTED] and I'm the one that shot him? You let that
23 whole time period go not sure if they knew who you
24 were?

25 A. No, I did not know. I was scared at the

1 moment.

2 Q. You were scared?

3 A. Yes, sir.

4 Q. Like you were scared was the reason that you
5 turned yourself in in Allendale?

6 A. Yes, sir.

7 Q. When did you have the verbal confrontation with
8 Odom in the middle of Emerald Lane?

9 A. I don't remember.

10 Q. That didn't happen?

11 A. I'm not saying it didn't happen. I don't
12 remember. It happened.

13 Q. When did you swing at Odom in the middle of
14 Emerald Lane?

15 A. I don't remember swinging, sir.

16 Q. What were you and Odom arguing about when you
17 were standing in the middle of Emerald Lane after he
18 had walked away, after you had driven up, and after
19 you came back together? What were the two of you
20 arguing about then?

21 A. I don't remember, sir.

22 Q. Well, did it happen or did it not happen?

23 A. I don't remember if it happened or not. It was
24 two years ago.

25 Q. When you got out of the car, did you already

1 have your gun on you? Where was your gun?
2 A. I believe it was on me, sir.
3 Q. Where?
4 A. Probably in my pocket.
5 Q. And it was a .380?
6 A. Yes, sir.
7 Q. It was a Hi-Point?
8 A. Yes, sir.
9 Q. Were all the shell casings that were loaded
10 into it the same color, all the shells?
11 A. I don't remember.
12 Q. Do you always carry a gun?
13 A. No, sir.
14 Q. Why were you carrying a gun this night?
15 A. I had received threats from other individuals
16 that I used to hang with him.
17 Q. You received threats from people that used to
18 hang with Odom?
19 A. Yes, sir.
20 Q. And so you knew there was a problem between you
21 and Odom; correct?
22 A. No, sir.
23 Q. How about after you had your argument there at
24 59? Did you think there was a problem with you and
25 Odom then, even though you don't remember anything

1 about what it was about now?

2 A. He probably had a hostile -- hostile feeling
3 about me.

4 Q. No further questions.

5 MR. KOGER: No questions, Your Honor, no
6 followup.

7 THE COURT: Thank you. You may step down.
8 Next witness.

9 MR. KOGER: Defense case, Your Honor.

10 MR. MILLER: Your Honor, I apologize Dr. Ross
11 is --

12 THE COURT: We knew it was going to be 2:00.

13 All right. Mr. Foreman, ladies and gentlemen
14 of the jury, we're going to break till 2:00.
15 Dr. Ross should be here and ready to go at that
16 time. That testimony won't last but about 15
17 minutes.

18 MR. MILLER: I wouldn't think it will be very
19 long, Your Honor.

20 THE COURT: All right. Will you have anything
21 in reply?

22 MR. MILLER: I do not anticipate anything in
23 reply, Your Honor.

24 THE COURT: So we'll be back at 2:00 to finish
25 up testimony, no later than 2:30. I'll have to take

1 a quick break with the lawyers and we'll come back
2 in and argue, I'll instruct you on the law, and
3 we'll be in a position to deliberate this afternoon,
4 or I can give you the choice of coming back in the
5 morning and deliberating and hearing the arguments.
6 Y'all discuss that at the break and I'll do whatever
7 the 12 of you wish to do. Everyone else remain
8 seated. Don't discuss the case, don't deliberate.

9 (The jury exits the courtroom at 12:11 PM.)

10 THE COURT: Gentlemen, let's be back at 1:45.
11 That's an hour and a half. At that time, be
12 prepared to discuss verdict form and jury charges.

13 MR. MILLER: Yes, sir.

14 MR. KOGER: Okay.

15 THE COURT: Unless you want to give me some
16 idea right now. What are you asking for, Mr. Koger,
17 or do you know yet?

18 MR. KOGER: Well, of course I'm going to ask
19 for self-defense.

20 THE COURT: What else?

21 MR. KOGER: The self-defense charge that Judge
22 Anderson placed in his book that includes about the
23 first shot and shooting to -- shooting until the
24 danger has ceased.

25 THE COURT: Let me see what you want. I mean,

1 have you got it typed out or in a book?

2 MR. KOGER: I got it in a book.

3 THE COURT: All right. Well, have it marked
4 and put it on my desk. I'm going to go eat lunch.

5 MR. KOGER: Okay.

6 THE COURT: How about lesser included offenses?

7 MR. KOGER: May I beg the Court's indulgence?

8 THE COURT: Mr. Miller?

9 MR. MILLER: Your Honor, I don't think there's
10 any sufficient legal provocation for the lesser
11 included offense. And there's a case that came out
12 that pretty much said if I concede that there is
13 sufficient legal provocation and the Supreme Court
14 finds that it isn't, it's a reversible error. So I
15 don't think there's sufficient legal provocation to
16 justify the offense in this case.

17 MR. KOGER: Your Honor, I think there's been
18 testimony, numerous testimony, about -- of course
19 it's a jury issue, about interactions between the
20 two, and we would ask that you would consider
21 allowing the voluntary manslaughter charge.

22 THE COURT: All right. Have me some law on
23 that when I get back.

24 All right. We'll stand at ease.

25 MR. MILLER: Thank you, Your Honor.

1 (Trial in recess 12:14 PM - 1:49 PM.)

2 THE COURT: All right. When we left, I said to
3 be back at quarter-till so we could discuss the
4 charges. I think the only thing that's -- the only
5 thing we had any controversy over was whether or not
6 to charge the lesser included offense, or if it is,
7 of voluntary manslaughter. The State was opposed,
8 Mr. Koger asked for it.

9 Anything else you want to tell me about that,
10 Mr. Koger?

11 MR. KOGER: No, Your Honor, as far as the
12 voluntary manslaughter. I also submitted the
13 self-defense instruction.

14 THE COURT: You did send me that. I'm going to
15 charge our normal self-defense charge that Court
16 Administration has put out, which is basically what
17 you've given me. Maybe not some of the stuff about
18 the firing until you quit, but that's more or less a
19 charge on the facts. But I'm going to charge the
20 self-defense.

21 MR. KOGER: And, Your Honor, in relation back
22 to the voluntary manslaughter, I don't have anything
23 different other than what I initially placed on the
24 record, but just based upon testimony on, I think,
25 two of the witnesses that the interactions exchanged

1 back at [REDACTED] that it was -- there was testimony
2 that they didn't know exactly what it was, but they
3 knew it was somewhat confrontational and not
4 cordial.

5 THE COURT: Well, your client testified he
6 doesn't even remember if it happened about the
7 argument and the swinging.

8 MR. KOGER: Yes, sir.

9 THE COURT: I don't remember if it even
10 happened, is what he said. So how can you get a
11 sudden heat of passion during an argument if your
12 client is testifying, I don't remember it and I
13 don't even remember it happening?

14 MR. KOGER: Well, he didn't testify to not
15 remembering the interaction happening.

16 THE COURT: Well, my notes say: I don't
17 remember swinging, I don't remember an argument, I
18 don't even remember if it happened -- talking about
19 the argument and swinging -- it happened over two
20 years ago. Exact quote that I've written down.

21 MR. KOGER: Well, Your Honor, I was talking
22 about back at [REDACTED] when he first approached.

23 THE COURT: Well, he didn't even remember that
24 argument. I mean, he remembered they had some
25 words, but he didn't remember what he said. It

1 certainly wasn't the kind of argument that would
2 arise to the level of sudden heat of passion that
3 the cases have referred to.

4 I have read very carefully State vs. Cook,
5 which is a 2015 case. And in using that as a
6 guideline in this particular case, I don't feel that
7 the evidence warrants a charge of voluntary
8 manslaughter.

9 It's very elementary that I must determine the
10 law to be charged based on the evidence at trial.
11 When the evidence contains no evidence to support
12 it, a voluntary manslaughter charge should not be
13 given. And there's no factual basis that he acted
14 in a sudden heat of passion, and they say that's a
15 question for the Court, a question of law.

16 And I -- from my view of the evidence it's
17 either -- as they said in the Cook case, it's either
18 a murder case or self-defense. There's certainly
19 nothing in the evidence to warrant a sudden heat of
20 passion to the extent that is required to mandate a
21 voluntary manslaughter charge.

22 The defendant's fear must manifest itself in an
23 uncontrollable impulse to do violence. Well,
24 there's just no evidence that he was acting under an
25 uncontrollable impulse resulting from an argument he

1 can't even remember happening. That's the argument
2 that allegedly took place right before they started
3 shooting at each other.

4 So you're protected. I respect deny the charge
5 on that, but I will charge the self-defense.

6 MR. KOGER: Yes, Your Honor.

7 THE COURT: And that self-defense charge,
8 Mr. Koger, you've heard me charge it before, but
9 it's simply: The defense has raised -- the
10 Defendant has raised the defense of self-defense, a
11 complete defense. If you find it's been
12 established, you must find him not guilty. The
13 State has the burden of disproving self-defense by
14 proof beyond a reasonable doubt.

15 And then I go into the elements that are
16 required: Without fault, imminent danger, he was
17 actually in imminent danger or would have warranted
18 a person of ordinary prudence to have felt that they
19 were in imminent danger, right to act on
20 appearances, enough that the defendant believed he
21 was in imminent danger, and then the last one,
22 that -- is that the defendant had no other probable
23 way to avoid the danger other than to act as he did
24 in this particular instance.

25 So I'm going to keep it succinct and to these

1 points as our standard charge. You can put your
2 charge in the record that you want and you'll be
3 protected. You simply just gave me the charge out
4 of Judge Anderson's charge book.

5 MR. KOGER: Yes, sir.

6 THE COURT: The verdict form will be: We find
7 the defendant not guilty or guilty to the offense of
8 murder.

9 MR. MILLER: Your Honor, I have -- I put up on
10 the bench and handed to defense counsel the verdict
11 form there, if that meets with the Court and the
12 Defense's approval.

13 MR. KOGER: No objection, Your Honor.

14 THE COURT: And, of course, you'd want a lesser
15 included voluntary manslaughter, but you're
16 protected on that.

17 MR. KOGER: And also to be protected on the
18 self-defense charge with that clause, I can place
19 that on the record to you, correct, the one that I
20 gave you, that you decided to use the standard --

21 THE COURT: That's the one about continuing to
22 shoot until it is apparent that the danger to his
23 life and body has ceased?

24 MR. KOGER: Yes, Your Honor.

25 THE COURT: Make that a Court exhibit or make

1 that an exhibit not for the jury, but to protect you
2 on the record.

3 MR. KOGER: Yes, sir.

4 (Court's Exhibit No. 1 marked for
5 identification.)

6 THE COURT: Anything else?

7 MR. KOGER: No, Your Honor. Nothing from the
8 defense, Your Honor.

9 MR. MILLER: Nothing from the State.

10 THE COURT: Dr. Ross is here I see.

11 MR. MILLER: We're ready to go, Your Honor.

12 (The jury enters the courtroom at 2:02 PM.)

13 THE COURT: Mr. Koger, you have no further
14 witnesses; is that correct?

15 MR. KOGER: Correct, Your Honor.

16 THE COURT: Mr. Miller.

17 MR. MILLER: Your Honor, the State calls
18 Dr. Janice Ross.

19 THE COURT: Dr. Ross, come around, please,
20 ma'am.

21 JANICE ROSS

22 being first duly sworn, testified as follows:

23 THE WITNESS: I do.

24 THE CLERK: If you would, please, ma'am, be
25 seated and state your full name for the record.

1 THE WITNESS: Janice Edwards Ross, R-O-S-S.

2 DIRECT EXAMINATION

3 BY MR. MILLER:

4 Q. Dr. Ross, who do you work for?

5 A. Newberry Pathology Associates in Newberry,
6 South Carolina.

7 Q. And how long have you worked in that job for
8 Newberry Pathology?

9 A. Since May of 2000.

10 Q. And can you briefly describe what it is you do
11 at Newberry Pathology.

12 A. Yes. We do autopsies for the coroners of the
13 state of South Carolina at their request and
14 authorization.

15 Q. And what kind of experience or training have
16 you had to enable you to do that job?

17 A. I've gotten a bachelor's degree from the
18 University of South Carolina and an MD, Doctor of
19 Medicine, from Upstate Medical Center in Syracuse,
20 New York where I did further study in the field of
21 pathology.

22 Pathology, as opposed to pediatrics or surgery,
23 is a discipline where we learn how to diagnose
24 diseases like cancers and leukemias and we learn how
25 to do an autopsy. I did further training in

1 forensic pathology which uses our pathology
2 knowledge on legal cases, learning how to do a
3 forensic autopsy where we learn how to identify
4 patterns of injury, document patterns of injury,
5 take fluids from -- at the autopsy for the purpose
6 of toxicology, and document whatever we need to do
7 for the court of law.

8 Q. Dr. Ross, have you ever been qualified as an
9 expert to testify in the courts of this state?

10 A. Yes, I have.

11 Q. And do you have any idea how many autopsies
12 you've done over the course of your career?

13 A. Over 11,000.

14 MR. MILLER: Your Honor, at this time the State
15 would move to enter Dr. Ross as an expert in the
16 field of forensic pathology.

17 MR. KOGER: No objection, Your Honor.

18 THE COURT: All right. Dr. Ross will be
19 allowed to testify and give opinion testimony in the
20 field of forensic pathology.

21 BY MR. MILLER:

22 Q. Dr. Ross, did you have occasion to perform an
23 autopsy on Devante Odom, who was the victim in this
24 case?

25 A. Yes.

1 Q. When was that done?

2 A. That was May 23rd of 2015.

3 Q. Can you please relay to the jury --

4 A. I'm sorry. It was May 26th, 2013 [sic]. The
5 23rd is when he died.

6 Q. Can you relay to the jury the significant
7 findings of your autopsy and how they're related to
8 his ultimate cause of death?

9 A. Yes. At the autopsy we look at him externally
10 and internally, and we saw evidence of gunshot
11 wounds, therefore we did x-rays to see if there were
12 any bullets left inside. We found evidence of four
13 gunshot wounds.

14 Q. Were any bullets located as a result of the
15 x-rays?

16 A. Yes, one.

17 Q. And what happens when you find a bullet that
18 you're able to remove? What do you do with that?

19 A. We take photographs of it, seal it, and then
20 send it to SLED for evidence.

21 Q. In this case, how many gunshot wounds were
22 noted on the deceased?

23 A. Four.

24 (State's Exhibit No. 12 marked for
25 identification.)

1 Q. And I want to show you what's been marked for
2 identification as State's Exhibit 12. Can you
3 identify that?

4 A. Yes. This is a diagram I made of the gunshot
5 wounds to try to give everybody an idea of the
6 direction of where they went.

7 Q. So those gunshot wounds that are labeled on
8 there show the impact where they hit on the body as
9 well as the direction of travel?

10 A. Correct.

11 Q. And that was based on your observations during
12 the course of the autopsy or immediately following
13 the autopsy?

14 A. Yes.

15 Q. And did you prepare that for court here today?

16 A. Yes, I did.

17 MR. MILLER: Your Honor, at this time the State
18 would move to enter State's Exhibit 12 into
19 evidence.

20 MR. KOGER: Without objection.

21 (State's Exhibit No. 12 admitted into
22 evidence.)

23 BY MR. MILLER:

24 Q. Dr. Ross, there are four wounds noted there.
25 They're numbered 1, 2, 3 and 4. Is there any

1 significance to the numbering of the wounds?

2 A. No. We number these wounds for our own
3 organization when we dictate and itemize what
4 happened with each wound, and we usually, in
5 general, go from top to bottom of the body and from
6 front to back.

7 Q. And in this case can you describe for the jury
8 each of the four gunshot wounds sustained by the
9 victim.

10 A. Yes. Gunshot Wound No. 1 went in the upper
11 left chest. It went from the front to the back,
12 slightly downward, and it went out of the left back.
13 What -- it injured the left lung and caused bleeding
14 internally.

15 Gunshot Wound No. 2, which actually may be two
16 different wounds, but we thought that it appeared
17 that it went through the right arm, came out the
18 right arm, and then went back in the right chest.
19 It went slightly upward and right to left and from
20 the front to the back, and it went out the right
21 back.

22 Am I going too fast?

23 Q. No, ma'am.

24 A. Okay. Number 3 entered the back, the left
25 back, lower lower back. It went almost straight

1 through, maybe slightly upward, and it hit the aorta
2 and pancreas. And that bullet was found under the
3 skin of the abdomen on the left.

4 And then the fourth shot went from the back of
5 the right calf of the right leg and came out the
6 front of that right calf.

7 Q. Based upon your examination of the victim
8 during the course of the autopsy, were you able to
9 form an opinion beyond a reasonable doubt to a
10 reasonable degree of medical certainty as to the
11 cause and manner of death in this case?

12 A. Yes.

13 Q. And what were those opinions?

14 A. The cause of death, just what it says, what
15 caused the death, is exsanguination, which means to
16 bleed out, due to laceration of both lungs and the
17 aorta due to gunshot wounds of the chest and back.

18 Q. And the manner of death?

19 A. The manner of death is how that cause of death
20 came about. And this, I felt it was -- I'm sure it
21 was homicide.

22 Q. Dr. Ross, going back to the wound that is
23 identified as number 1, the wound in the left upper
24 chest, was there anything significant noted about
25 that aside from the point of entrance and exit and

1 the direction of travel?

2 A. Yes. It's a -- there was some soot and some
3 stippling around it, which means that the barrel of
4 the gun was closer to the skin than the other
5 wounds, although we didn't have any clothing to look
6 at to see if there was any soot or stippling on the
7 clothing.

8 When a bullet comes out of a gun, soot comes
9 out also and little pieces of powder. But the soot
10 and powder only go a certain distance depending on
11 the gun and the caliber and different matters. So
12 when we see the stippling, we can say that the -- we
13 call it an intermediate range of gunshot. It means
14 that the barrel of the gun was closer to the skin,
15 close enough to cause the stippling and the soot.

16 Q. And is there a range that you say this is an
17 intermediate shot? For example, is there a range
18 where you say, if we see this stippling, then the
19 gun would have had to have been conservatively X
20 distance away from the person's -- from the wound?

21 A. Within an estimation of 18 inches to two feet.

22 THE COURT: Eighteen inches to two feet; is
23 that right?

24 THE WITNESS: Yes.

25 THE COURT: Thank you, ma'am.

1 MR. MILLER: Thank you, Dr. Ross. Please
2 answer any questions Mr. Koger may have for you.

3 CROSS-EXAMINATION

4 BY MR. KOGER:

5 Q. Now again, just to clarify, you said that the
6 order is just for organization for you at the
7 pathology practice; right?

8 A. That's correct.

9 Q. Okay. All right. And you're not giving any
10 opinions as to positioning of the deceased during
11 any type of altercation, are you?

12 A. No, I'm not.

13 Q. Okay. Thank you. I have no further questions.

14 THE COURT: Mr. Miller.

15 MR. MILLER: Your Honor, no further questions.

16 THE COURT: Thank you, Dr. Ross. I appreciate
17 you coming. Good to see you again. You're excused
18 from your subpoena. Please be careful on your way
19 back to Newberry.

20 THE WITNESS: Thank you.

21 THE COURT: Any additional witnesses by the
22 State?

23 MR. MILLER: Your Honor, at this time, the
24 State rests.

25 THE COURT: All right. Mr. Foreman, ladies and

1 you've already heard all of the evidence from which
2 you'll make your decision. Closing arguments, that
3 is not evidence in the case; that's what -- sort of
4 how the lawyers view the evidence. And, obviously,
5 they'll argue it in favor of their clients or their
6 position or their position in the situation. But
7 that's not evidence in the case. You've already
8 heard all of the evidence. The closing argument is
9 simply what it says, it's an argument.

10 Mr. Koger.

11 MR. KOGER: May it please the Court.

12 THE COURT: Yes, sir.

13 MR. KOGER: Solicitor Miller.

14 First of all, I want to thank you for your
15 attentiveness to this trial. It wasn't a long
16 trial, but it's a very important trial to my client
17 Demontay Payne and to the family of Devante Odom.
18 I've been practicing almost 24 years. And as Judge
19 Early stated in opening remarks, murder is probably
20 one of the more -- it's the most difficult, I think,
21 cases to try in criminal court and one of the more
22 difficult cases to deal with, I think both as a
23 prosecutor -- I've never been a prosecutor -- but
24 also as a criminal defense attorney, because in the
25 end, there's really no winners.

1 I've been working on this case, been
2 representing Mr. Payne for quite a while. And
3 during this particular time, even though my words
4 may ring hollow to the family of Devante Odom,
5 there's no winners here. The Odom family doesn't
6 have a family member and Mr. Payne is on trial and
7 dealing with a murder charge.

8 But with that being said, there is a rule of
9 law and there are laws to be followed, and that's
10 why we're here today trying this case in general
11 sessions court because my client Demontay Payne pled
12 not guilty to this charge and believed and still
13 believes that he acted in self-defense on May 23rd,
14 2015.

15 Mr. Payne believes that he did not bring about
16 the difficult situation or the difficulty on May
17 23rd, 2015. As testimony has shown through several
18 witnesses, he was hanging out, I think it was
19 testified, engaging in girl talk with three other
20 witnesses at [REDACTED]. Mr. Odom came around
21 the corner. And, again, what I say is not evidence
22 and what Mr. Miller is going to say is not evidence,
23 so it's going to come from what you recollect from
24 the testimony.

25 But my summary is, is that he was sitting out

1 there, Devante Odom came around the corner, words
2 were exchanged, over with, Mr. -- eventually
3 Mr. Odom went up to the road to the intersection or
4 near the intersection of Wingo Estates and Emerald
5 Lane. My client, Mr. Payne, eventually moved next
6 door -- got next door to [REDACTED]. When he
7 got out the car, he was approached. According to my
8 client, Mr. Payne, he was approached by Mr. Odom
9 and, tragically, gunfire ensued. And the result was
10 and is that Mr. Odom is no longer with us.

11 But in the mind and at that particular time, to
12 Mr. Payne, he acted in self-defense. He was
13 approached with gunfire, eventually with gunfire, he
14 was in actual danger of losing his life or suffering
15 serious bodily harm, or at least he thought so
16 because he was approached with a gun and gunfire.
17 It was reasonable for him to respond in that manner
18 because he was approached with a gun and gunfire.
19 And he had no other means to avoid the situation but
20 to respond the way he did to save his life on May
21 23rd, 2015.

22 Now, the State placed up approximately, I
23 think, between maybe eight to ten witnesses and we
24 had just three. But, as the Judge is going to
25 instruct you, that in jury instruction it doesn't

1 matter the number of witnesses. He instructed you
2 at the beginning that you are to judge in your
3 efforts, in your quest to find the true facts,
4 you're going to determine or adjudge or judge the
5 credibility and the believability of each witness.

6 I added in my opening statement that you're
7 going to use what is said in this chair or what is
8 not said in this chair, what is placed into evidence
9 and what is not placed into evidence, to determine
10 whether on May 23rd, 2015, that Mr. Payne acted in
11 self-defense.

12 Now, to somewhat -- just summarizing the
13 testimony is not going to take too long on that. To
14 summarize the testimonies of both the State and the
15 Defense -- and if I take them out of order, I -- I
16 thought I might have placed them in order, but I
17 might take them out of order. But the first one
18 that took the stand was Alicia Youmans. And I would
19 have to say probably, and I think Solicitor Miller
20 would agree, that that is the basic fact witness in
21 this particular case.

22 And she testified the way that she testified to
23 here on today, on yesterday, or during this actual
24 trial, and I won't summarize what she said because
25 we don't have to summarize what she said. We can

1 look at the statement that she gave, and it's in
2 evidence and you get to take this back in the room
3 with you, on May 23rd, 2015. And it's in this
4 statement right here.

5 And of course this statement says that my
6 client, Mr. Payne, pulled his gun out first. But
7 what is telling about this statement, she testified
8 to that Mr. Payne had a gun in his waist back when
9 they was in front of [REDACTED], and it's not
10 in here. So this is the statement that was made
11 closest -- the most recent to the happening of the
12 event, this statement right here.

13 And even though the State stated, well, she was
14 traumatized at that particular time, she had just
15 seen one of her friends or associates or
16 acquaintances got shot, well, that was May 23rd of
17 2015. And as Investigator Peterson stated, no one
18 came -- or at least he didn't have any interaction
19 with her as far as amending or correcting or
20 supplementing that statement since May 23rd, 2015.

21 Also, too, from testimony, you might can get
22 some type of insight to maybe the type of person
23 Devante Odom was just by one simple statement she
24 made that basically -- well, Mr. Payne, well, he was
25 welcome to being in front of [REDACTED], but

1 she didn't know whether Mr. Odom was welcome. Now,
2 again, you -- the Judge will tell you, you will
3 place whatever weight, whatever consideration,
4 whatever determination on what came from the stand
5 and what comes out -- what came out in this
6 particular trial.

7 Also, too, I want you to keep in mind that if
8 or when Solicitor Miller tried to discount the
9 physical observation by Tyeisha Youmans of what
10 happened on that particular night, she was at [REDACTED]
11 [REDACTED] but Alicia Youmans was also -- her
12 observation was from [REDACTED]. So if the
13 State asks you to disregard at least as to the
14 physical observation of what happened up the road,
15 you would have to disregard the physical observation
16 of Alicia Youmans because they was in the same
17 location at [REDACTED]. And, again, that goes
18 in with your job of determining the true facts in
19 this particular case.

20 Now, the next witness they placed up, and she
21 was a short witness and she was a good Samaritan,
22 Ms. Brandy Williams. She came there, she testified
23 to she presently works at the Hampton County
24 Detention Center. At the time of this unfortunate
25 event, she worked at the Barnwell County Detention

1 Center. And she came on the scene and she tried to
2 save Mr. Odom's life. But what is -- and it wasn't
3 a long testimony, but, nevertheless, she stated some
4 things that will later be confirmed by other
5 witnesses.

6 First of all, she stated that law enforcement
7 didn't arrive until 30 minutes later, which would be
8 later confirmed that the scene was left unsecure for
9 30 minutes. It was not secure. Okay? She
10 confirmed that because she say law enforcement
11 arrived 30 minutes later. And also, too, if you're
12 trying to -- not if you're trying to. When you're
13 trying to determine whether Tyeisha Youmans is
14 telling the truth that she was on the scene after
15 the shooting with Mr. Odom, she remarked it was a
16 small guy there and there was a heavysset black lady
17 there. Okay? Again, in your determination of true
18 facts, these are things that you need to look at.

19 And I think the third person to testify was, at
20 the time, the lead investigator on the case, Andy
21 Chavis. Now, Investigator Chavis was -- now Deputy
22 Chavis, he was very honest with you. And he did the
23 exact same thing that I tell my sons and I tell my
24 daughter to do; that when you didn't do something,
25 that when you mess up, if you tell me, if you admit

1 to it, we can get past it, we can get past it.

2 So I didn't badger Deputy Chavis about him
3 misplacing the crime scene photos, because he sat in
4 that chair and he stepped up and he answered the
5 questions from Solicitor Miller saying, for whatever
6 reason, I misplaced the crime scene photos. But
7 that does not lessen or minimize the fact that those
8 photos would have been the best evidence of where
9 physical evidence was placed on that particular
10 night.

11 It's nothing against him making a mistake, but
12 the State has to prove their case beyond a
13 reasonable doubt. And right after he admitted that
14 he misplaced the photos, he said, well, this is what
15 I went through on the scene, this is my procedure:
16 I meticulously put flags down, you know, casings
17 found here, a casing found here, you know, I did all
18 these things and I took 50 to 100 photos of where
19 things are placed.

20 And in your determination of the true facts,
21 that's what you need to determine what happened, the
22 positioning and all those things that go with that.
23 And instead, because of the misplaced photos, you
24 were given information of, well, yeah, I think it's
25 right here, oh, I think it's right here, and that's

1 not right, that's not fair.

2 Because when a case -- if the judicial
3 system -- the State is asking you -- it's asking you
4 to determine the true facts of the case, then you
5 got to have something to work with, and it is their
6 burden to provide the tools to try to determine
7 these facts. And if they don't provide them, then
8 it goes to the benefit of the defendant, because he
9 never had the photos.

10 And we are left to -- we are left to try to
11 guess, well, did it happen at the intersection? Did
12 it happen up here? Did it happen there? And if we
13 had had those photos to show where all the casings
14 are located, whether any measurements were taken,
15 then your job would be easier. But we don't have
16 that. So, again, when you go on your quest in
17 trying to determine the true facts, keep that in
18 mind.

19 Now, another thing, too, and key to, again,
20 confirm what we probably know at this point, that
21 the scene was unsecure -- and I'll get to why that's
22 important -- that the scene was unsecure for a
23 period of about 30 minutes. Now, I don't -- you
24 know, Solicitor Miller is an excellent lawyer and
25 I'm not even going to try to anticipate what he's

1 going to say on closing. But what he said in
2 opening is that this is not CSI. But I have never
3 seen a CSI episode that lose the crime scene photos
4 and don't secure the scene. That's basic, that's
5 standard, and you have to take that into
6 consideration as you try to find the true facts in
7 this particular case.

8 Now, Investigator Chavis also stated that a .40
9 casing was found near the head of the deceased. And
10 from testimony, you know that there was one .40
11 casing found and there was approximately six,
12 eventually, .380 casings found. Those are two
13 different types of ammunition. And we'll get back
14 to that again along with scene -- the possibility of
15 scene contamination.

16 Now, Brenda O'Berry testified that she just
17 basically transported some evidence to make sure
18 that the chain was correct. Verona Herrera, she was
19 a technician from SLED to make sure that the rule of
20 law is followed that everything gets where it needs
21 to be.

22 Now, we had Tyler Sturkie. And Tyler Sturkie
23 was the person that did the gunshot residue. And
24 Mr. Sturkie got up here and he received this kit
25 from, I think, Investigator Chavis. But Mr. Sturkie

1 actually did the gunshot residue test. And he
2 stated he followed proper protocol, did it within
3 the allotted timeframe to do it on the deceased.

4 But here's what -- here's, again, what's
5 important about that gunshot residue kit: He said
6 that gunshot residue was found on both hands of the
7 deceased. And he said when he label hands on his
8 report, he's talking about the back and the front.

9 Now, he testified to there are three ways of
10 obtaining this here; discharging a firearm, being in
11 proximity, being in the area of a discharged
12 firearm, and maybe getting it from another contact
13 surface. But you have to -- you have to look at the
14 facts of this case, the circumstances of this case,
15 and make a determination that whether that gunshot
16 residue that was on the back, that was on the palm,
17 was caused by the discharge of a firearm. And,
18 again, that goes into, again, as you try to
19 determine the true facts in this particular case.

20 James Green, another one with SLED, not very
21 long testimony, but just wanted to point out that
22 what was told to him and what has been confirmed,
23 that the .40 casing was found by the victim's body
24 which is different than the .380 that is said to be
25 the one that delivered the fatal shot.

1 And we had -- their last witness a couple
2 minutes ago was Janice Ross, pathologist. She
3 testified to that there was no particular order,
4 that the order of the shots was based upon
5 organizational purposes. But here's what's
6 important about the one question that I asked her:
7 That she has no opinion on the positions of two of
8 the deceased and the defendant in any type of
9 altercation. She had no opinion. Okay?

10 She didn't state that it could not have been
11 self-defense because the number of -- the shot
12 labeled number 3 or shot labeled number 4 came from
13 the back. She said no opinion. This is from a lady
14 that has reviewed 11,000 -- I heard when the term
15 11,000 came up, someone was kind of in awe -- 11,000
16 autopsies.

17 Now, again, what we say is not evidence. And
18 Mr. Miller, if I -- if I -- I think I know him
19 pretty well. He may attempt to convince you through
20 maybe a walking -- a walking demonstration how
21 this -- how it could not be self-defense. But
22 that's not evidence, what Mr. Miller is going to
23 give; that's his version of what happened.

24 But we had someone that actually reviewed the
25 wounds, reviewed the positions, and stated that she

1 had no opinion as to the position of anyone between
2 the deceased and the defendant during any type of
3 altercation.

4 Now we get to the witnesses from the defense
5 side. And the first one that we placed up or that I
6 placed up was Tyeisha Youmans. And as we already
7 touched upon, that as far as from a physical
8 observation view, you would either have to accept,
9 as far as being able to view, not very
10 interpretation of went on, but just to view what
11 happened, you would either have to accept both or
12 reject both, because they was at the same place
13 under the same lighting on that particular evening.
14 So if you're thinking about rejecting as far as
15 physical vantage point, then you have to do both of
16 them because they was located in the same area.

17 Now as far as what she testified to, she
18 testified to that the four of them, being in front
19 of [REDACTED], she testified to Odom, she
20 didn't know where -- which direction he came from,
21 but approaching them at the scene. She testified to
22 Mr. Odom leaving the scene, she testified to
23 Mr. Odom going up to the top of the road, she
24 testified to -- to the incident happening in that
25 general vicinity of [REDACTED] and Emerald

1 Lane, some testimony that it happened at the
2 intersection of Emerald Lane and Wingo Estates.

3 Of course we don't know exactly because we
4 didn't get the crime scene photos of where the
5 casings were exactly placed. We didn't get that.
6 So we got to deal in, well, now we got to figure
7 this out. But, nevertheless, Ms. Alicia Youmans
8 testified to, without any doubt, that Mr. Odom fired
9 the first shot. And I asked her, is there any doubt
10 in your mind? She said, Mr. Odom came behind
11 Mr. Payne and fired the first shot and then he went
12 into the direction of the two trailers on Emerald
13 Lane and -- where he fell, unfortunately.

14 Now, Tyeisha testified to -- and, again,
15 Tyeisha Youmans, and this goes to you trying to
16 determine the true facts and trying to judge the
17 believability and credibility: She said she went up
18 there to see what happened to the deceased. And she
19 said, well, when I went, I saw a gun -- well, she
20 saw it the first time when Mr. Odom took the gun out
21 and shot Mr. Payne -- that I saw a gun.

22 Now, you have to believe that Mr. Odom had a
23 gun to -- as the judges of true facts, you have to
24 believe that Mr. Odom had a gun to be able to shoot
25 first, that that caused Mr. Payne to act in

1 self-defense. But this is how all this ties in:
2 Ms. Tyeisha Youmans testified to when I first got
3 there, it was a couple people, but by the time I
4 left, there was, what 15 or 20 people.

5 Now, that is important that the scene was left
6 un-secure for 30 minutes because someone could have
7 taken the gun to protect Mr. Odom. Someone could
8 have taken the gun, because the .40 casing was found
9 by his head, didn't come from the same gun that
10 produced the .380. Tyeisha Youmans saw he pulled
11 out a gun, gave a brief description of the gun, and
12 she saw the gun. But she didn't stay on the scene
13 the whole time. I think she testified to -- and you
14 remember what come from the stand. I think she
15 said -- she testified she stayed 10 to 15 minutes.
16 I'm not sure. She stated she didn't take the gun.

17 Other law enforcement personnel that arrived
18 afterwards, they didn't find a gun. But that's
19 where it's important as far as if you -- you have to
20 believe that Mr. Odom had a gun, took the gun out,
21 and shot at Mr. Payne. So in order to place that
22 together, you got the gunshot residue, you got the
23 scene unsecured for 30 minutes with a lot of
24 people, Chief Johnson say he was -- well, it was one
25 other officer was called for crowd control. There's

1 no question there was a crowd problem. Someone
2 could have taken the gun to protect Mr. Odom.

3 Again, that's your job as the judges of the
4 true facts. And as I just stated about Chief
5 Johnson, he confirmed that the crowd control was
6 somewhat out of control. But the one thing that --
7 which was the most important thing from his
8 testimony than when he got there, someone said -- he
9 said Jerome Creech say, oh, Ty was there with him,
10 Ty was there with him. That's Tyeisha Youmans.

11 So if you're trying to judge the credibility or
12 the believability of what Tyeisha is saying is true
13 is being confirmed by the chief of Barnwell City
14 Department now that he received a name, he said he
15 passed it on to the one that was investigating, that
16 she was in fact there. So again, when you try to
17 determine the true facts, it goes to that.

18 Last but certainly not least, because this
19 trial is about whether he committed murder on that
20 particular night or whether he acted in self-defense
21 on that particular night, and that is Demontay
22 Payne. And Demontay Payne took the stand, he
23 answered the questions that he could. This happened
24 over two years ago. And the event itself when,
25 someone is shooting at you, you're probably not

1 going to remember every landmark, every measurement
2 when you're trying to save your life. But he
3 testified.

4 He testified about the interaction that he had
5 with Mr. Payne at [REDACTED] He testified
6 that when he pulled next door, [REDACTED],
7 which is located, again, in that vicinity, Emerald
8 and Wingo Estates, that when he got out, he was
9 approached and attacked -- attack mean gunfire -- by
10 Mr. Odom. And he demonstrated that he was trying to
11 get away from it and he was trying to get away from
12 the gunfire, and he was going backwards. He was
13 going backwards. Again, this is what he testified
14 to.

15 And he testified to that he didn't bring about
16 the difficulty because he was getting out of his
17 car, and when he was faced with gunfire, he didn't
18 believe that he was in danger, he was in actual
19 danger. He was. And it was reasonable, especially
20 in the context that he's between -- he's between his
21 yard and Emerald Lane for him to protect himself and
22 he had no other means -- he had no other way to
23 respond or act than the way he did on that
24 particular evening. And again, the Judge is going
25 to give you instructions on how you come to

1 determine whether self-defense is applicable in this
2 case or not.

3 Again, I ask you to hold the State's feet to
4 the fire in their burden of proof in their
5 obligation of proving the case beyond a reasonable
6 doubt. I ask you to consider evidence as evidence,
7 and what is not evidence and what is just opinion,
8 to disregard.

9 On May 23rd, 2015, Mr. Payne acted in
10 self-defense. He didn't bring about the difficult
11 situation that occurred that led to the death of
12 Mr. Odom, he was in actual danger because he was
13 being fired upon. It was reasonable for him to
14 respond in that particular way because he was being
15 fired upon, and he had no other way to avoid
16 responding the way that he did.

17 Again, I thank you for your attentiveness. The
18 State, I'm sure, thank you, the families involved
19 thank you, and I'm sure that after you -- I'm
20 confident that after you review everything, after
21 you review what was said, what was not said, what
22 was placed in evidence, what was not placed in
23 evidence, what was not given to you to aid you and
24 to assist you in finding the true facts, I'm
25 confident you will find for my client Demontay Payne

1 not guilty. Thank you.

2 MR. MILLER: May it please the Court,
3 Mr. Koger.

4 Ladies and gentlemen, one of the things that I
5 like to do during closing argument is to kind of
6 give the jury what I think is a roadmap for their
7 deliberations; a way for you to break down the case,
8 to look at the case, to figure out what is it that
9 we need to be thinking about back in that jury room.

10 And I told you in my opening that the big thing
11 the Defense wants you to focus on is did Devante
12 Odom have a gun whenever all of this went down?
13 That's what they want you to focus on. But I'm
14 going to explain to you why that's wrong. The Judge
15 is going to instruct you that murder is the unlawful
16 killing of another with malice aforethought. So
17 let's take unlawful off of there for right now.

18 The killing of another, everybody admits we
19 have that. Demontay Payne, the defendant, sat up
20 there and said, I killed him. So there's no
21 question about that. Malice aforethought. Malice
22 aforethought means that you had malice at the time.
23 What is malice? Malice is an evil heart. It is a
24 heart that is bent on violence. Malice is hatred or
25 ill-will.

1 There was malice. There had been at least one
2 altercation based on all of the people who were
3 there that testified. And let's think about that.
4 Everybody that is alive that was outside at that
5 trailer at [REDACTED] said there was a
6 verbal altercation between Devante Odom and Demontay
7 Payne at that trailer. Nobody knows what it was
8 about. Even the guy who was in the verbal
9 altercation doesn't know what it was about.

10 Everyone agrees that Devante Odom left, he
11 walked away. Everyone agrees that Demontay Payne
12 got into his car and went towards Emerald. Now,
13 there are three different versions of how he did
14 that; one, from Alicia, is that he went down to the
15 intersection and he turned right on Emerald right
16 there. Ty Youmans says he turned out onto Wingo
17 Estates and turned right back into his driveway and
18 went around and parked beside -- parallel towards
19 the end of the trailer at [REDACTED].

20 The defendant says he just drove straight
21 across the yard and he parked parallel to the
22 trailer at [REDACTED] towards the end of the trailer.
23 And that's where the stories start to diverge. But
24 no matter how you slice it, he followed in the same
25 direction that Devante Odom was going.

1 And then, according to two of the witnesses,
2 there was a second altercation. There was an
3 altercation in the street at Emerald Lane. And they
4 were sitting there arguing. And according to his
5 witness, she couldn't hear what the argument was
6 about. According to Alicia Youmans, she couldn't
7 hear them arguing at all. She was seeing them
8 arguing, but she couldn't hear what was going on.
9 But even the defendant doesn't remember what this
10 argument was about either. Suddenly he doesn't
11 remember if this argument even happened.

12 There was a second altercation, it was on
13 Emerald. He went after Odom. He went after Odom
14 because of whatever reason we'll never know because
15 he claims not to remember what it was. What was
16 this argument about? We don't know. But that's
17 malice. He said -- Demontay Payne said when he came
18 around at [REDACTED], when he walked around
19 from the back of that trailer, I could tell he had a
20 gun.

21 Well, you know he's got a gun, and you argue
22 with him and he walks away from you, and yet you get
23 in your car and then you drive down to where he is
24 and you get back out of your car and you go argue
25 with him again? Maybe he needed to get his gun out

1 of his car, maybe he needed to load his gun, maybe
2 he wanted to get another gun that he didn't like as
3 much as the gun he was carrying because he knew he
4 was going to have to get rid of that gun. By the
5 way, where is his gun?

6 He acted in self-defense, that's his story.
7 Completely justified. I got shot at, I returned
8 fire, I wasn't trying to hurt anybody or do
9 anything, I was just trying to get out of the way
10 and get him to stop shooting at me. That's his
11 story. But he jumps in his car and he flees to
12 Allendale County where he stays gone for a week, and
13 then he turns himself in. Where is the gun? He
14 didn't bother to bring that with him when he turned
15 himself in. He didn't turn over that little piece
16 of evidence.

17 So you got the unlawful killing of another with
18 malice aforethought. You have the killing of
19 another, you definitely have malice. You have that
20 hatred, that evil, that ill-will, that heart bent of
21 depravity. The only thing that makes a murder or a
22 killing of another with malice aforethought lawful
23 is if the law justifies it. And in this case, the
24 defense is that it's justified by self-defense.

25 And you're going to hear the Judge talk about

1 what are called the elements of self-defense. And
2 you've already heard Mr. Koger talk about them a
3 little bit. And for us to overcome that, for the
4 State to overcome a self-defense assertion, we have
5 to disprove one element of self-defense, just one
6 out of the four. If any one of them fails, you
7 don't consider self-defense anymore, it's done. And
8 that's the law that the Judge will tell you.

9 The State will disprove two of them beyond a
10 reasonable doubt. The first one: He didn't have
11 anything to do with bringing about this difficulty.
12 Really? He didn't have anything to do with bringing
13 about the difficulty? He's arguing with him at [REDACTED]
14 [REDACTED], and when the victim walks away, he
15 pursues, he gets out of the car again, he goes up
16 and he starts another argument with him. He
17 absolutely brought about the difficulty.

18 And that leads into the second one. And it's
19 not exactly the second element, it's the fourth
20 element, it's the last element, that he had no other
21 choice, no other way he could avoid it than to act
22 the way he did, which, according to his testimony,
23 was firing a gun while he was running away backwards
24 and he couldn't see where he was shooting. That's
25 what his testimony was. There's just no other way

1 in the world that he could have avoided what
2 happened other than to shoot like he did. And
3 that's crazy. That is absolutely unreasonable.

4 He could have stayed at [REDACTED]. He could
5 have driven in the other direction. He could have
6 turned his car away. He could have called the
7 police and said there's a guy standing at the
8 intersection of Wingo Estates and Emerald with a
9 gun, and then the police would have come out there.
10 There were plenty of ways for him not to end up in a
11 situation where he's firing as he's running away
12 behind him. But think about how reasonable that is.

13 I don't know what these guys were arguing
14 about, we'll never know what these guys were arguing
15 about, but for you to find there was no other way to
16 avoid the difficulty than to act as he did, you have
17 to say whatever they were arguing about justified
18 him, ultimately, five minutes later, shooting
19 Devante Odom in the back. Because if you don't
20 think it justified him shooting Devante Odom in the
21 back, then there was another way to act than he did.

22 Ladies and gentlemen, if you find the unlawful
23 killing of another with malice aforethought and you
24 find that the State has disproven, beyond a
25 reasonable doubt, either there's no fault in

1 bringing on the difficulty or that he had no other
2 choice than to act the way that he did, you don't
3 ever to get to the question of whether there was a
4 gun because that's murder and that's guilty. That's
5 the law. You don't get to claim mostly I had
6 self-defense whenever I killed this person; you have
7 it all or you don't have any of it. And I submit to
8 you he does not have any of it.

9 Let's talk about the evidence. And there's not
10 going to be a whole lot of discussion about the
11 evidence from the standpoint of the Defense because
12 the evidence doesn't support their story at all.
13 Mr. Koger has made a point, and I don't even
14 disagree with him, we wish we had the crime scene
15 photos. There's no question we'd prefer to have the
16 crime scene photos. But there are things that
17 happen in this world and you don't always get what
18 we want. We want to be able to present it to you.

19 But here's the thing: They didn't hem and haw
20 and say I think, I think. Andy Chavis and Scott
21 Peterson both said very clearly they were on -- all
22 of the shell casings were on the opposite side of
23 Emerald Lane from Wingo Estates Road, they were over
24 here along the side of the road and into the grass,
25 probably could have gone a six- or eight-foot circle

1 and gotten all of the shell casings.

2 Now, were they here or were they here or were
3 they here? Ladies and gentlemen, it doesn't matter.
4 And the reason that it doesn't matter is because,
5 according to the defendant's story -- which if that
6 were true, then there might be some way that he was
7 entitled to self-defense. But according to the
8 defendant's story, there would have to be shell
9 casings all the way over here.

10 Now, any of you that have experience with guns,
11 any of you that have experience with guns will know
12 shell casings ejects, it might go six feet, it might
13 go eight feet, could go ten feet, could land right
14 by your feet, depending on how it hits the ground
15 and which way it bounces. But it didn't go across
16 30 feet of grass so it could jump across the road
17 and land over here. This is where the body was, in
18 this yard.

19 His story is his car is parked right here. His
20 story is he got out of his car and was so close to
21 it he still hadn't had a chance to close the
22 driver's side door yet before he started getting
23 shot at and he returned fire. But he's going
24 away -- when he starts shooting back, according to
25 his story, he's backing up towards his porch. So

1 the shell casings should have gone from where the
2 car was back towards the porch; they shouldn't have
3 all been over here on the side of the road.

4 Look at the evidence. According to the
5 defendant, according to his testimony, and according
6 to Ty Youmans' testimony, the girl that goes to see
7 him in jail when he's in Aiken, the girl that goes
8 and sees him in jail whenever he's in Barnwell, the
9 girl that ends their phone conversations with I love
10 you and he says I love you right back, according to
11 the two of them, Devante Odom opened fire on
12 Demontay Payne causing Demontay Payne to return
13 fire.

14 How do you get off six shots if somebody starts
15 shooting at you first? How does he get off six
16 shots whenever this is what they want you to believe
17 came out of the gun that they want you to believe
18 that Devante Odom had? Here's what came out of the
19 gun that Demontay Payne told you he had.

20 When you go back and you start thinking about
21 what really did go on here, what really did happen,
22 you're going to have to make credibility
23 determinations. You've heard it from me twice now,
24 you've heard it from Mr. Koger twice now, you've
25 heard it from the Judge, and you'll hear it from the

1 Judge again. But when you're making a credibility
2 determination, look at the witnesses and look at
3 what they said.

4 And, ladies and gentlemen, I would submit to
5 you that there were actually four witnesses that
6 testified about what happened during the shooting.
7 Ty Youmans and her friend the defendant testified;
8 their stories don't match up and don't match the
9 evidence. And Devante Odom and Alicia Youmans
10 testified; Devante Odom testified through Dr. Ross.

11 You heard Alicia say he pulled onto Emerald,
12 and as soon as he got onto Emerald, he stopped and
13 got out his car and that's when they started arguing
14 again, and all of a sudden, he started shooting and
15 Devante took off running. Eight, ten, twelve feet.
16 Payne and Tyeisha Youmans claim that Odom was
17 shooting from this distance when Payne started
18 returning fire.

19 But Gunshot Wound No. 1 in the left chest has
20 got soot and stippling on it. You heard Dr. Ross,
21 who doesn't know anything other than she got a body,
22 so she does her job, she's done over 11,000
23 autopsies, Dr. Ross said, there ain't but one way
24 that happens, that happens because the muzzle of the
25 gun was 18 to 24 inches away from his chest when it

1 went off. If you look on the next page, it will
2 show you the direction that the bullet traveled and
3 the angle it traveled -- the approximate angle of
4 travel for the bullet.

5 Now, according to Alicia, when Ty -- or when
6 Demontay pulled his gun and started firing, she saw
7 Demontay run away. Well, first shot, upper chest;
8 exit wound, out the back; second shot, through the
9 back of the right arm and into the right side; third
10 shot, in the back; fourth shot, in the leg, each of
11 the shots -- each of the shots in succession. Why
12 would the shell casings be spread out over eight
13 feet? Because that's probably something that he
14 testified truthfully about.

15 As Demontay Payne was shooting Devante Odom in
16 the back, he was backing up. He shoots him in the
17 chest with the first one, starts backing up; Devante
18 is running away from him at this point, he shoots
19 him in his arm, goes through his arm and into his
20 side, he shoots him in the back, and he shoots again
21 as he's going to the ground. Does it matter whether
22 he got 17 feet away from all of those shell casings
23 before he fell down into the dirt at [REDACTED]
24 [REDACTED] and died? Or 20 feet, because that's what the
25 photographs would show you?

1 The photographs would show you exact
2 measurements and exact, precise distances. And it
3 just isn't necessary in this case. You know that
4 there's only one explanation for how those shell
5 casings all ended up on that side of Emerald Lane
6 and how there were six of them and, supposedly,
7 according to the Defense, this one that came from a
8 gun that they don't have. We don't have it either.

9 Is it possible -- is it possible that someone
10 took a gun that Devante Odom had, and as he laid
11 there on the ground dying, they ran off with the gun
12 before the police got there? Absolutely. Mr. Koger
13 said someone could have taken the gun to protect
14 Odom. I'm not exactly sure what them taking the gun
15 does to protect Odom. He's been shot four times,
16 he's going to die. I don't know how taking the gun
17 protects Odom, but certainly somebody could have
18 taken the gun.

19 What about the GSR? Firing a weapon, being in
20 proximity of a weapon being fired, or touching
21 something that has GSR on it. If someone snatches a
22 gun out on you and they're 18 to 24 inches away from
23 you, you're going to put your hands up, you're going
24 to be trying to turn and get away from them,
25 particularly if you don't have a gun of your own.

1 He's 18 to 24 inches away from him, so let's
2 consider that.

3 Let's take -- just for the sake of argument,
4 let's just assume that Devante Odom did have a gun.
5 How does the shell casing end up beside his head
6 where he dies? He could shoot and the shell casing
7 fall to the ground, and then while the defendant is
8 getting out of his car and getting his gun and
9 pointing it at him, he can continue towards him
10 until he's 18 to 24 inches away at which point gets
11 shot by the defendant, turns around and starts
12 running in the other direction, and just so happens
13 to fall on the shell casings. That's one
14 possibility. Doesn't seem very likely.

15 The other possibility is maybe he did have a
16 gun and maybe he and the defendant were face to face
17 arguing in the middle of Emerald Lane. Maybe the
18 defendant just pulled his gun first and started
19 shooting. And as he's getting shot in the chest and
20 the arm, into his lungs, and in the back and in the
21 back of his leg as he's running for his life trying
22 to get between those two trailers, he tries to pull
23 his gun out and he gets off a shot.

24 Part of judging credibility, part of your job
25 as jurors, is to look at the evidence and think

1 about what is reasonable. What's reasonable? It's
2 called a reasonable doubt for a reason, not some
3 wild
4 all-the-shell-casings-must-have-jumped-to-where-he-
5 shot-to-the-other-side-of-the-street story. That's
6 why you know that the story is not credible because
7 the story doesn't match the evidence.

8 And speaking of that credibility issue,
9 Mr. Koger has told you that if we say anything about
10 Tyeisha's observations from [REDACTED], then
11 we have to say the same thing about Alicia's. But
12 consider what their testimony was. Alicia said, I
13 never saw him with a gun, never saw Odom with a gun.
14 She didn't say he didn't have one, she said I never
15 saw him with one. It's pretty reasonable to think
16 that if somebody was a hundred yards away and it's
17 9:00 at night, even if they're under a streetlight,
18 you wouldn't see them with a gun. That's pretty
19 reasonable.

20 But then you got her sister Ty. And here's
21 what Ty says: Ty says that they're a hundred yards
22 away and she's watching and he pulls out a gun and
23 she can tell what color it is. Okay. That doesn't
24 seem really reasonable. She can't hear what they're
25 arguing about, but after the shooting she can hear

1 him gasping for air from an even further distance
2 because she says that's why she went down there to
3 check on him, because she heard him gasping for air.
4 But she can't hear them talking.

5 Nobody has disputed the fact that Tyeisha
6 Youmans went to the location where Devante Odom was
7 sitting -- or was laying. Nobody has disputed that
8 fact. But, you know, when Brandy Williams testified
9 about seeing a small guy at the scene with a larger,
10 black lady, Mr. Koger says, well, that proves it,
11 that proves Ty was there. Okay.

12 What did that lady say when Brandy Williams
13 said did you see what happened? Somebody stopped in
14 a car, got out, shot him, and drove away. Well,
15 that's not really that great of a story. She
16 doesn't say, it was my best friend Demontay Payne.
17 Somebody drove by, got out of a car, shot him, and
18 drove away. Interestingly though, it's consistent
19 with what actually did happen: He stopped, he got
20 out of the car, he shot him, he drove away.

21 Ladies and gentlemen, there are a lot of times,
22 particularly in our profession, both for Mr. Koger
23 and for myself, that when we initially see a case we
24 just don't know what we've got. What is it? We
25 don't have any idea. And then once all of the

1 evidence starts coming in, once the reports come in,
2 once the information from the experts at SLED comes
3 in, because, you know, here's -- you'll notice this:
4 There are six shell casings in this bag, but one of
5 them is brass and doesn't match the others.

6 Now, if I'm just out picking these things up
7 from the road where I know there's been a shooting,
8 I'd think that there's two guns who's going to have
9 two different colors because who's going to have
10 different colored brass in their gun? But, nope,
11 once it comes back these all came out of the same
12 gun, Mr. Payne has told you it's his gun.

13 Why was it that Ty Youmans never went to the
14 police? Why was it that the defendant let a week
15 pass without ever contacting the police? I mean, he
16 knew enough to stay out of Barnwell, he knew enough
17 to turn himself in in Allendale, but he never
18 contacted the police to say, I got shot at and I
19 returned fire because this guy shot at me
20 unjustifiably.

21 Ladies and gentlemen, it's because until they
22 read the report, they didn't know that .40 caliber
23 shell casing existed. They had no idea that the
24 police were going to pick up a .40 caliber shell
25 casing. And when they did, let's make up a story,

1 we got proof he had a gun, that's why their stories
2 don't match. He knows everybody's stories match
3 about what happened at [REDACTED], everybody's
4 did, what they were talking about everything else.
5 It's not until Odom shows up that the story starts
6 to diverge. But only one person's story matches the
7 evidence. Only person's story matches what the
8 police were able to see and document out there that
9 night.

10 And the other stories don't make any sense.
11 Alicia was very, very clear about where she saw them
12 and when they interacted and what happened and that
13 he jumped back -- that Demontay Payne jumped back
14 into his car and drove away. Ty Youmans was very
15 clear too that all of the shooting was going on over
16 here in the yard. But none of the shell casings
17 were there, none. And then Demontay Payne says the
18 same thing. Oh, he was -- wasn't even out of his
19 car good, he was standing beside it but the door was
20 still open.

21 Ladies and gentlemen, this is not a
22 self-defense case. And I promised you that I was
23 going to explain to you why it didn't matter if he
24 didn't have a gun or if he did have a gun. The
25 reality is he got shot by Demontay Payne before he

1 ever took out his gun, if he had one. And you don't
2 have to decide whether he had one and we don't have
3 to prove that he didn't have one, because if you
4 follow the law and you follow your oath, you're
5 going to find out that the question is answered
6 before you ever get to what about whether or not he
7 had a gun. This kid walked up on a situation, he
8 got into an argument, and he did what you tell your
9 kids to do, he walked away, and the fight followed
10 him.

11 Ladies and gentlemen, there is one appropriate
12 verdict in this case, and that is a verdict of
13 guilty to the offense of murder. I ask that you
14 please continue to listen carefully to the Judge and
15 follow his instructions, and they will guide you to
16 doing the right thing. Thank you.

17 THE COURT: Mr. Foreman, ladies and gentlemen
18 of the jury, my charge is about 15 or 20 minutes.
19 Anybody need a bathroom break before we start? If
20 you get uncomfortable during my charge, please raise
21 your right hand. Please don't get uncomfortable.

22 Mr. Foreman, ladies and gentlemen, as I go
23 around the state and preside over these trials, when
24 we have a criminal trial such as this, a murder
25 trial, there are general propositions that apply to

1 all criminal cases. So let me go through those
2 first, and then we'll go to the elements dealing
3 with murder, I'll go through it with you, and the
4 self-defense requirements. So the first -- let me
5 just go through the general standard procedure, the
6 standard charges that apply to all cases.

7 First of all, let me remind you the fact that
8 the defendant in this case was arrested, charged,
9 and indicted for the offense of murder, that is not
10 evidence in the case and can't be considered by you
11 as evidence in the case nor does it create any
12 presumption or inference of guilt. The indictment
13 is simply, as I told you earlier, the legal
14 document, the formal written instrument, which
15 contains the charges made against the defendant, the
16 way this case is brought into this courtroom.

17 The indictment in this case charges the
18 defendant with the offense of murder. And,
19 obviously, you must determine in this case whether
20 or not the State has proven to you beyond a
21 reasonable doubt all the elements of the crime of
22 murder.

23 To the indictment of murder, the defendant has
24 pled not guilty. A plea of not guilty, as I said,
25 puts the burden on the State to prove the defendant

1 guilty to you beyond a reasonable doubt. A person
2 charged with committing a criminal offense in our
3 state is never required to prove himself innocent.
4 I charge and instruct you it is an important
5 constitutional rule of law that the defendant in a
6 criminal trial, no matter how serious the charges
7 may be, will always be presumed to be innocent of
8 the crimes in which the indictment was issued unless
9 guilt has been proven by the State by evidence
10 satisfying you of that guilt beyond a reasonable
11 doubt.

12 Now, the presumption of innocence does not end
13 when you start your deliberations but it stays with
14 the defendant throughout the trial until you reach a
15 verdict based on guilt and evidence satisfying you
16 of that guilt beyond a reasonable doubt.

17 Presumption of innocence is not a mere legal phrase
18 or theory, it's the substantial constitutional right
19 to which every defendant is entitled unless you, the
20 jury, are satisfied from the evidence of the
21 defendant's guilt beyond a reasonable doubt.

22 What is a reasonable doubt? Our Supreme Court
23 has, on a number of occasions, given us a definition
24 for reasonable doubt. A reasonable doubt is the
25 kind of doubt that would cause a reasonable person

1 to hesitate to act. It's the kind of doubt that
2 would cause a reasonable person to hesitate to act.
3 Proof beyond a reasonable doubt is proof that leaves
4 you firmly convinced of the defendant's guilt.

5 There are very few things in this world that we
6 know with absolute certainty, and in criminal cases
7 the law does not require proof that overcomes every
8 possible doubt. If, based on your consideration of
9 the evidence, you are firmly convinced that the
10 defendant is guilty of the charged crime, then you
11 must find him guilty. If, on the other hand, you
12 think there's a real possibility that he's not
13 guilty, then you must give him the benefit of the
14 doubt and find him not guilty.

15 As I told you early on, you and I have certain
16 duties to perform. As the trial judge, it's my
17 responsibility to preside over the case and to rule
18 on the admissibility of the evidence, and you
19 determine from that evidence what the true facts are
20 and determine whether or not the State has proven
21 their case to you beyond a reasonable doubt.

22 As I've told you once before, if you disagree
23 with what I charge you, this is the law in the case,
24 so please accept it and set aside any belief that
25 you may have that doesn't coincide with what I say.

1 But, more importantly, the law that makes me the
2 judge of the law in the case makes you the judges of
3 the facts in the case.

4 So if at any time during the trial of the case
5 you've seen me smile or frown or raise my eyebrows
6 or stretch or yawn or whatever and you think I have
7 an opinion about the facts, I can't, the law does
8 not allow me to have any opinion whatsoever about
9 the facts, that's your sole duty. So please don't
10 infer anything that I may or may not have done
11 during the trial of the case that I have an opinion
12 about the facts because I, by law, cannot.

13 Now, as being the judges of the facts,
14 necessarily you must determine the credibility of
15 the witnesses who have testified in this case. As I
16 told you when we started, it's certainly not unusual
17 for one witness to say one thing and another one to
18 say another thing. We've had that situation here.
19 So you have to determine the credibility of the
20 witnesses who have testified in the case.
21 Credibility simply means believability. It becomes
22 your duty as jurors to analyze and evaluate the
23 evidence and determine which evidence convinces you
24 of its truth.

25 In accomplishing that task, in determining the

1 credibility of the witnesses who have testified in
2 the case, you can believe one witness over several,
3 several over one; you can disbelieve everything a
4 witness says, you can believe everything a witness
5 says, you can believe part and disbelieve the other
6 part; you may consider whether any witness has
7 exhibited to you interest, bias, prejudice, or other
8 motive in the case, and you can also consider the
9 appearance and the manner of the witness while on
10 the witness stand.

11 As I told you earlier, please don't leave your
12 common sense at the front door, use your common
13 sense. You deal with people all the time, you know
14 how to judge the credibility, you know how to judge
15 believability of someone telling you something and,
16 in this case, someone testifying to these facts.

17 In this case we had a couple witnesses I
18 qualified as an expert and they were allowed to give
19 opinion testimony. Normally our rules of evidence
20 do not allow witnesses to give opinions or
21 conclusions. There's an exception called the expert
22 witness exception. A witness who, by education and
23 experience expert, has become an expert in some
24 science may render an opinion in a case and give
25 reasons for their opinion.

1 Now, you should consider any expert opinions
2 received in evidence in this case like any other
3 evidence and give it whatever weight, if any, you
4 think it deserves. An expert witness' testimony is
5 to be given no greater weight than that of any other
6 witness simply because the witness is an expert.
7 And further, you're not required to accept an
8 expert's opinion even though it's not contradicted.
9 So you have the right to weigh that expert's opinion
10 just like you do any other witness who has testified
11 in this case.

12 Now, that is pretty much the general
13 propositions of law that deal with all offenses.
14 Let's turn to the particular offense in this case.
15 The defendant has been indicted for the offense of
16 murder. The State must prove to you beyond a doubt
17 that the defendant killed another person with malice
18 aforethought. Our courts have defined have defined
19 the word malice as follows: Malice is hatred,
20 ill-will, or hostility towards another person. It
21 is the intentional doing of a wrongful act without
22 just cause or excuse and with an intent to inflict
23 an injury or under circumstances that the law will
24 either infer an evil intent.

25 Malice aforethought does not require that the

1 malice exist for any particular time before the act
2 is committed, but malice must exist in the mind of
3 the defendant just before and at the time that the
4 act is committed, therefore there must be a
5 combination of evil intent and the act.

6 Malice aforethought may be expressed or
7 inferred. That doesn't mean there are two types of
8 malice, that just means that -- the manner in which
9 malice may be shown to exist. Malice may be
10 inferred from conduct showing a total disregard for
11 human life.

12 Expressed malice is shown when a person speaks
13 words which express hatred or ill-will for another
14 or when the person prepared beforehand to do the act
15 which was later accomplished. So it could be
16 inferred from conduct showing a total disregard for
17 human life or it can be expressed speaking words
18 showing the malice.

19 So actually murder, notwithstanding the fact
20 that it is obviously the most serious crime a person
21 can be charged with, but the definition of it is
22 fairly simple, it is the killing of another person
23 with malice aforethought. The State has to prove
24 that to you beyond a reasonable doubt. Malice is
25 hatred, ill-will, or hostility towards another

1 person, it's the intentional act of doing a wrongful
2 act without just cause or excuse or with an intent
3 to inflict an injury or under circumstances that the
4 law will infer evil intent.

5 Now, the defendant has raised the defense of
6 self-defense, so let me go over that with you. As I
7 said, the defendant has raised the defense of
8 self-defense. Self-defense is what we call a
9 complete defense, and if it is established, then you
10 must find the defendant not guilty. The State has
11 the burden of disproving self-defense by proof
12 beyond a reasonable doubt. So if you have a
13 reasonable doubt of the defendant's guilt after
14 considering all of the evidence, including the
15 evidence of self-defense, then you must find the
16 defendant not guilty. On the other hand, if you
17 have no reason -- reasonable doubt of the
18 defendant's guilt after considering all the
19 evidence, including the element of self-defense,
20 then you must find the defendant guilty.

21 , The State -- self-defense has several elements
22 that all have to exist. The first: The defendant
23 must be without fault in bringing on the difficulty.
24 The defendant must be without fault in bringing on
25 the difficulty. If the defendant's conduct was the

1 type which was reasonably calculated to and did
2 provoke a deadly assault, the defendant would be at
3 fault in bringing on the difficulty, it would not be
4 entitled to a verdict of not guilty based on
5 self-defense.

6 So that's one element that must be proved along
7 with the others, but the defendant -- that must
8 exist. But the defendant doesn't have to prove it;
9 the State has to disprove it. The defendant must be
10 without fault in bringing on the difficulty.

11 The second element of self-defense is that the
12 defendant was actually in imminent danger of death
13 or serious bodily injury or that the defendant
14 actually believed he was in imminent danger of death
15 or serious bodily injury. If the defendant was
16 actually in imminent danger, it must be shown that
17 the circumstances would have warranted ordinary
18 firmness and courage to strike the fatal blow to
19 prevent death or serious bodily injury.

20 If the defendant believed he was in imminent
21 danger of death or serious bodily injury, it must be
22 shown that a reasonable prudent person of ordinary
23 reason and firmness and courage would have had the
24 same belief. In deciding whether the defendant
25 actually was or believed he was in imminent danger

1 of death or serious bodily injury, you should
2 consider all of the facts and circumstances
3 surrounding the case, including the physical
4 condition and characteristics of the defendant and
5 the victim.

6 And last, the final element of self-defense is
7 that the defendant had no other probable way to
8 avoid the danger of death or serious bodily injury
9 other than to act as the defendant did in this
10 particular case. Final element is that the
11 defendant had no other probable way to avoid the
12 danger of death or serious bodily injury other than
13 to act as he did in this particular case.

14 Now, Mr. Foreman, ladies and gentlemen of the
15 jury, you will have a verdict form in the jury room.
16 Mr. Still, obviously, the verdict form is fairly
17 simple as we find the defendant not guilty of the
18 offense of murder or we find the defendant guilty of
19 the offense of murder. Check the appropriate box.
20 I've got not guilty first, guilty second. There's
21 rhyme or reason why I put one before the other;
22 obviously I got to put one first and one second. So
23 that has no significance.

24 Your job is to carefully consider and
25 deliberate the evidence, decide which evidence

1 convinces you of its truth, and then apply that
2 truthful evidence to the law as I've given it to you
3 to make a determination as to whether or not the
4 State has proven its case to you beyond a reasonable
5 doubt. All 12 must unanimously agree. You must all
6 agree. Obviously we have no friends to reward or
7 enemies to punish. You must make your decision on a
8 careful and just deliberation of the evidence. And
9 once you reach that decision, you can knock on the
10 door and I'll receive you back.

11 If during the deliberation process you have a
12 question that you need to ask me, the protocol is --
13 the procedure is just write it on a piece of paper,
14 knock on the door, and the bailiffs will bring it
15 out to me. Sometimes I can answer it, sometimes I
16 can't. I'll do the best I can to give you a
17 response. Sometimes it's just beyond what the law
18 allows me to do, maybe a comment on the facts or
19 something of that nature. But if you have a
20 question, write it out, I'll consider it and answer
21 it if I can.

22 So I'm going to ask you in just a second to go
23 back to your jury room. Don't start deliberating.
24 I have to ask the lawyers if I've left anything out,
25 we have to gather the evidence, and we'll send the

1 evidence back along with the verdict form. And once
2 that's back there in a couple minutes, then you may
3 start your deliberation. It's 3:30ish now. Just
4 let me know how you're going and we'll adjust as we
5 go.

6 All right. You may go back to your jury room.
7 Please separate my alternates out. Don't start
8 deliberating until I send all this back to you.
9 Thank you.

10 (The jury exits the courtroom at 3:36 PM.)

11 THE COURT: Gentlemen, we got any objections,
12 requested additions or deletions to the charge on
13 behalf of the State?

14 MR. MILLER: Nothing on behalf of the State,
15 Your Honor.

16 THE COURT: Mr. Koger, obviously you're
17 protected on the lesser included offense of
18 voluntary manslaughter. But, other than that, any
19 objections?

20 MR. KOGER: Your Honor --

21 THE COURT: And also you're protected on your
22 self-defense request.

23 MR. KOGER: Yes, Your Honor.

24 Your Honor, during Mr. Miller's closing, the
25 statement near the end he inadvertently stated that

1 make sure it's all accounted for and the verdict
2 form.

3 (Brief pause in the proceedings.)

4 THE COURT: All right. Let the record reflect
5 both sides have reviewed all the evidence, the
6 verdict form, all the evidence is accounted for, and
7 there's no objection to the verdict form.

8 MR. KOGER: And, Judge, I want to make sure
9 that that case law is Court Exhibit No. 1. I know
10 it doesn't go back, but...

11 THE COURT: My court reporter marked it earlier
12 and it is Court Exhibit 1.

13 MR. KOGER: Thank you.

14 MR. MILLER: Thank you, Your Honor.

15 THE COURT: All right. We'll stand at ease.

16 (The jury begins deliberations at 3:40 PM.)

17 THE COURT: All right. I got two questions
18 from the jury, so I'm going to bring them back out
19 and try to respond to them.

20 (Court's Exhibit Nos. 2 and 3 marked for
21 identification.)

22 (The jury enters the courtroom at 5:23 PM.)

23 THE COURT: Mr. Foreman, I got a note that you
24 wanted me to write out the elements of self-defense.
25 Is that correct?

1 THE FOREMAN: Yes, sir.

2 THE COURT: Instead of writing it, I'll just
3 have to bring you back out and charge you, once
4 again, those elements of self-defense. Okay? All
5 of them must apply.

6 The first is that the defendant must be without
7 fault in bringing about the difficulty. If the
8 defendant's conduct was the type which was
9 reasonably calculated to and did provoke the deadly
10 assault, the defendant would be at fault in bringing
11 on the difficulty and would not be entitled to be
12 found not guilty based on self-defense. So that's
13 the first one. All of them have to apply. If any
14 of them doesn't apply, then he's not entitled to a
15 defense of self-defense. The defendant must be
16 without fault in bringing on the difficulty.

17 Second one that must be present is that the
18 defendant was actually in danger of death or serious
19 bodily injury -- in imminent danger of death or
20 serious bodily injury or that the defendant
21 believed, actually believed, he was in imminent
22 danger of death or serious bodily injury. In other
23 words, he must be in imminent danger of death or
24 serious bodily injury or believes that he was in
25 imminent danger of death or serious bodily injury.

1 If the defendant was actually in imminent
2 danger it must be shown that the circumstances would
3 have warranted a person of ordinary firmness and
4 courage to strike the fatal blow to prevent death or
5 serious bodily injury. If the defendant believed he
6 was in imminent danger of death or serious bodily
7 injury, it must be shown that a reasonably prudent
8 person of ordinary firmness and courage would have
9 had the same belief.

10 And then the last thing that must be present or
11 must exist is that the defendant had no other
12 probable way to avoid the danger of death or serious
13 bodily injury other than to act as he did in this
14 particular instance. So those -- all of the
15 elements of self-defense all must be there to be
16 applicable.

17 The other question was: What happens if you
18 can't agree? Well, we're way too early to be
19 deciding that. I mean, y'all have only been out
20 less than two hours. So, you know, there's been a
21 lot of time and effort put into the trial of this
22 case. And, I mean, if at the end of six or seven
23 hours you aren't able to agree, then I may -- but
24 here's what happens: We do it again. It's a
25 mistrial we bring in another set of jurors, the same

1 witnesses, maybe the same judge or another judge
2 will be telling the jury the same thing.

3 So we encourage, please try to reach a
4 unanimous decision. Obviously if you can't -- but
5 we're way too early in it to decide that. You know,
6 it's 5:30 now. If you want me to order you some
7 supper, I'll be glad to do that, just send me a note
8 when you decide that.

9 THE FOREMAN: Okay.

10 THE COURT: Thank y'all. You can go back to
11 your jury room and resume your deliberations.

12 (The jury returns to their jury room to resume
13 deliberations at 5:27 PM.)

14 THE COURT: All right. Any objections to the
15 instructions I just gave them?

16 MR. MILLER: None from the State, Your Honor.

17 MR. KOGER: None from the Defense, Your Honor.

18 THE COURT: All right. We'll continue to stand
19 at ease.

20 (Pause in the proceedings 5:27 PM - 6:27 PM.)

21 THE COURT: All right. Is the State ready to
22 receive the verdict?

23 MR. MILLER: Yes, Your Honor.

24 THE COURT: Mr. Koger, is your client ready?

25 MR. KOGER: Yes, Your Honor.

1 THE COURT: All right. Ladies and gentlemen, I
2 have no earthly idea what the verdict is; obviously
3 it's guilty or not guilty. Y'all have been a
4 wonderful crowd, wonderful audience, no one has
5 acted out of the way. Obviously there will be some
6 emotions involved one way or the other.

7 If you cannot control your emotions, I'm asking
8 you to leave now. We will not tolerate any
9 outbursts, any behavior that's not consistent with
10 what you've already been doing. In other words, if
11 you act out, you will be escorted out of the
12 courthouse and taken to the Barnwell County jail.
13 So if you cannot control your emotions, please leave
14 now. Fair warning. And I do have officers around
15 the courtroom to make sure that everyone behaves.

16 (The jury enters the courtroom at 6:29 PM.)

17 THE COURT: Mr. Foreman, have y'all reached a
18 verdict.

19 THE FOREMAN: We have, sir.

20 THE COURT: Pass it to the clerk, please.

21 All right. Ma'am, you may publish it.

22 THE CLERK: Thank you.

23 In the General Sessions Court, Second Judicial
24 Circuit, State of South Carolina, County of Barnwell
25 vs. Demontay Markeith Payne, 2017-GS-06-00066, we

1 the jury unanimously find the defendant guilty of
2 the offense of murder as charged in the
3 above-referenced indictment, signed by Kim Still,
4 jury foreman, dated September 19th, 2017 in
5 Barnwell, South Carolina.

6 THE COURT: Ladies and gentlemen, if that is
7 your verdict and still is your verdict, please all
8 raise your right hand.

9 Thank you. Everyone complies.

10 Mr. Koger, anything else for the jury before I
11 dismiss them?

12 MR. KOGER: Nothing for the jury, Your Honor.

13 THE COURT: Ladies and gentlemen, short trial,
14 but most important, and obviously y'all deliberated
15 long and hard. It's not an easy job, not an easy
16 civic duty to perform, but in order to ensure that
17 everyone lives under the rules of law, we have to
18 have jurors who are ready, willing, and able to
19 perform their duty.

20 What we have now is I will have to enter a
21 sentence against him. Y'all are welcome to stay.
22 You have completed your duty, so you can leave now.
23 It's almost 7:00, so if you want to leave, leave
24 right through here, they'll show you through your
25 jury room. If anyone needs a work excuse, please

1 gentlemen here? You've been in their house and
2 their homes.

3 So hopefully what happens here today, others in
4 the community will see how the use of guns ruined
5 all involved. It's hard on everyone; the family,
6 you, the person who is dead. My sentence today is
7 that you be committed to the state department of
8 corrections for a period of 35 years. Good luck to
9 you.

10 MR. MILLER: Thank you, Your Honor.

11 THE COURT: All right. Everybody sit tight.
12 He'll be given credit for 843 days.

13 All right. I'll let the defendant's family
14 leave first, please, and make sure they all clear
15 the courtroom. To the Odom family, once they clear
16 out out there -- my heart goes out to y'all. I will
17 let y'all go on out here and we'll get y'all out.
18 And thank you very much. It's just not an easy task
19 and it's -- hopefully this will send some message to
20 the community and these young people. Gosh knows if
21 you got a problem, use your fist, don't use a gun.
22 Thank y'all.

23 -- END OF TRANSCRIPT OF RECORD --

24

25

at such a remote time as to be inadmissible, the length of time elapsing between the utterance of such statements and the death of the person who made them does not affect their relevancy but only their weight; where the defense asserts the deceased's death was a suicide or an accident that occurred when the defendant attempted to prevent the deceased from committing suicide, the prosecution may introduce evidence to rebut that claim); *Black's Law Dictionary* 1434 (6th ed. 1990) (defining suicide).

§ 6-6 Self-Defense

Self-defense is a complete defense. If established, you must find the defendant not guilty.

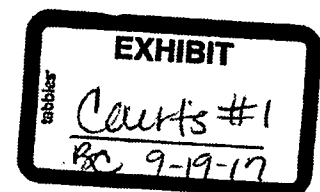
There are four elements required by law to establish self-defense. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, then the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to [strike the fatal blow] [shoot the fatal shots] in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. These are the elements of self-defense.

A defendant, in a self-defense case, has the right to act on appearances. A defendant must have believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a reasonable, prudent man of ordinary firmness and courage would have entertained the same belief.

Words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense.

Self-defense is not available to one who uses language so opprobrious that a reasonable person would expect it to bring on a physical encounter, and which did actually contribute to bring it on.

If the defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased. Ordinarily, a defendant is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled.



If the defendant was on his own premises, he had no duty to retreat before acting in self-defense. The defendant has no duty to retreat if by doing so he increases his danger of being killed or suffering serious bodily injury.

~~There has been evidence about bad blood or ill feelings between these parties. If there is bad blood or ill feelings between the victim and the defendant, and there have been antecedent threats between them, that would not give either of them in itself the right to injure or physically harm the other. If there are ill feelings or bad blood between the victim and defendant and they have that information, they have the right to judge the other person's conduct more harshly than otherwise. If there have been ill feelings and bad blood, if there have been any antecedent threats, the other person is justified in interpreting acts more harshly than in the case of friends. If there are threats of harm or ill feelings or bad blood, the conduct is to be judged in that light, and the other person may judge more harshly in determining whether there is any necessity to act for that person's safety.~~

There is no burden upon the defendant to prove self-defense. The defendant is not required to prove any element of self-defense. The burden is on the State to disprove self-defense beyond a reasonable doubt.

If you have a reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the defendant guilty.

- *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984) (setting forth a model self-defense charge); *State v. Glover*, 284 S.C. 152, 326 S.E.2d 150 (1985) (holding the charge approved in *Davis* shall be applied in all cases tried subsequent to *Davis*); *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989) (declaring that trial judge should specifically tailor self-defense instruction to adequately reflect facts and theories presented by defendant; in charging on self-defense, trial court must consider facts and circumstances of case at bar in order to fashion appropriate charge; the *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984), self-defense charge is not exclusive); *State v. Nichols*, 325 S.C. 111, 481 S.E.2d 118 (1997) (noting that *Fuller* held it was error for the trial judge to give the *Davis* common law instruction as an exclusive self-defense charge when defense counsel repeatedly requested additional charges; *Davis* charge was not intended to be exclusive charge for self-defense; trial courts have been instructed to consider the facts and circumstances of the case at hand to fashion an appropriate charge); *State v. Huggins*, 325 S.C. 103, 108, 481 S.E.2d 114, 117 (1997) ("Appellant argues the trial judge erred in not giving a self-defense charge based on *State v. Fuller*. We agree for the reasons expressed in *State v. Nichols* and thus find Appellant entitled to a new trial on this additional ground.") (footnotes omitted); *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000) (clarifying that *Fuller* held it was error for the trial judge to exclusively charge the *Davis* instruction on self-defense when the

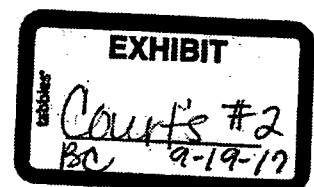
Defenses

defendant requests additional charges and evidence supports the requests; recognizing that *Fuller* instructed the trial court to fashion an appropriate self-defense charge based on the facts and circumstances of each case).

- *Jackson v. State*, 355 S.C. 568, 586 S.E.2d 562 (2003) (concluding defendant is entitled to self-defense charge if there is evidence establishing: (1) he was without fault in bringing on the difficulty; (2) he believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) he had no means of avoiding the danger; and (4) that a reasonably prudent person of ordinary firmness and courage would have entertained the same belief about the danger); *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999) (ruling that to establish self-defense, there must be evidence (1) appellant was without fault in bringing on the difficulty; (2) appellant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) appellant had no other probable means of avoiding the danger); *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994) (identifying the elements of self-defense); *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978) (discussing the elements of self-defense and the retreat doctrine); *State v. Light*, 363 S.C. 325, 610 S.E.2d 504 (Ct. App. 2005) (articulating the elements of self-defense); *State v. Slater*, 360 S.C. 487, 602 S.E.2d 90 (Ct. App. 2004), *cert. granted* (Mar. 23, 2006) (stating one who provokes or initiates assault cannot escape criminal liability by invoking self-defense; defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent).
- *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005) (determining defendant is entitled to appearances charge where claim of self-defense arises from mistaken appearance of danger; finding because petitioner's claim of self-defense did not rely on mistaken appearance of danger, failure to give appearances charge was not reversible error); *State v. Starnes*, 340 S.C. at 321, 531 S.E.2d at 912 (emphasizing the right to act on appearances is not limited to the situation where the defendant testifies he mistakenly thought he saw a weapon in the victim's hand); *State v. Nichols*, 325 S.C. at 117, 481 S.E.2d at 121 (finding appellant was entitled to a charge on the right to act on appearances because appellant testified he had seen a shiny object in the victim's hand and thought it was a gun); *Battle v. State*, 305 S.C. 460, 409 S.E.2d 400 (1991) (concluding a charge on appearances would have been appropriate); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) ("The test is not whether there was testimony of an *intended* attack but whether or not the appellant *believed* he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief.") (emphasis in original).
- *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) ("Moreover, the trial judge erred in not charging the jury that 'words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense' as this court stated in *State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409 (1951), and previously in *State v. Mason*, 115 S.C. 214, 105 S.E. 286 (1920)."); *State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409

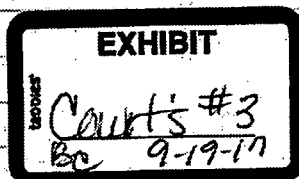
Please provide in writing
the four rules of self defense.

Thank you!



~~Robert~~

What happens if
all 12 jurors do
not agree?



WITNESSES

Barnwell Sheriffs Office

Brian Johnson

Law Enforcement Case #: C15-05--2678

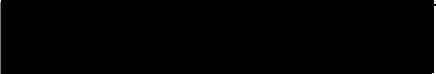
DWM

ARREST WARRANT NUMBER

2015A0610400210

ACTION OF GRAND JURY

True Bill


Foreperson of Grand Jury
Date: March 9, 2017

VERDICT

Foreperson of Petit Jury
Date:
2017

DOCKET NO. 2017GS0600066

The State of South Carolina

County of Barnwell

COURT OF GENERAL SESSIONS

MARCH TERM 2017

THE STATE

VS.

DEMONTAY MARKEITH PAYNE

CDR #: 0116

Indictment for

MURDER

§ 16-03-0010; 16-03-0020

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELL)
)

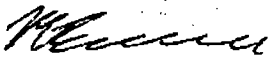
INDICTMENT FOR
MURDER

§ 16-03-0010; 16-03-0020

At a Court of General Sessions, convened on March 13, 2017, the Grand Jurors of Barnwell County present upon their oath:

That **DEMONTAY MARKEITH PAYNE** did in Barnwell County on or about May 23, 2015, feloniously, wilfully and with malice aforethought, murder Devante Odom by means of shooting the victim with a firearm and that the victim did die in Barnwell County at [REDACTED] as a proximate result thereof on May 23, 2015. All in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF 248 Barnwell
 STATE VS.
 Demontay Markeith Payne

AKA:

Race: Black Sex: M Age: 28

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Barnwell, SC 29812-6964

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
 TO: Murder / Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2017GS0600066

A/W#: 2015A0610400210

Date of Offense: 5/23/2015

S.C. Code §: 16-03-0010; 16-03-0020

CDR Code #: 0116

SENTENCE SHEET

30 years - Life

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010; 16-03-0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST: David Warren 69553 MA. PAYNE REFUSES TO SIGN 7/11
 Miller, David Warren SC Bar# Defendant Attorney for Defendant SC Bar#

 WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 35 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. from 5-29-15 (843 days)☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 61.6 (Public Def/Probation)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
3% to County (if paid in installments)	\$ 3.75

TOTAL

\$ 128.75
 40.00 P.D. App
 168.75

Clerk of Court/ Deputy Clerk

Court Reporter: Bethany Clapper

SCCA/217 (07/2016)

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: Pay \$40 public defender application fee.
☐ Appointed PD or appointed other counsel, Proviso 61.6 requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge

Judge Code: 2136Sentence Date: Sept 11, 2017

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 11th day of June, 2019.

RECEIVED

JUN 11 2019

SC Court of Appeals

5

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMONTAY MARKEITH PAYNE,

APPELLANT

APPELLATE CASE NO. 2017-002014

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED

JUN 24 2019

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in failing to instruct the jury on voluntary manslaughter where (1) the undisputed evidence showed that Appellant and the deceased were in a heated argument immediately prior to the shooting, (2) there was additional evidence that the deceased pulled a gun and shot at Appellant immediately prior to Appellant returning fire, and (3) the judge based his decision not to instruct the jury on the lesser-included offense because Appellant did not remember the content of the argument?

II. Did the trial judge err in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased?

STATEMENT OF THE CASE

A Barnwell County grand jury indicted Appellant for murder (2017-GS-06-00066) on March 9, 2017. R. 246-247. On September 18-19, 2017, the state, represented by David Miller and Jackson Cooper, called the case for trial before the Honorable Doyet A. Early, III, and a jury. R. 1. Joshua Koger represented Appellant. R. 1. Judge Early refused defense counsel's request to instruct the jury on the lesser-included offense of voluntary manslaughter; therefore, the jury considered only the murder charge. R. 173, l. 23 – R. 175, l. 3.

During the deliberations, the jury requested the elements of self-defense in writing. R. 234, ll. 23-25; R. 244. Judge Early declined the jury's request to provide the instruction in writing, but he verbally re-instructed the jury on self-defense. R. 235, l. 2 – R. 236, l. 16. Additionally, the jury questioned what would happen if the jurors could not agree. R. 236, ll. 17-18; R. 245. Judge Early told the jurors that it was "way too early to be deciding that." R. 236, ll. 18-19. He noted the jury had "only been out less than two hours." R. 236, ll. 19-20. However, he then told the jurors:

So, you know, there's been a lot of time and effort put into the trial of this case. And, I mean, if at the end of six or seven hours you aren't able to agree, then I may - - but here's what happens: We do it again. It's a mistrial we bring in another set of jurors, the same witnesses, maybe the same judge or another judge will be telling the jury the same thing.

So we encourage, please try to reach a unanimous decision. Obviously, if you can't - - but we're way too early in it to decide that. You know it's 5:30 now.

R. 236, l. 20 – R. 237, l. 6. An hour later, the jury returned to the courtroom to announce its verdict. R. 237, ll. 12-22. The jury found Appellant guilty as charged. R. 238, l. 23 – R. 239, l. 9. Judge Early sentenced Appellant to thirty-five years imprisonment. R. 240, ll. 6-8; R. 248.

On September 29, 2017, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

On May 23, 2015, Appellant stopped at his next door neighbor's home to visit with some friends, Alicia Youmans, Tyeisha Youmans, and Yvette Walker. R. 11, ll. 20-24; R. 14, l. 19 – R. 15, l. 9; R. 16, ll. 2-5; R. 104, l. 12 – R. 105, l. 11; R. 107, ll. 13-14; R. 149, ll. 2-6. The foursome was sitting outside. R. 12, ll. 9-10; R. 105, ll. 15-19; R. 149, l. 7 – R. 150, l. 1. Suddenly, Devante Odom appeared. R. 15, ll. 10-23; R. 150, ll. 19-23. Odom asked to buy two cigarettes from Alicia. R. 16, ll. 11-14; R. 151, ll. 15-20.

Odom and Appellant began arguing. R. 16, ll. 20-23; R. 32, l. 24 – R. 33, l. 1; R. 108, ll. 1-5; R. 109, ll. 17-23; R. 110, ll. 10-1; R. 152, ll. 7-12. Appellant did not remember what Odom said to him, but he remembered telling Odom that he was not “worrying about it.” R. 152, ll. 13-19; R. 160, l. 24 – R. 161, l. 2. The argument ended when Odom walked in the road toward Appellant's home. R. 17, ll. 5-7; R. 17, l. 18 – R. 18, l. 2; R. 153, ll. 4-8; R. 153, ll. 13-15. Shortly thereafter, Appellant got into his car and drove toward his home. R. 17, ll. 5-7; R. 19, ll. 1-8; R. 107, ll. 11-25; R. 111, ll. 11-15; R. 111, ll. 20-25; R. 154, ll. 8-24.

Appellant explained that as he was getting out of his car, he saw Odom approach him. R. 155, ll. 9-11; R. 163, ll. 16-22. The two men then “exchanged words.” R. 155, ll. 22-23. Odom fired a shot at him. R. 155, ll. 9-11; R. 155, l. 23. In fear for his life, Appellant then fired back at Odom. R. 155, l. 11; R. 155, ll. 23-24; R. 156, ll. 11-12; R. 159, ll. 6-12.¹ Appellant explained that he was shooting at Odom as he was backing away from Odom and moving toward his house. R. 156, ll. 3-12; R. 165, ll. 3-5. Appellant did not remember how many shots he fired. R. 156, ll. 18-21.

¹ Appellant had started carrying a gun because he had received threats from Odom's friends. R. 168, ll. 14-19.

Tyeisha's testimony differed only slightly from Appellant's memory of the events. Tyeisha explained that Appellant parked his car at his home and walked to the roadway where Odom, who was taunting Appellant, stood. R. 113, ll. 7-15. Appellant and Odom continued to have words with each other. R. 113, ll. 2-6. According to Tyeisha, Appellant swung at Odom, trying to punch him. R. 113, ll. 18-20; R. 114, ll. 1-3; R. 129, ll. 2-7; R. 131, ll. 5-7. Odom stepped back to avoid the hit. R. 114, ll. 4-7.

After the attempted punch, Odom pulled a gun on Appellant. R. 114, ll. 7-18; R. 129, ll. 8-10. Although the two men continued to exchange heated words, Appellant turned to go toward his house and car. R. 114, l. 19 – R. 115, l. 1; R. 129, ll. 11-15. Odom followed Appellant into his yard. R. 115, ll. 5-25; R. 116, ll. 3-8; R. 130, ll. 5-7. As the verbal argument and Odom's pursuit continued, Appellant turned around to face Odom. R. 116, ll. 9-10; R. 130, ll. 7-8. Odom then fired a shot at Appellant, who fired back. R. 117, ll. 4-15; R. 129, ll. 17-21; R. 130, ll. 8-9. When Appellant started shooting at Odom, Odom started running. R. 117, ll. 16-24; R. 118, ll. 1-2. Appellant then got into his car and left. R. 118, ll. 19-24.

When Tyeisha saw that Odom had fallen to the ground, she went to check on him. R. 118, l. 19 – R. 119, l. 10. Although only a few other people were gathered around Odom initially, "more and more people" arrived as time passed. R. 119, ll. 11-17. Tyeisha saw Odom's gun beside his body when she first got to him. R. 119, ll. 18-23. Approximately fifteen minutes later, Tyeisha left. R. 121, ll. 3-5. Although the police had not arrived yet, there were about thirty people near Odom at that time. R. 120, ll. 5-16.

Alicia claimed she was alone outside after Appellant left because her sister and Yvette walked inside. R. 20, ll. 11-15.² According to Alicia, Appellant drove to where Odom was in the roadway and the two “had another verbal dispute or whatever.” R. 20, ll. 16-20; R. 21, ll. 12-16. She further claimed Appellant got out of his car while the two men continued to argue. R. 20, ll. 20-22. Then, Appellant “turned to go back to his car,” but he never made it all the way back to his car. R. 20, l. 22; R. 21, l. 22 – R. 22, l. 1.

Alicia was uncertain “if something was said or what happened,” but she next saw Appellant turn around to face Odom and begin shooting at him. R. 20, ll. 22-25; R. 22, ll. 2-5. Odom started running. R. 22, ll. 6-8. Alicia claimed she saw Odom “fall to the ground” and “start[] waving his arm in the air.” R. 23, ll. 20-23. Alicia called 911. R. 23, l. 24 – R. 24, l. 5. Alicia told the 911 dispatcher that Appellant shot Odom. R. 24, ll. 8-20. Alicia walked up to Odom where she joined more than five people who had gathered already around him. R. 26, ll. 4-11.

Brandy Williams, who was visiting her parents nearby, heard seven to nine gunshots. R. 46 ll. 19-20. After calling for help, Williams went to where Odom was on the ground and performed CPR on Odom for thirty minutes – the time it took law enforcement to arrive. R. 48, ll. 19-20; R. 50, ll. 7-10. By the time the police arrived, there were between ten and fifteen people gathered around Odom. R. 50, ll. 3-6; R. 51, ll. 1-15.

² Appellant contradicted Alicia Youmans’ testimony on this point. Appellant saw Alicia go inside the house to get the cigarettes for Odom. R. 151, l. 25 – R. 152, l. 6.

When the first officer arrived on the scene, there were more than twenty people present. R. 131, ll. 10-16. The scene was “chaotic.” R. 142, ll. 20-23. Initially, “there was a bit of confusion on exactly where the crime scene was or the incident location was.” R. 143, ll. 2-4. When the police “finally got there,” they found “a large number of people” and had difficulty securing the scene. R. 143, ll. 4-6. In light of the crowd, the local police department “had to call for additional units from Barnwell, Williston, and Blackville” to help “control the crowd and secure everything.” R. 143, ll. 7-10.

When law enforcement finally secured at the scene, the investigator processing the scene collected six .380 caliber shell casings. R. 56, ll. 6-12; R. 57, ll. 12-13.³ Unfortunately, there was no way for the jury to know where the shell casings were located because the photographs the investigator took were lost by the police prior to trial. R. 55, ll. 12-17; R. 56, ll. 13-18. When asked where he found the casings, the investigator was uncertain of the exact location, but estimated they were found in the front yard of a particular residence. R. 56, l. 19 – R. 57, l. 7; R. 63, ll. 6-10; R. 64, ll. 6-8. He thought the .380 shell casings were found within six to eight feet of each other. R. 57, ll. 14-17. According to the forensic firearms examiner, the six .380 caliber shell casings were fired by the same firearm. R. 82, ll. 11-17; R. 84, ll. 13-14.

Additionally, and most importantly, the investigator found a .40 caliber shell casing close to where Odom was lying on the ground. R. 58, ll. 3-9. The examiner explained the .40 Smith and Wesson caliber casing that was found close to Odom’s body “was not fired by the same gun” that fired the .380 caliber shell casings. R. 83, ll. 17-19; R. 84, ll. 13-16. Furthermore, forensic testing revealed Odom had gunshot residue on both of his hands. R. 73, l. 22 – R. 74, l. 12.

³ Appellant admitted he was using a Hi-Point .380 firearm. R. 168, ll. 5-8.

The pathologist observed four gunshot wounds on Odom's body. R. 180, ll. 21-23. The first wound she observed was an entrance wound on the upper left chest. R. 182, ll. 10-14. This bullet went out of Odom's left back. R. 182, ll. 10-14. The second went through the right arm, then entered the right chest and out the right back. R. 182, ll. 15-21. The third wound entered the left lower back. R. 182, ll. 24-25. This one hit the aorta and pancreas. R. 183, ll. 1-2. The pathologist found this bullet under the skin of the abdomen. R. 183, ll. 2-3. The fourth shot went through the right calf. R. 183, ll. 4-6. There was some soot and stippling around the wound to the upper left chest. R. 183, l. 22 – R. 184, l. 15. According to the pathologist, this meant the barrel of the gun was within eighteen inches to two feet of Odom's chest at the time the gun was fired. R. 184, ll. 16-24.

According to the firearms examiner, the projectile removed from the deceased's body by the pathologist during the autopsy was a .380 auto-caliber bullet. R. 87, ll. 5-6. Further, the examiner explained that the casings that were found at the scene could have been fired by the same firearm that fired the projectile that was removed from the deceased's body. R. 88, ll. 8-13.

ARGUMENT

I. The trial judge erred in failing to instruct the jury on voluntary manslaughter where (1) the undisputed evidence showed that Appellant and the deceased were in a heated argument immediately prior to the shooting, (2) there was additional evidence that the deceased pulled a gun and shot at Appellant immediately prior to Appellant returning fire, and (3) the judge based his decision not to instruct the jury on the lesser-included offense because Appellant did not remember the content of the argument.

Standard of review

“In criminal cases, appellate courts sit to review only errors of law.” State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). “An appellate court will not reverse the trial [court]’s decision absent an abuse of discretion.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id. at 570, 647 S.E.2d at 166–67.

“The law to be charged to the jury is determined by the evidence presented at trial.” State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). “The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense.” Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). “The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” Pittman, 373 S.C. at 570, 647 S.E.2d at 167.

“In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.” Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). “The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense.” Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

Relevant facts

During the charge conference, defense counsel requested the judge instruct the jury on the lesser-included offense of voluntary manslaughter. R. 171, ll. 6-7; R. 171, ll. 17-21. Counsel explained that two witnesses testified regarding “interactions exchanged” at the residence. R. 172, l. 21 – R. 173, l. 4. The state objected to the instruction, arguing there was no evidence of “any sufficient legal provocation.” R. 171, ll. 9-16.

Despite recognizing there was evidence in the record regarding an argument between Appellant and the deceased and testimony that Appellant swung at the deceased prior to the shooting, the judge refused to instruct the jury on voluntary manslaughter based upon Appellant’s testimony. R. 173, l. 5 – R. 175, l. 3. According to the judge, Appellant’s testimony that he did not remember an argument with or swinging at the deceased barred an instruction on voluntary manslaughter. R. 173, l. 5 – R. 175, l. 3. The judge questioned how defense counsel could get a sudden heat of passion during an argument if Appellant testified he did not remember the argument occurring. R. 173, ll. 5-20. The judge explained that in light of Appellant not remembering the argument, or more specifically that Appellant did not remember the exact

words the two men exchanged during the argument, then the argument “certainly wasn’t the kind of argument that would arise to the level of sudden heat of passion.” R. 173, l. 23 – R. 174, l. 3.

Relying upon Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (Ct. App. 2015), the judge determined the evidence did not warrant a charge of voluntary manslaughter. R. 174, ll. 4-8. The judge found “no factual basis that [Appellant] was in a sudden heat of passion.” R. 174, ll. 9-15. In the judge’s view, the evidence presented showed the death was “either a murder case or self-defense.” R. 174, ll. 16-18. Put succinctly, the judge determined there was “certainly nothing in the evidence to warrant a sudden heat of passion to the extent that is required to mandate a voluntary manslaughter charge.” R. 174, ll. 16-21. In order for voluntary manslaughter to be considered by the jury, according to the judge, there must be evidence that the defendant’s fear manifested itself in an uncontrollable impulse to do violence. R. 174, l. 22 – R. 175, l. 3. However, the judge found “no evidence that [Appellant] was acting under an uncontrollable impulse resulting from an argument he can’t even remember happening. That’s the argument that allegedly took place right before they started shooting at each other.” R. 174, l. 23 – R. 175, l. 3.

Discussion

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006. South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow “a rational inference” that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d

at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), “[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury’s view of the facts.” A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Frasier v. State, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)).

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). “To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original) (holding that in murder cases, trial courts should charge manslaughter unless “there is no evidence whatsoever tending to reduce the crime from murder to manslaughter”).

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as “the unlawful killing of another without malice, express or implied.” S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). The South Carolina Supreme Court made it clear that both of these elements must be present in order to warrant a

voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). Thus, “[w]hether a voluntary manslaughter charge is warranted turns on the facts.” Starnes, 388 S.C. at 597, 698 S.E.2d at 608; see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (“The law to be charged must be determined from the evidence presented at trial.”).

Quoting a trial judge’s jury instruction, the Supreme Court explained voluntary manslaughter as follows:

The law recognizes the frailties of human nature, and appreciates the fact that there may be occasions in one’s life when he may lose control of himself temporarily, be swept off his feet, to act upon the spur of the moment rather from premeditation or design. And, if under those circumstances one slays his fellow man, the law will not excuse him entirely, but will not visit upon him the extreme penalty it would have if the act had been accompanied by malice. ... [T]he provocation which the law recognizes as being one sufficient to reduce the homicide from murder to manslaughter must be such as to involve some indignity to throw a man in sudden heat and passion. ... So, also by way of illustration, if he should meet another on the street and that one should pull his nose, or spit in his face, and on the spur of the moment he should slay him, he would be guilty, not of murder, but of manslaughter. ... [W]ords, however opprobrious, could never be sufficient to reduce a homicide from murder to manslaughter.

State v. Cleland, 148 S.C. 86, 86, 145 S.E. 628, 629 (1928) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

“Sudden heat of passion upon sufficient legal provocation” mitigating felonious killing to manslaughter “must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)) (quotations omitted).

“The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.” Cooley, 342 S.C. at 67, 536 S.E.2d at 668. “A legal provocation is some act which, either alone or in connection with words or circumstances is calculated to throw one into a passion.” State v. Gadsden, 314 S.C. 229, 232, 442 S.E.2d 594, 596 (1994). “[I]n order to constitute ‘sudden heat of passion upon sufficient legal provocation,’ the fear must be the result of sufficient legal provocation and cause the defendant to lose control and create an uncontrollable impulse to do violence.” State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). “[A]n overt, threatening act or a physical encounter may constitute sufficient legal provocation.” Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (citing State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)). However, evidence of a struggle during an armed robbery is not sufficient legal provocation. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984); see also State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

“[F]ear resulting from an attack can constitute a basis for voluntary manslaughter.” Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed “the principle that a person’s fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion.” Id. One’s mind may be rendered incapable of cool reflection by “exasperation, rage, anger, sudden resentment, or terror.” State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992).

The South Carolina Supreme Court reversed a murder conviction and remanded for a new trial where a trial judge refused to charge the jury on voluntary manslaughter where the evidence required such an instruction. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274

(1993). Lowry and the deceased were “arguing and ‘bumped chests’” during an altercation near a grocery store. Id. at 398, 434 S.E.2d at 273. Lowry aimed his pistol at the deceased and pulled the trigger; however, the pistol was not loaded. Id. Lowry’s friend broke up the fight, and the deceased entered the grocery store. Id. Lowry then loaded his pistol, fired a single shot, and entered the grocery store as well. Id. The men “began arguing and shouting at each other again.” Id.

The state’s witnesses claimed the deceased told Lowry he was unarmed and refused to “take it outside” as Lowry suggested. Id. The deceased also spread his arms away from his body purportedly to show he was unarmed. Id. However, Lowry’s witnesses claimed the deceased denigrated Lowry by saying, “You think you are a big man because you got a gun.” Id. Then, the deceased “moved toward Lowry in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him.” Id. All witnesses agreed that after the deceased raised his arms, Lowry shot him in the chest. Id. The witnesses agreed that after the deceased fell, Lowry cursed him and shot him in the head. Id.

The Court held the trial judge erred by refusing to instruct the jury regarding voluntary manslaughter. Id. at 399, 434 S.E.2d at 274. The Court explained there was “testimony which, if believed, tend[ed] to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred.” Id. Because it did not “very clearly appear that there [was] no evidence whatsoever tending to reduce the crime from murder to manslaughter,” the judge erred in failing to so instruct the jury. Id.

The Supreme Court concluded a trial judge correctly instructed a jury on voluntary manslaughter where “there [was] evidence in the record which [tended] to show [Wiggins] acted in sudden heat of passion upon sufficient legal provocation” because it was undisputed Wiggins

was in a “heated argument” with the deceased and the deceased’s sister and the deceased “physically threatened him.” State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 496 (1998).

Like the evidence in State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), the evidence at Appellant’s trial supported a charge of voluntary manslaughter. Believing that his former girlfriend’s lover wanted to see him, Gilliam went to the lover’s place of business. Gilliam, 296 S.C. at 396, 373 S.E.2d at 597. The two men argued and the lover “made threatening statements” to Gilliam. Id. Gilliam claimed the lover “took a gun from his pocket and shot at” Gilliam. Id. Gilliam then shot back at the lover, killing him. Id. After confirming that self-defense and voluntary manslaughter are not mutually exclusive, the Court held that “the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.” Id. at 397, 373 S.E.2d at 597. According to the Court, Gilliam’s “testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion.” Id.

The South Carolina Supreme Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon one of the defendant’s statements to law enforcement indicating the decedent had cut the defendant prior to the defendant striking the final blow. State v. Knoten, 347 S.C. 296, 305-306, 555 S.E.2d 391, 396 (2001). In the second statement, Knoten told police that the decedent cut him, then chased Knoten out of the apartment. Id. at 305, 555 S.E.2d at 396. Outside, Knoten went to his car and got a metal pipe. Id. Thereafter, Knoten reentered the apartment and killed the decedent after she cut him again. Id. The Court explained that if the jury were to believe the facts presented in Knoten’s second statement, then the jury could conclude Knoten and the decedent were in a heated encounter and the decedent had twice

cut him with a knife when he struck her with a pipe; thus, “it follow[ed] that a charge on voluntary manslaughter was required.” Id. at 306, 555 S.E.2d at 396.

In relying upon Cook v. State, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015), the judge may have determined Appellant was not entitled to a jury charge on voluntary manslaughter because “words alone, however opprobrious, are not sufficient to constitute a legal provocation.” At any rate, the judge’s refusal to charge voluntary manslaughter because Appellant could not remember the content of the argument was reversible error. What the judge failed to consider was the ample evidence in the record that Odom’s conduct was not limited to mere words – no matter the content of the undisputed argument the two men were having. Instead, the evidence presented showed Odom pulled a gun and fired a single shot at Appellant, which supported a charge on voluntary manslaughter. See Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (explaining that “when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault – by some overt, threatening act – which could have produced the heat of passion”); Gilliam, 296 S.C. at 397, 373 S.E.2d at 597 (finding evidence to support a charge of voluntary manslaughter where the defendant testified that the victim threatened him and then fired at him because this testimony supported a finding of sufficient legal provocation and heat of passion); State v. Johnson, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998) (“Here, Johnson and the victim had ‘had words’ and were engaged in a fight at the time the shooting occurred. ... [I]t is patent Johnson was entitled to a voluntary manslaughter charge”).

The undisputed evidence showed Appellant and Odom exchanged words when Odom stopped at the neighbor’s house to buy cigarettes. The undisputed evidence further showed the heated argument between Odom continued when the two men left the neighbor’s house. Two

witnesses – Appellant and Tyeshia – Odom pulled a gun and shot at Appellant. Appellant then returned fired. Although the officers, who arrived on the scene at least thirty minutes after the shooting, did not find a gun beside Odom, the officers recovered two types of shell casings from the area around the shooting. The .380 shell casings corresponded with the gun Appellant said he was using. However, the .40 shell casing, which was undisputedly not shot from the gun used by Appellant, was found very close to Odom's body and supported Appellant's version of events – that Odom shot first. Further, there was evidence that Odom actually shot a gun. According to the forensic testing conducted on the gunshot residue kit administered on Odom, there was gunshot primer residue on Odom's hands. Although the state elicited testimony that Odom may have had the residue on his hands because he was shot, the expert also admitted that Odom may have had the residue on his hands because he handled a gun.

The evidence presented supported a jury instruction for voluntary manslaughter. The evidence that Odom and Appellant engaged in a heated exchange immediately prior to Odom pulling and discharging a firearm demonstrated that Appellant acted in the sudden heat of passion based on sufficient legal provocation. The trial judge erred by failing to instruct the jury on the lesser-included offense of voluntary manslaughter.

II. The trial judge erred in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.

Standard of review

“An appellate court will not reverse the trial judge’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)). “In reviewing jury charges for error, [the appellate court] must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.” Id. (internal quotation omitted). “The trial court is required to charge only the current and correct law of South Carolina.” Id. (internal quotation omitted). “The evidence presented at trial determines the law to be charged to the jury. State v. Jackson, 384 S.C. 29, 35, 681 S.E.2d 17, 20 (Ct. App. 2009).

Relevant facts

Defense counsel requested the judge instruct the jury that an individual may continue to shoot until it is apparent that the danger to his life and body has ceased. R. 170, ll. 21-24; R. 241-243. Counsel explained he wanted the self-defense instruction to include that a person may continue to shoot until the danger has ceased. R. 170, ll. 21-24. Specifically, counsel requested the judge instruct the jury that “[i]f the defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.” R. 241-243. Finding “the stuff about firing until you quit” as “more or less a charge on the facts,” the trial judge refused. R. 172, ll. 17-19; R. 175, l. 7 – R. 176, l. 4. Instead, the trial judge instructed the jury regarding self-defense without tailoring the instruction to the facts presented. R. 229, l. 5 – R. 230, l. 13.

Discussion

The South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a “body of common law self-defense” and trial judges must “consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.” Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute’s trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute’s trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant’s car and asked him “what he was ‘trying to do to that white lady.’” Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, “‘we’re going to take care of you.’” Id. The defendant thought he saw something shiny in one of the men’s hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant “repeatedly requested additional charges.” Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general

charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-44, 377 S.E.2d at 330-31(citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that “words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense.” Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat “if by doing so he would increase his danger of being killed or suffering serious bodily injury.” Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant’s theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, “[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.” Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased’s drug consumption. Id.; see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978) (including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

It has long been the law in this state that “when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.” Hendrix, 270 S.C. at 661, 244 S.E.2d at 507 (internal quotation omitted). While “[t]he rule is that ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled,” where a person fired in rapid succession and the deceased did not hit

the ground until after the last shot was fired, the Court has held the person was acting in self-defense as a matter of law. Id. at 661-662, 244 S.E.2d at 507.

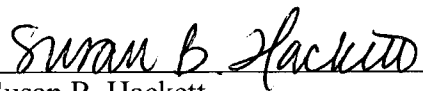
Recently, the South Carolina Supreme Court examined a case with an issue similar to the one presented in Appellant's case, but with important distinctions. In State v. Marin, 415 S.C. 475, 481, 783 S.E.2d 808, 811 (2016), Marin challenged the trial judge's refusal to instruct the jury that "one who is acting in self-defense and has the right to fire a first shot has the right to continue shooting until it is apparent that the danger of death or serious bodily injury has ended." At the outset, the Court made clear that Marin's request was an accurate statement of the law. Id. at 482, 783 S.E.2d at 812. However, the Court found no error in the trial judge's failure to instruct the jury on this accurate statement of the law because "the experienced and excellent trial judge gave a thorough and comprehensive self-defense charge." Id. at 483, 783 S.E.2d at 813. Important to the Court's analysis, the trial judge in Marin went "well beyond the general State v. Davis elements." Id. According to the Court, "[w]hile the 'continuing to shoot' charge may have been appropriate, its absence [did] not mandate reversal" because the "essence of the charge was encompassed in the jury instructions, particularly the instruction that 'a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable.'" Id.

Unlike the trial judge in Marin, the judge in the instant case did not "well beyond" the general self-defense instruction. See R. 229, l. 5 – R. 230, l. 13. In fact, the trial judge referred to his instruction as "succinct" and his "standard charge." R. 175, l. 25 – R. 176, l. 1. The "essence" of the requested charge, which was undoubtedly an accurate statement of the law, was not encompassed within the instructions given. Importantly, the judge did not instruct the jury that a "person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable" as the judge in Marin did.

The trial judge erred in refusing to charge the jury in the context of self-defense that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased. All parties agreed Appellant was entitled to a self-defense instruction. In accordance with controlling South Carolina law, Appellant requested the self-defense instruction be tailored to the specific facts and circumstances presented by the evidence before the jury. Despite Appellant requesting an undoubtedly correct statement of the law be charged to the jury and the facts supporting the request, the trial judge erroneously refused to issue the instruction. The “succinct” and “standard” charge given by the judge did not encompass the law Appellant sought for the jury to know and it in no way conveyed that Appellant could continue to shoot until the danger passed. The judge’s refusal to issue the instruction was reversible error.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of June, 2019.

CERTIFICATE OF COUNSEL

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

June 24, 2019

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

RECEIVED
JUN 24 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMONTAY MARKEITH PAYNE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon W. Joseph Maye, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of June, 2019.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of June, 2019.

Mary Allaire (L.S)
Notary Public for South Carolina

My Commission Expires: May 12, 2027.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

Demontay Markeith Payne,

APPELLANT

Appellate Case No. 2017-002014

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err in failing to instruct the jury on voluntary manslaughter where (1) the undisputed evidence showed that Appellant and the deceased were in a heated argument immediately prior to the shooting, (2) there was additional evidence that the deceased pulled a gun and shot at Appellant immediately prior to Appellant returning fire, and (3) the judge based his decision not to instruct the jury on the lesser-included offense because Appellant did not remember the content of the argument?
- II. Did the trial judge err in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Was the trial judge correct in declining to provide a voluntary manslaughter jury charge when Appellant (1) did not testify that he acted under the heat of passion during the shooting, (2) testified that he fired his gun in self-defense, (3) demonstrated that he could not recall whether or not an argument ensued immediately before the gunfire, and (4) could not recall the topic of the possible argument, if an argument occurred at all?
- II. Did the trial judge commit prejudicial error in refusing to instruct the jury as requested with language that Appellant, if deemed to be acting in self-defense, is justified to continue shooting until the apparent danger has ceased when Appellant's own defense testimony demonstrated that he did not know whether he had shot victim, was firing behind his back while attempting to run away, and where such an instruction would constitute an charge upon the facts?

STATEMENT OF THE CASE

Appellant was indicted for murder by a Barnwell County Grand Jury (2017-GS-06-00066). Assistant Solicitors David Miller and Jackson Cooper represented the State at trial, and Defendant Demontay Markeith Payne (hereinafter “Appellant”) was represented by attorney Joshua Koger, Esquire (hereinafter “Defense Counsel”). (R. p. 1). Prior to trial, Appellant filed a Motion to Dismiss pursuant to the Protection of Persons and Property Act, for which a hearing was conducted on August 22-23, 2017. The trial court heard testimony and concluded that the testimony of witnesses differed considerably, such that he could not find by preponderance of the evidence that Appellant was entitled to protection under the Act.

The case was called to trial before the Honorable Doyet A. Early, III, and a jury, on September, 18-19, 2017. (R. p. 1). At the conclusion of trial the jury returned a guilty verdict against Appellant for murder. Judge Early sentenced Appellant to thirty-five (35) years imprisonment with credit for time served. (R. p. 240). This appeal follows.

STANDARD OF REVIEW

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). An abuse of discretion “means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law.” *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). A jury charge which is substantially correct and covers the law does not require reversal. *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018), reh’g denied (Aug. 16, 2018), cert. granted (Dec. 13, 2018), cert. dismissed as improvidently granted, No. 2018-001671, 2019 WL 1783684 (S.C. Apr. 24, 2019). “In reviewing jury charges

for error, [the appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). The denial of a requested jury charge is subject to harmless error analysis, and both error and prejudice must be demonstrated in order to warrant reversal. *State v. Commander*, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011). *State v. Battle*, 408 S.C. 109, 116, 757 S.E.2d 737, 740 (Ct. App. 2014).

STATEMENT OF FACTS

The Crime

On the evening of May 23, 2015, Appellant was on the porch of 59 W. Estates Road with other individuals, including Stacey Hartzog, Alicia Youmans, Tyeisha Youmans, and Yvette Walker. (R. p. 104, line 18 through 105, line 11; p. 14, lines 14-21; pg. 16). While the group were outside on the porch, Devante Odom (hereinafter “Victim”) came to the home. Victim asked to buy a couple of loose cigarettes from Alicia Youmans and soon after “had words” with Appellant. None of the witnesses were able to recall the substance of the argument, and the argument ended with Victim leaving 59 W. Estates and walking up to the intersection of W. Estates Road and E. Lane. (R. p. 17, lines 6-21; p. 19, lines 9-11). Soon after Victim left, Appellant got in his car and drove up to the same intersection, adjacent to his home located at 25 W. Estates. (R. p. 19, lines 3-8).

Appellant drove up to the corner to exchange more words with Victim, and then got out of the car and continued to have words with Victim. He appeared to turn away and head back to his car, but then turned back around and began shooting at Victim with .380 caliber Hi-Point pistol. Victim was struck by Appellant’s gunfire four times. Victim ran away toward 550 E. Lane, but fell in his efforts. Although no firearm was recovered, a single .40 caliber casing was

found next to Victim's body, suggesting that he fired his own pistol once in his efforts to escape. (R. p. 58, lines 1-15). Victim died from his wounds shortly thereafter.

Investigation and Evidence Presented at trial

Testimony of Alicia Youmans

Ms. Alicia Youmans, (hereinafter "Alicia") testified that she grew up in the same neighborhood as both Victim and Appellant, and that Victim was a close friend of her brother's. (R. p. 11, line 20 through p. 12, line 5). She testified that she recalls the events of May 23, 2015, when Victim was murdered. (R. p. 12, lines 6-8). She testified that at the time she was on the porch at 59 W. Estates Road. She explained the layout of the area and noted that the two main streets in relation to the murder were W. Estates Road and E. Lane. (R. p. 13-14). Alicia testified that she, her sister Tyeisha Youmans (hereinafter "Tyeisha"), Yvette Walker, Mr. Stacey Hartzog, and Appellant were all at 59 W. Estates Road prior to Victim's arrival. (R. p. 14, lines 14-21; pg. 16). Alicia testified that Victim came up to the house and asked her for a couple cigarettes. (R. p. 16, lines 6-12). She testified that she has known both Appellant and Victim for many years and that she was friendly with both of them. (R. p. 26, line 21 through p. 27, line 9).

A verbal dispute began between Victim and Appellant, but Alicia could not recall what the argument was about. (R. p. 16, line 15 through p. 17, line 4). She testified that the argument ended when Victim walked away, after which Appellant got into his car and drove off. (R. p. 17, lines 5-7).

Alicia testified that both individuals headed toward E. Lane, and that she was able to see them clearly due to the street light on the corner. (R. p. 19-20). She testified that she remained on the porch once Appellant left, but that Tyeisha and Yvette both went inside. (R. p. 20, lines 11-15). Specifically, Alicia testified at trial, "Mr. Payne drove his car up to E. Lane, him and

[Victim] had another verbal dispute or whatever, he got out of his car, they were still arguing or whatever, and he turned to go back to his car. I'm not sure if something was said or what happened, but he – when he turned back around to face Mr. Odom, he began shooting at him.” (R. p. 20, lines 19-25).

She then further clarified her testimony by stating that she could see them arguing back and forth before Appellant got out of his car. (R. p. 21, line 12-16). When Appellant exited the vehicle he continued to argue with Victim. Appellant turned to go back to the car but did not get all the way there before turning back around and shooting at Victim. (R. p. 21, line 19 through p. 22, line 5). Alicia testified that Victim then ran away toward 550 E. Lane. (R. p. 22, lines 6-24). Alicia testified that she did not see Victim with a gun. (R. p. 26, lines 1-3). She realized that Victim had been shot when she saw Victim fall to the ground and wave his hand in the air. (R. p. 23, lines 17-23). Alicia testified, and identified via photograph exhibits, that there are multiple streetlights between 59 W. Estates and the location of the shooting; this lighting allowed her to see clearly despite the crime occurring at night. (R. p. 27, line 10 through p. 28, line 13).

Alicia called 911 and reported the shooting, but she did not provide much detail during her first phone call with the dispatch operator. However, she spoke with 911 services again a few minutes later and identified Appellant as the shooter, and described the vehicle and direction Appellant used when driving away from scene of the crime. (R. p. 24, line 2 through p. 25, line 1). Approximately 30 to 45 minutes after the shooting occurred, Alicia did as she was instructed by the dispatch operator and got in touch with one of the responding officer's on the scene and provided a written witness statement. (R. p. 25, lines 2-23; p. 33, lines 14-17).

On cross-examination, Alicia testified that Appellant had started the argument with Victim, and believed that the argument started when Appellant lifted his shirt to display his gun

to Victim as he arrived. (R. p. 29, lines 15-18; p.33, lines 2-10). Defense Counsel identified and introduced Exhibit 1 (Alicia Youmans' written statement) into evidence and had Alicia read her statement aloud. (R. p. 35-36). In doing so, she states:

On May 23rd, 2015, I was sitting outside at W. Estates talking with Montay Payne when Vante Odom came up walking and asked me for two cigarettes. As I was getting them, he and Montay Payne had some exchanged words. I didn't hear what they were saying. I only heard Vante Odom state to Montay Payne you're going to have to show me you're going to kill me. Devante walked up the road and Montay Payne got into his car and drove up the road. H stopped, they exchanged words. Montay got out of his car swinging his arms. After that they got real close to each other, and that's when Montay Payne pulled out his gun and shot Devante Odom. He jumped back into his car and left.

(R. p. 35, lines 11-25). Alicia admits on cross-examination that her written statement does not include details about a gun being in a waist band or that Appellant lifted his shirt to show his gun. (R. p. 36, lines 4-7; p. 37, lines 9-12). She also acknowledged that she did not provide any information about the shooter to 911 services when she called the first time. (R. p. 39, lines 6-10).

On re-direct, Alicia agreed that she had just watched one of her friends kill another friend, and she agreed that during the first call, the 911 dispatch operator told her that help was coming and to hang up the phone. (R. p. 41, lines 11-15; p. 41, lines 1-8). Alicia missed the initial call-back from the dispatch operator, but quickly called her back and provided the information regarding Appellant's involvement in the crime. (R. p. 41, line 16 through p. 42, line 3). She confirmed that she even had to step away from the crowd of people before she could speak with the 911 operator to give the requested information. (R. p. 42, lines 4-8). Alicia testified that she spoke with the police in person that night at her home, despite not wanting to,

because she felt like it was what she had to do, and what she needed to do. (R. p. 42, lines 11-20).

Testimony of Brandy Williams

Brandy Williams (hereinafter “Ms. Williams”) was barbequing with her family on May 23. (R. p. 46). She testified that she heard between seven and nine gun shots. (R. p. 46, lines 19-21). Ms. Williams testified that she was third to find the victim, with the first two being a larger set woman and small framed male – she did not know either individual. She noticed that victim had a wound to his upper left side and did not see a weapon near Victim. (R. p. 46-47; p. 49, lines 2-5). Ms. Williams testified that when she arrived the other individuals stated, “they didn’t know who shot him, said somebody got out the car, shot him, and they got back in the car and they left, and they didn’t know which direction he went or the person went, they just know it could have been like a black or blue Chevy Impala.” (R. p. 47, lines 16-21). Ms. Williams testified that she was certified in CPR and performed CPR on Victim for approximately thirty minutes with the assistance of another bystander. (R. p. 48, lines 15-20; p. 49, lines 14-21). She did not see a weapon near Victim during her assistance. (R. p. 49, lines 2-5). On cross-examination, Ms. Williams testified that it was 30 minutes before EMS arrived and that, as time progressed, as many as 10-15 people were around the body. (R. p. 49-50).

Testimony of Investigator James Andrew Chavis

Investigator Chavis was the on-call investigator for Barnwell County Sheriff’s office at the time of the shooting. (R. p. 52). He testified that the Victim had already been taken to the hospital by the time he arrived. (R. p. 53, lines 1-3). When he arrived, he met with road deputy responding officer, Sergeant Johnson, and then began processing the scene, which included

photographing the scene and marking evidence. (R. p. 53, lines 1-25).¹ He also commented that his job would include speaking with witnesses. (R. p. 54, lines 22-25).

Investigator Chavis identified Exhibit 8 as six .380 caliber shell casings which were found in the yard at the crime scene. (R. p. 56, lines 4 through p. 57, lines 13). He testified that all six casings were found close together within a 6-8 foot area, and all were located on the 550 E. Lane side of the road or in the edge of the front yard of 550 E. Lane. (R. p. 57, lines 12-25). Investigator Chavis testified that Exhibit 10 was a .380 projectile that was removed from Victim's body during autopsy. (R. p. 61, lines 15-19). Investigator Chavis also identified Exhibit 9, a .40 caliber casing, and testified that it was found near where Victim had been laying. (R. p. 58, lines 1-15).

On cross-examination, Investigator Chavis agreed that without the photographs from the crime scene, he was giving an estimation as to exactly where the .40 caliber round was recovered. (R. p. 63, lines 6-11). He also confirmed that he asked Officer Scott Peterson to speak with Alicia Youmans, as he was tied up processing the crime scene. (R. p. 66, lines 15-17). Investigator Chavis agreed that the crime scene remaining open for thirty minutes prior to arrival of law enforcement left open the opportunity for contamination, but testified that there were no bullet casings collected from the yard or street-side of the corner of W. Estates road and E. Lane. (R. p. 67, lines 3-7; p. 67, lines 14-21).

¹ Deputy Chavis testified that he was later made aware that the photographs taken at the crime scene were lost, and Deputy Chavis could not explain how this happened. (R. p. 55, lines 12-25).

Testimony of Scott Peterson

Chief investigator Scott Peterson testified that he was not working on the night of May 23, 2015, but was called out to the crime scene to help with crowd control. However, by the time he arrived the crowd had dispersed, so he offered his help with the investigation. (R. p. 91-92)

Investigator Peterson assisted Sergeant Johnson and recalls speaking to people at the Payne residence located at 25 W. Estate Road. (R. p. 93, lines 5-8). Appellant was not present at the time. (R. p. 96, lines 17-21). He also conducted the interview with Alicia Youmans and took her written statement. (R. p. 93, line 18 through p. 94, line 8). Investigator Peterson testified that he asked her to tell him what she saw, tell him everything, and then asked her if she'd provide a written statement, which she did. (R. p. 94, lines 1-8). The oral statement was recorded by video camera via Investigator Peterson's body-cam. (R. p. 94, lines 9-13). He identified Exhibit 1 as Alicia's written statement from that night. (R. p. 94, lines 21-25). Investigator Peterson testified that the oral conversation with Alicia lasted approximately ten minutes and that there were details discussed verbally that were not put in the written statement; he commented that this was normal. (R. p. 95, lines 3-14; 99, lines 16-21). He testified on cross-examination that he did not seek a supplemental statement from Alicia. (R. p. 100, line 15 through p. 101, line 5).

Investigator Peterson testified that to his knowledge no one else actually saw what happened; Alicia Youmans was the only eye-witness. (R. p. 96, lines 15-25). He confirmed the testimony of Investigator Chavis, noting that the shell casings were located on the side of the road adjacent to 550 E. Lane. (R. p. 97, lines 10-15).

Investigator Peterson recalled that Appellant turned himself in to law enforcement in Allendale about one week after the incident. (R. p. 96, lines 6-14). He testified that during the

week before Appellant turned himself in, he did not call to inform police that he was defending himself. (R. p. 101, lines 12-17).

Testimony of Officer Brian Johnson

Officer Johnson testified that he believes he was the first officer to respond to the scene. (R. p. 142, line 7-9). He testified that there were at least twenty people at the scene when he arrived, and described the scene as “chaotic”. (R. p. 142, line 10-23). He testified that initially there was some confusion about exactly where the crime scene was. (R. p. 143, lines 2-6). He testified that he talked to some people that were sitting on a porch on an adjacent property, but that they did not see anything. (R. p. 143, lines 23-25).

Officer Johnson testified that he spoke back with dispatch, and dispatch gave him the name of Alicia Youmans as an eye-witness. Officer Johnson called Alicia Youmans and then asked Investigator Peterson to contact her and obtain a statement. (R. p. 144, lines 1-6).

Officer Johnson agreed that he had information in his preliminary investigation which demonstrated that Tyeisha Youmans was on the scene; he believed that this information came from Jerome Creech. (R. p. 144, lines 9-16). He testified that he did not get a chance to speak with Tyeisha as the case was ultimately handed over to the investigators. (R. p. 145, lines 7-12). He testified that Jerome Creech was also identified as a potential witness, and a brief discussion with him suggested that Tyeisha and one other female were actually beside Victim immediately prior to the shooting occurring. (R. p. 146, lines 8-16). Officer Johnson was unaware if anyone else followed up with Mr. Creech. (R. p. 146, lines 17-18).

Testimony of Tyeisha Youmans (Defense case-in-chief)

Tyeisha Youmans (hereinafter “Tyeisha”) testified that she recalls the events of May 23rd, 2015. (R. p. 104, lines 12-14). She testified that she was at 59 W. Estates with her sister Alicia,

Stacey Hartzog, Appellant, and her Aunt Yvette. (R. p. 104, line 18 through 105, line 11). She testified that Appellant was calm and in a good mood, and had driven to the residence that evening. (R. p. 107, lines 1-9). (R. p. 108, lines 13-17).

Tyeisha testified that she did not know anything about Appellant lifting his shirt to show a firearm when Victim arrived. However, she also testified that she did not notice Victim's arrival until she heard Appellant and Victim "having words" with each other. (R. p. 111, lines 7-10; p. 109, line 6 through p. 110, line 14). She heard Appellant and Victim arguing, but could not remember what was said in the argument and commented that it only lasted a couple of minutes. (R. p. 109, lines 20-23; 110, lines 15-19). Tyeisha testified specifically, "I mean, they wasn't necessarily arguing, arguing, but they was just having words back and forth." (R. p. 110, lines 10-14).

Tyeisha recalled hearing Victim say he was going to walk down the road – to the top of the road to the intersection of E. Lane and W. Estates Road). (R. p. 110, line 22 through p. 111, line 2). She testified that Appellant then got back into his car, and she assumed he intended to go home, which was next door to where they were. (R. p. 111, lines 18-25). She testified that Victim was at the top of the road and that Appellant had walked into the road (E. Lane) after driving back to his home. Tyeisha testified that Victim and Appellant appeared to continue having words with each other. (R. p. 113, lines 2-15).

At this point, Tyeisha testified that she saw Appellant swing at Victim in an effort to punch him. (R. p. 113, lines 18-21). She testified that Victim moved back to avoid getting hit, but then pulled out his gun. According to Tyeisha, Appellant backed up with his hands gesturing like he did not want to fight, but was still having words with Victim. (R. p. 114, lines 21-24). She testified that she could see the gun in Victim's hand and described it as "kind of bright". (R.

p. 114, line 8-18). Tyeisha testified that Appellant turned to head back to 25 W. Estates, and Victim trailed behind him some, which suggested to her that they were still having words. (R. p. 114, line 24 through p. 115, line 9). She testified that Appellant reached his yard before shots were fired. (R. p. 115, lines 12-18). On cross-examination, Tyeisha testified that all of this began in the road and then moved to the grass of the yard of 25 W. Estates; she then described it as being toward the driveway that comes out into E. Lane (R. p. 131, line 5-132, line 4).

Tyeisha testified that Victim shot at Appellant, and Appellant turned back around to face Victim and shot back. (R. p. 129, lines 17-25). She testified that Victim fired first, but Appellant started firing immediately after, noting that it was “consecutive”. (R. p. 117, lines 5-6). Regarding how she knew Victim fired first, she testified, “Cause I could see, like, whenever he fired, I could see it coming from, like, his direction – like, whenever he was shooting the gun.” (R. p. 117, lines 8-12). She testified that in the middle of the shooting, Victim turned to run behind two trailers located on E. Lane to get away. (R. p. 117, lines 18-22; 118, lines 6-15). When Appellant stopped shooting he got into his car and left. (R. p. 118, lines 21-24). She testified that she thought Victim had run between the trailers, but he had fallen to the ground and that she could hear him gasping for air. (R. p. 118, lines 21-24). She testified that she viewed the shooting from the 59 W. Estates address. (R. p. 121, lines 6-10). On cross-examination, she maintained that she could hear Victim gasping for air, despite agreeing that 59 W. Estates was approximately 100 yards away. (R. p. 126, line 11 through p. 127, line 12).

Tyeisha testified that she went to where Victim fell and was one of the first few people to reach him. (R. p. 119, lines 9-17). She testified that Victim’s gun was right beside him when she arrived. (R. p. 119, lines 18-23). Tyeisha testified that she stayed for approximately 10-15

minutes, did not stay long enough to see CPR being performed on Victim, and was not familiar with Brandy Williams. (R. p. 119, line 24 through p. 120, line 13; 121, lines 3-5).

On cross-examination, Tyeisha admitted to giving inconsistent sworn testimony about whether she saw someone administering CPR. (R. p. 124, lines 11-19). Ms. Tyeisha Youmans' pretrial testimony was read aloud by the Solicitor: "People was walking around the body?" "It was, like, a few people around, I know I was one of them, who was right there close to him. "It was probably, like, two other people, because one other person was trying to put some pressure on his wounds." "And the other one, she was trying to do CPR." (R. p. 125, line 18 through p. 126, line 3). She agreed that her earlier testimony indicated that someone was performing CPR while she was present. (R. p. 126, lines 4-9).

Tyeisha testified that she left just before the police arrived, did not tell the police what she claimed she saw, did not tell anybody what she saw happen, and did not tell anyone what she saw until meeting with the parties' attorneys a month before trial. (R. p. 133, line 12 through p. 134, line 3). She testified that she and Appellant were very close to each other, that she visited him in prison, spoke with him on the phone while he was incarcerated, and that their conversations would end with "I love you". (R. p. 134, line 4-22). She admitted that she did not have that sort of relationship with Victim. (R. p. 134, lines 23-25). She testified that despite her alleged knowledge of the incident, and the contradiction of the murder charges against Appellant that she could provide, she did not go to police because she did not want to get involved in it. (R. p. 135, lines 1-12). Tyeisha testified that she found out that defense counsel wanted to speak with her when he texted her and called her, but she had no idea how he obtained her contact information. (R. p. 136, line 22 through p. 137, line 7).

Testimony of Demontay Payne

Appellant testified that he lived at 25 W. Estates (testimony demonstrated that Appellant lived with his grandmother). (R. p. 147, lines 19-20; p. 154). He testified that he was sitting down with Tyeisha Youmans, Alicia Youmans, and Yvette Walker on May 23, 2015, at 59 W. Estates. (R. p. 149, lines 2-12). Appellant testified that he was listening to the girls talk, and had driven over from 25 W. Estates about 20 minutes earlier when Victim walked up and asked to buy two cigarettes from Alicia Youman. (R. p. 150, lines 5-23; p. 151, lines 15-18). Appellant testified that he remembers Alicia going into the house to get the cigarettes. (R. p. 152, lines 5-6).

Appellant testified that Victim said something to him, but he could not remember what was said, only that they then engaged in an argument. (R. p. 152, lines 10-14). Appellant testified specifically that he was calm during the exchange. (R. p. 152, line 20-24). He testified that Victim never received his cigarettes, and that the girls told him to leave; after which Victim walked up to the top of the road beside Appellant's yard, at the corner of E. Lane and W. Estates. (R. p. 153, lines 4-17). Appellant testified that the girls told him "not to follow" Victim, and he said he was not going to. He then claimed that he left and drove home next door to his grandmother's house, where he lives. (R. p. 154, lines 9-24).

Appellant testified that as he was getting out of the car when Victim came toward him and shot at him. (R. p. 155, lines 3-11). He testified that he saw Victim coming, they exchanged words, and then Victim fired at him. *Appellant explicitly testified that he fired back in self-defense.* (R. p. 155, lines 12-24). *He testified specifically that he was backing up while shooting, was not paying attention to where he was shooting, and does not recall how many times he fired.* (R. p. 156, lines 5-21). On cross-examination, Appellant reiterated the manner and reason for

which he shot at victim, stating "When you're backing up not looking, you can't see who you're shooting at or what you're shooting , you just know you're shooting to get someone away from you or anything that's firing at you away." (R. p. 164, lines 15-20).

Appellant testified that Victim's gun was chrome and black. He did not see where Victim ran to (as he was looking back running away). However, he did see Victim on the ground as he jumped into his car and pulled off. (R. p. 157, lines 2-8). Appellant testified that he drove off because he was scared. (R. p. 157, lines 6-8). Appellant testified that he turned himself in to Allendale Police Department the day after he learned of his arrest warrant. (R. p. 157, line 11 through p. 158, line 20). He testified that he had no other recourse than to fire back as he did. (R. p. 159, lines 6-15).

During cross examination Appellant admitted that in prior statements he testified that he knew Victim had a gun on him, as he saw the bulge in the side of Victim's pants. (R. p. 160, lines 15-20). Appellant testified that despite the argument leading to him shooting Victim just 5 minutes later, he could not recall the topic of their argument. (R. p. 160, line 24 through p. 161, line 6). Appellant claimed that he was calm, and that Victim was out of control. (R. p. 161, lines 16-18). Appellant was asked: if he was calm and Victim had left, why did the girls need to tell him not to follow Victim? Appellant was unable to provide a reasoned response, and stated simply "because he went to the top of the road and stayed there." (R. p. 161, line 23 through p. 162, line 4).

During cross-examination, the distance between Victim and Appellant at the time of the shooting was described in the courtroom by the distance between Assistant Solicitor. Miller and

Appellant, but not made clear for the record. (R. p. 165, lines 13-24).² Appellant testified that he did not get hit, and does not recall the car being hit either. (R. p. 166, lines 2-13).

On cross-examination, Appellant was asked “when did you have the verbal confrontation with [Victim] in the middle of E. Lane?” Appellant responded he did not remember, but confirmed that it happened. (R. p. 167, lines 7-15). He testified just moments later that he was not sure if the argument on E. Lane actually happened or not. (R. p. 167, lines 22-24). He likewise testified that he could not remember the content of the argument or the topic of the argument. (R. p. 167, lines 16-21). He also testified that he does not remember swinging at Victim. (R. p. 167, lines 13-15). Ultimately, concerning the argument which occurred at E. Lane, Appellant testified “I don’t remember if it happened or not. It was two years ago.” (R. p. 167, lines 16-24). Appellant admitted that he was carrying a gun on him that night, a .380 Hi-Point, likely had it in his pocket, and claims he was carrying it because he had received threats from other individuals he use to hang out with. (R. p. 168, lines 1-18). At the end of Appellant’s cross-examination, Appellant testified that he did not know of a problem between he and Victim prior to the shooting, and conceded only that Victim “probably had a hostile – hostile feeling about me.” (R. p. 168, line 20 through p. 169, line 4).

² This examination began when the Assistant Solicitor asked how far away Victim was when he fired his weapon. Appellant responded “He probably had been a little farther than you, a little father than you.” Appellant then again confirms that he fired while running away. The record lacks any reference to how far away the Assistant Solicitor was. – Unless the Assistant Solicitor was standing *immediately* in front of Appellant on the witnesses stand, this testimony would conflict with the forensic testimony wherein the stippling on Victim suggested that his left chest gunshot wound was received from a distance of 18inch to 2 feet away. (R. p. 165-166).

Forensic Evidence

Testimony of Tyler Sturkie

Mr. Sturkie is a SLED forensic scientist in the trace evidence department. (R. p. 69, lines 2-7). Mr. Sturkie testified that he conducted the test for the gun shot residue lifts taken from Victim's hands. (R. p. 69, lines 9-10). The tests for both of Victim's hands were positive for gunshot residue. (R. p. 74, line 5-12). Mr. Sturkie testified that gunshot residue tests can be positive in one of three ways: either the hand tested fired the weapon, was in close proximity to the weapon, or touched an object that had gunshot residue on it. (R. p. 74, lines 15-19).

Testimony of James Green

SLED forensic firearms examiner, James Green, concluded that only Hi-Point Firearms could match the rifling characteristics from Exhibit 10, and that all of the shell casings identified as Exhibit 8 were fired from the same gun. (R. p. 82, lines 11-17; p. 88, lines 1-7). Mr. Green also testified that the information accompanying Exhibit 9 (the .40 S&W caliber casing) indicated that it was recovered from beside victim's body. (R. p. 89, lines 20-24).

Testimony of Dr. Janice Ross

Dr. Ross performed Victim's autopsy and found evidence of four gunshot wounds. (R. p. 179, line 22 through p. 180, line 13). One gunshot struck the upper left chest, from front to back at a slightly downward angle, and exited the left back; this gunshot also presented "soot and stippling around it, which means that the barrel of the gun was closer to [Victim's] skin than the other wounds". (R. p. 182, lines 10-14; p. 184, lines 2-7). Dr. Ross estimated that based on the soot and stippling, the gunshot occurred between 18 inches and two feet. (R. p. 185, lines 16-24). The second gunshot entered through the right arm and traveled through to the right chest. (R. p. 182, lines 15-21). The third gunshot entered the left lower back, striking the aorta and pancreas,

and was recovered from underneath the left abdomen. (R. 182, line 24 through p. 183, lines 3). The fourth gunshot entered from the back right calf and exited out the front of the right calf. (R. p. 183, lines 4-6).

ISSUES AS THEY WERE PRESENTED AT TRIAL

With consent of the parties, and for purposes of witness scheduling, the trial court took up discussion of requested jury charges before the conclusion of evidence. Defense counsel requested a charge for voluntary manslaughter, arguing that he believed, “there’s been testimony, numerous testimony, about – of course it’s a jury issue, about interaction between the two, and we would ask that you consider allowing the voluntary manslaughter charge.” (R. p. 171, line 17-21). The state objected, arguing that there was no sufficient legal provocation for the lesser included offense. (R. p. 171, lines 9-16). Defense counsel also requested a self-defense charge which included language that once an individual is justified in shooting he may continue to shoot until the threat has ended. (R. p. 170, lines 21-25). This particular charge request was not objected to by the State at trial. The trial court requested law on the voluntary manslaughter issue and recessed for lunch.

Despite the court’s requests, defense counsel did not provide any case law supporting its requests for voluntary manslaughter, and only provided cursory argument for the charge, admitting that while the Appellant could not recall the content of the initial argument at 59 W. Estates, there was testimony that it was “somewhat confrontational and not cordial.” (R. p. 172, lines 2-13; p. 172, line 21 through p. 173, line 4). The trial court disagreed, finding no basis to charge sudden heat of passion, noting that Appellant testified that he does not remember if the subsequent argument and swinging even happened due to the two years that had passed since the shooting. (R. p. 173, lines 5-13). The trial court concluded that it was a question of law for the

court to determine whether the charge should be given, and in reliance upon *State v. Cook*, the court found no evidence to warrant the charge. (R. p. 174-175). The Court agreed to charge the jury on self-defense, but declined to include the language about “firing until you quit.” (R. p. 172, lines 14-20; p. 176).

ARGUMENT

- I. Was the trial judge correct in declining to provide a voluntary manslaughter jury charge when Appellant (1) did not testify that he acted under the heat of passion during the shooting, (2) testified that he fired his gun in self-defense, (3) demonstrated that he could not recall whether or not an argument ensued immediately before the gunfire, and (4) could not recall the topic of the possible argument, if an argument occurred at all?**

Appellant argues that the trial court erred in denying its request for a voluntary manslaughter charge to the jury on the grounds that there was evidence to support the charge. Specifically, Appellant alleges that there was “undisputed” evidence of a heated argument immediately prior to the shooting, evidence that Victim pulled a gun and shot at Appellant first, and that the judge erroneously based his decision not to give the charge upon Appellant’s failure to recall the content of the argument. Appellant’s reliance on these points is misplaced for a number of reasons.

Evidence of a “heated argument” immediately before the shooting is most certainly *disputable*, as is the circumstances for which Victim fired his own pistol, and the trial court recognized that Appellant could not even be certain whether an argument occurred at all, to say nothing of his inability to recall the content of the “possible” argument. Moreover, the testimony of witnesses who heard the first “argument” were reluctant to describe it as anything serious, and no one testified that the argument carried the requisite intensity that might support a heat of passion killing. Appellant’s own testimony demonstrated explicitly that he only shot back in self-defense, did so to try and get Victim away from him, could not recall the topic of argument,

could not recall if further argument occurred immediately before the shooting, and was retreating and shooting blindly as he attempted to get away. Appellant's claim is meritless as there is simply no evidence to establish that the trial court abused its discretion in failing to find the requisite heat of passion upon legal provocation for voluntary manslaughter.

Voluntary manslaughter is the unlawful killing of another human being in a sudden heat of passion, brought upon by sufficient legal provocation. *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). This heat of passion must carry such sway that it would produce an "uncontrollable impulse to do violence." *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000). It is true that our Supreme Court has ruled that self-defense and voluntary manslaughter are not mutually exclusive, but likewise our Court has found that a self-defense case can lack the necessary evidence to support voluntary manslaughter. *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604, 608-09 (2010). "Whether a voluntary manslaughter charge is warranted turns on the facts." *Id.* at 597. As a result, the basis for sufficient legal provocation can be difficult to discern, and has led to our courts' frequent struggle to delineate it from evidence sounding in self-defense. *Id.* at 597-598. Our courts have held that an unprovoked attack can constitute sufficient legal provocation for a heat of passion killing, but they have also found that a defendant's fear alone is insufficient to satisfy an entitlement to voluntary manslaughter. The evidence must demonstrate that the fear manifested itself in an uncontrollable impulse to do violence. *Id.* at 598-599.

Our courts have also found that mere words, no matter how opprobrious, are insufficient to establish legal provocation without being accompanied by some overt, threatening act which could have produced the necessary heat of passion that would result in an uncontrollable impulse to do violence. *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). A jury instruction

for voluntary manslaughter is only proper if there is evidence to demonstrate *both* a sudden heat of passion *and* sufficient legal provocation under the circumstances presented. *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000); *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996). These elements demonstrate that a voluntary manslaughter charge is only proper if there is evidence to demonstrate that a defendant was subject to a sudden heat of passion, and based on the circumstances, was reasonably put into such a state by sufficient legal provocation. It is the actual heat of passion itself that Appellant neglects to address and satisfy.

There are numerous instances where despite the defendant's request for voluntary manslaughter instructions, the facts of the case lacked evidence showing heat of passion and rendered self-defense as the only proper instruction. First, in *State v. Cole*, the Court concluded that there was "no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an "uncontrollable impulse to do violence." On the contrary, by Appellant's own testimony, he shot at the men to scare them away. The Court found that "Appellant's testimony appears designed to support a charge of self-defense, not heat of passion." *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000). In *Niles*, our Court recognized that the Appellant's own testimony did not establish that he was overtaken by a sudden heat of passion, but rather that he did not want to hurt victim, shot with his eyes closed, and only wished to scare victim away. As such, his testimony satisfied a self-defense instruction, but not a voluntary manslaughter instruction. *State v. Niles*, 412 S.C. 515, 522–23, 772 S.E.2d 877, 880–81 (2015). Chief Justice Toal's concurring opinion in *State v. Childers* noted that the defendant's own narrative was instructive, and demonstrated that he harbored no criminal intent whatsoever. The facts demonstrated that defendant was shot at first and defendant used his own gun to return fire, and "retreated from the property while firing multiple times over his shoulder." *State v. Childers*,

373 S.C. 367, 374–76, 645 S.E.2d 233, 237 (2007) (Toal, J, Concurring).

In *State v. Starnes*, our Court found that “manslaughter should not be charged simply because a defendant claiming self-defense testifies he was afraid.” *State v. Starnes*, 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2010). Our Supreme Court took considerable efforts to distinguish evidence of fear and how it should be evaluated in terms of voluntary manslaughter. Therein, our Court conceded that fear can serve as the basis for voluntary manslaughter, but ruled that inquiry does not stop with the conclusion that fear existed. *Id.* at 598. “Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.” *Id.* at 598-99. Lastly, and the authority cited by the trial court in Appellant’s case, *Cook v. State* notes that “whether or not the facts constitute a sudden heat of passion is an appropriate question for the court.” *Cook v. State*, 415 S.C. 551, 557, 784 S.E.2d 665, 668 (2015) (citing *State v. Niles*, at 522). Similar to the case at hand (if evidence supporting defendant is to be believed), defendant *Cook* attempted to walk away from Victim, but Victim cut him off. Our Court concluded that the fact the defendant was trying to walk away does not suggest he was incapable of cooling off or controlling his actions. *Id.* Likewise, the Court reasoned that Cook’s own statement did not indicate he lacked control over his actions. As such the case was rendered either a murder, or self-defense. *Id.* As in *Cook*, a voluntary manslaughter charge under the circumstances of Appellant’s case would encourage compromised verdict that would undermine the fundamental fairness of the trial. *Id.* at 559.

The trial court’s reliance upon and application of *Cook v. State* to the circumstances presented in Appellant’s case was proper. In Appellant’s case there are conflicting testimonies abound, but none satisfy the factual requirements needed to warrant a voluntary manslaughter charge, specifically that a heat of passion existed. The state’s witness, Alicia Youmans, testified

that an argument, however brief began on the porch of 59 W. Estates, and after a few minutes continued in the E. Lane intersection. The argument ended when Appellant seemed to walk away, only to turn around and begin firing at Victim. Here, there is insufficient legal provocation, as the testimony showed nothing more than verbal argument before Appellant shot Victim. It should be noted that the forensic evidence supports this testimony as the Victim attempted to run away between nearby trailers from the shooting, *and the sole .40 caliber round was found beside his body, not at the location in which he was shot at.* This evidence would suggest that he did not attempt to shoot back until well after being shot. It's also supported by the fact that Victim was struck four times, one occurring within a range of *at most* two feet, and Appellant was not shot at all.

Regardless of credibility, there is also evidence from Tyeisha Youmans. She testified that the initial argument at 59 W. Estates was not particularly heated, and chose to describe it as "having words". She also could not recall the subject matter of the dispute. She testified that from a distance, it appeared as though Appellant and Victim continued their dispute and that Appellant swung at Victim. Victim pulled out a gun which prompted Appellant to walk away with his hands up indicating he did not wish to fight. She testified that Victim followed Appellant to his yard, shot once at Appellant, and only after being shot at did Appellant turn back around and shoot back in self-defense. While she testified that Appellant shooting back was "consecutive", based upon her testimony Appellant did not act first. Under this evidence, we have absolutely no testimony to demonstrate the content of the argument or the reasoning for Appellant returning fire. While under this version of facts, there are both words and an overt threatening act, i.e. arguably sufficient legal provocation, there is still absolutely no context or evidence to determine that the necessary heat of passion existed; there is no evidence to

demonstrate that Appellant was out of control. In fact, it would appear the opposite, as under this version of facts, Appellant still maintained sufficient control to put his hands up and walk away from the altercation. Our Court has made it clear that both elements are necessary to warrant the charge, and the testimony from Tyeisha is lacking evidence of heat of passion.

Lastly, most significantly, and regardless of credibility, is the testimony of Appellant himself. Appellant testified that he could not recall whether a subsequent argument at the E. Lane intersection occurred, nor could he recall the subject matter of the dispute in the first place. Moreover, Appellant testified that he fired back in self-defense, and gave no indication whatsoever that his actions were a result of a heat of passion and an uncontrollable impulse to do harm. Appellant's specific testimony states, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you away." (R. p. 164, lines 15-20). Such testimony demonstrates that he was not overtaken by a desire to do harm to Victim, but was firing to get Victim away from him, and could not be sure if he was even firing at Victim during his retreat. In culmination, Appellant was asked if problems existed between he and Victim, and his *only response* was that he believed Victim probably harbored a hostile feeling toward him. (R. p. 168, line 20 through p. 169, line 4).

If any gray area remained at all as to whether the *lack of detail* in Tyeisha's testimony regarding heat of passion might create enough gray area to consider a voluntary manslaughter charge, the testimony of Appellant filled in the blanks with absolute clarity. The trial court was correct in finding that Appellant's testimony left no doubt as to the heat of passion element, wherein he ruled from the bench that Appellant's inability to remember any subsequent argument or the content of the dispute demonstrated a lack of heat of passion, and that in this

case there is likewise no indication that Appellant's fear manifested itself in an uncontrollable impulse to do violence. (R. p. 173, line 5 through p. 174, line 25).

This case, as was concluded by the trial court, is either a self-defense case or a murder case, but it does not support voluntary manslaughter. (R. p. 174, lines 16-18). Given the evidence presented and the precedent relied upon, the trial court did not err in denying the voluntary manslaughter charge, as there is no evidence demonstrating the shooting was committed in a sudden heat of passion.

II. Did the trial judge commit prejudicial error in refusing to instruct the jury as requested with language that Appellant, if deemed to be acting in self-defense, is justified to continue shooting until the apparent danger has ceased when Appellant's own defense theory demonstrated that he did not know whether he had shot victim and was firing behind his back while attempting to run away, and where such an instruction would constitute an charge on the facts?

Appellant argues that the trial court erred in declining to give its precise requested self-defense instruction which included language that the Appellant, if deemed to be shooting in self-defense was entitled to continue shooting until the threat had ended. While Respondent argues that the trial court's exclusion of this particular portion of the self-defense charge was not in error, as such a charge was not necessary under the facts and would otherwise constitute a charge upon the facts in violation of the South Carolina Constitution, the most convincing argument demonstrates that the issue is ultimately harmless in consideration of the facts presented at trial.

a. If the trial court's denial of the "shoot until you stop" language was in error, it is harmless error in light of the facts of the case.

"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.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct.App.1998)). "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.* The issue of a defendant justifiably firing multiple times at their assailant only becomes relevant if there is a reasonable concern that the jury would interpret a defendant’s continued discharge of a weapon as somehow detracting from his otherwise self-defending acts. This concern only arises in circumstances where the defendant is actually aware that he has shot the assailant or otherwise reduced the assailant’s threats, but leaves unanswered the question of whether danger still exists. As this is not the circumstance presented by Appellant’s case, any error by the trial court was harmless.

Succinctly put, the number of shots fired by a defendant in self-defense only matter to the jury if the facts demonstrate that the defendant knew whether the first of his shots had successfully ended or reduced the threat. If Appellant’s self-defense testimony is to be believed, then likewise would the jury believe the context in which the shots were fired. Appellant specifically testified at trial that after Victim shot at him he fired back in self-defense, was backing up while shooting, was not paying attention to where he was shooting, and does not recall how many times he fired. (R. p. 155, lines 12-24; p. 156, lines 5-21). These points were reiterated on cross-examination, wherein Appellant testified, “When you’re backing up not looking, you can’t see who you’re shooting at or what you’re shooting, you just know you’re shooting to get someone away from you or anything that’s firing at you away.” (R. p. 164, lines 15-20). Appellant also testified that he did not see Victim on the ground until he was driving away. (R. p. 157, lines 2-8).

Under these circumstances, the number of shots is irrelevant, as all were fired under the alleged initial threat posed by Victim, and Appellant, if believed, was retreating and unaware of

whether the first shots had any effect on the perceived threat. Moreover, the self-defense charge given by the trial court encompasses the leniency for which Appellant requested the additional charging language. In instructing on the second element of self-defense, the trial court instructs the jury that defendant must actually be in imminent danger or believe he is in imminent danger, and that consideration should be given to the physical condition and characteristics of the defendant and the assailant. (R. p. 230-231). Under the circumstances presented, if Appellant is believed, there is no evidence or testimony which demonstrated that Appellant continued to shoot Victim after knowingly eliminating the threat or incapacitating Victim. As this is the only factual scenario for which the additional charge language is applicable, the facts do not warrant the charge. There can be no prejudice to Appellant under the circumstances, as the requested charge was ultimately irrelevant to the case facts.

Appellant's requested charge is simply irrelevant in light of the factual scenario painted by the defense in support of self-defense. They argued to the jury that Victim fired first and Appellant fired back blindly while running away. The number of shots is irrelevant as there is nothing to demonstrate that the initial perceived threat had changed before the shooting ceased.

b. Appellant's requested charge is impermissible under the South Carolina Constitution.

South Carolina, by constitutional prohibition, does not permit a court to give jury instructions based on the facts of a case. S.C. Const. art. V, § 21. Moreover, the trial court was within its discretion to deny the charge based on the parameters guiding proper jury instructions.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "[T]he 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). “Generally, the trial judge is required to charge only the current and correct law of South Carolina.” *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” *Id.* Here, the charge was a current and correct statement of the law the elements of self-defense. “An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial judge’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *State v. Commander*, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” *State v. Dickey*, 394 S.C. 491, 512, 716 S.E.2d 97, 108 (2011). “The substance of the law is what must be charged to the jury, not any particular verbiage.” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). This issue was most recently addressed in *State v. Otts*. Therein, our Court found that it was in error to give instruction on defense of others at the request of the State. The Court’s ruling demonstrated that it is improper to give jury instruction which comments upon either party’s theory of the case. See *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018), reh’g denied (Aug. 16, 2018), cert. granted (Dec. 13, 2018), cert. dismissed as improvidently granted, No. 2018-001671, 2019 WL 1783684 (S.C. Apr. 24, 2019).

Under the circumstances presented, if Appellant’s version of facts is believed, there is nothing within the record which would bring into question his shooting multiple times during retreat. If the court were to instruct specifically on his right to do so, it may constitute a charge upon the facts impermissible under Article V of the South Carolina Constitution.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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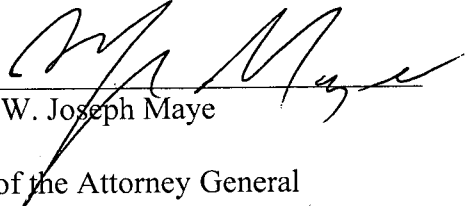
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July 1, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

RECEIVED
JUL 01 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

Demontay Markeith Payne,

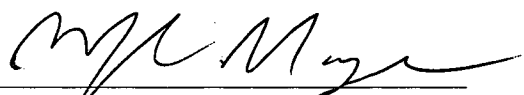
APPELLANT

Appellate Case No. 2017-002014

CERTIFICATE OF COMPLIANCE

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

This 1st day of July, 2019.


W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

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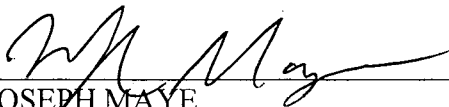
Appellate Case No. 2017-002014

CERTIFICATE OF SERVICE

I, W. Joseph Maye, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 1st day of July, 2019.


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ATTORNEY FOR RESPONDENT

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Demontay Markeith Payne, Appellant.

Appellate Case No. 2017-002014

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5846
Heard September 15, 2020 – Filed August 11, 2021

REVERSED AND REMANDED

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

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Attorney General W. Jeffrey Young, Deputy Attorney
General Donald J. Zelenka, Senior Assistant Deputy
Attorney General Melody Jane Brown, Assistant
Attorney General William Joseph Maye, all of Columbia;
and Solicitor John William Weeks of Aiken, all for
Respondent.

HUFF, J.: Demontay Markeith Payne appeals his conviction for murder, asserting the trial court erred in (1) failing to instruct the jury on voluntary manslaughter and (2) refusing to tailor its self-defense instruction to include language concerning a defendant's justification in continuing to shoot until the apparent danger has

ceased. Because we find, under the facts presented before the jury, Payne was entitled to a voluntary manslaughter instruction, we reverse and remand for a new trial.

FACTUAL/PROCEDURAL HISTORY

This matter stems from the shooting death of Devante Odom (Victim). Essentially, three different versions of what occurred just before and at the time of the shooting were presented to the jury. The State presented eyewitness testimony from Alicia Youmans, while Payne presented the eyewitness testimony of Alicia's sister, Tyeisha Youmans, as well as his own testimony.

Alicia stated that she knew Payne and Victim from growing up in the same neighborhood and Victim was a close friend of her brother. She testified that on the night of May 23, 2015, she was sitting outside Stacey Hartzog's home with Tyeisha, her friend Yvette, and Payne "having some girl talk" when Victim walked up "from the backside."¹ Payne had arrived at the location, driving "straight across the yard." Victim spoke to Alicia, Tyeisha, and Yvette, but he did not speak to Payne. Victim asked Alicia for two cigarettes, which she was going to give him. However, before she could retrieve them from inside the house, Victim and Payne began to argue. Alicia did not know what they were arguing about.

The argument ended when Victim walked away, and Payne got into his car. Victim walked up Wingo Estates Road toward Emerald Lane. Payne got into his car and pulled onto Wingo and drove up toward Emerald, in the same direction Victim walked. Victim made it to Emerald and was at the intersection. Alicia stated there was a streetlight at the intersection on Emerald and she could clearly see what was happening in the intersection.² Alicia testified that after Payne pulled away no one else was outside with her, as Tyeisha and Yvette had walked inside the home. Alicia then described as follows:

¹ Alicia did not know if Victim was welcome at Hartzog's home, but she thought Payne would have been welcome there.

² Alicia estimated the distance between where she was and the intersection to be "about a hundred yards or so."

Payne drove his car up to Emerald ... him and [Victim] had another verbal dispute or whatever, he got out of his car, they was still arguing or whatever, and he turned to go back to his car. I'm not sure if something was said or what happened, but he — — when he turned back around to face [Victim], he began shooting at him.

Alicia stated that she observed Payne and Victim "going back and forth" before Payne exited his car, and when Payne stopped his car and exited the vehicle, he was continuing to argue with Victim. When Payne turned to go back toward his car, he never made it to the car, but turned back around and "just started firing" at Victim. Once Victim started getting shot by Payne while on the street, he attempted to run between some trailers to get away.

Alicia realized Victim had been hit when she saw him fall to the ground and he started waving his arm in the air. Alicia called 911 and told them someone had been shot and needed help. Though she did not initially identify Payne as the shooter, she did so in a subsequent call. She also indicated in her verbal and written statements to an investigator that she saw Payne start shooting at Victim. By the time Alicia walked up to Victim, more than five people had gathered around. She did not see Victim with a gun and did not see a gun on the ground in the area of Victim. Alicia testified regarding numerous street lights in the area between Hartzog's home and where the shooting took place, and she agreed it was "pretty well lit up at night."

On cross-examination, when Alicia was asked who started the argument, she replied, "I would say Mr. Payne initiated it." Alicia estimated Payne was at the location ten to fifteen minutes before Victim arrived and, during that time, his demeanor was calm. She believed that Payne started the argument because, while he was sitting with the women, he lifted his shirt to show a gun when Victim walked up to them. Alicia read her written statement into the record, which provided as follows:

On May 23, 2015, I was sitting outside at Wingo Estates talking with ... Payne when [Victim] came up walking and asked me for two cigarettes. As I was getting them, he and ... Payne had some exchanged words. I didn't hear what they were saying. I only heard [Victim] state to ... Payne you're going to have to show me you're going to kill me.

[Victim] walked up the road and ... Payne got into his car and drove up the road. He stopped, they exchanged words. [Payne] got out of his car swinging his arms. After that they got real close to each other, and that's when ... Payne pulled out his gun and shot [Victim]. He jumped back into his car and left.

Alicia acknowledged that she did not mention a gun being in Payne's waistband or Payne showing a gun in her statement—or any subsequent statement—and agreed it would have been a very important fact to include. Alicia stated that Payne drove on Wingo, not across the yard to his residence, and he never pulled into his yard.

Brandy Williams testified she was at her parents' home on the night of May 23, 2015, when she heard seven to nine gunshots and called 911. After placing the call, she went over to the scene, where she observed two individuals next to Victim, who was lying on the ground. Williams performed CPR on Victim for thirty minutes, until EMS arrived. The Sheriff's Office arrived along with EMS. She stayed there about ten minutes after their arrival, and there was a large crowd of ten to fifteen people gathered by the time she left. She never saw a weapon on or near Victim. Williams agreed the Sheriff's Office was not there during the time she performed CPR, there were people walking back and forth around Victim's body, and the scene remained unsecure for those thirty minutes.

Investigator Andy Chavis, who was the on-call investigator at the time of the incident, testified Victim had already been taken from the scene and another officer had taped off the area when he arrived. Investigator Chavis photographed the overall scene and the evidence. He testified that six .380 caliber cartridge casings were recovered in front of a residence, with some of them in the road and a few in the yard, in an area of about six to eight feet. Investigator Chavis testified a .40 caliber cartridge casing was also found, and he stated it was located "close to where they said [Victim] was [lying]" and where he observed blood and items left by EMS. He performed a gunshot residue (GSR) test on Victim later that night at the morgue. A .380 caliber projectile was removed from Victim's body during his autopsy. Unfortunately, Investigator Chavis' photographs were lost, and he acknowledged the location of the shell casings was just an estimate on his part. He further agreed there would be an opportunity for crime scene contamination in a crime scene that was open for thirty minutes.

Tyler Sturkie, a SLED forensic scientist in the trace evidence department, testified regarding the results of the GSR test from Victim. Particles of GSR, particles consistent with GSR, and particles associated with GSR were found on Victim's right hand. As to his left hand, particles of GSR, one particle consistent with GSR, and one particle associated with GSR were found. Sturkie testified that finding GSR meant one of three things: the individual fired a weapon; the individual was in the vicinity when a weapon was fired; or the individual touched an object that had GSR on it.

SLED Agent James Green testified as an expert in the field of firearms identification. He examined the .380 caliber cartridge cases recovered from the scene as well as a .40 S&W caliber cartridge case. Agent Green opined the .40 S&W caliber was much larger and had different class characteristics from the .380 caliber cartridge cases and was not fired from the same gun. He further testified that the .380 caliber bullet recovered from Victim could have been fired from the same gun that fired the .380 caliber cartridge casings found at the scene. Agent Green acknowledged his report provided that the .40 S&W caliber cartridge casing was "collected from beside [V]ictim's body." Victim's autopsy revealed he suffered four gunshot wounds.

Investigator Scott Peterson testified he was initially called to the scene that night to help with crowd control, but the crowd had already dispersed by the time he arrived. He met with Alicia, and he was wearing a body camera that recorded her explanation of what had occurred that night. Alicia also provided him with a written statement. Investigator Peterson testified law enforcement attempted to locate other potential witnesses to the shooting, but he had no knowledge of anybody else who saw what happened.

Tyeisha testified that she was sitting outside Hartzog's home on May 23, 2015, with Alicia, Payne, and her aunt, Yvette Walker. Payne, who had driven up to the location, was engaged in conversation with the women and his demeanor was calm. Tyeisha, who had music playing in her car for the gathering, went to her car to change the music when she heard people "sounding like they [were] . . . arguing." She did not see Victim initially when he walked up because she was looking at her phone, but she looked up when she heard the arguing. She did not recall what was said during the argument or exchange. Tyeisha walked up to the porch to see what was happening, and Payne and Victim were still interacting, going back and forth. Tyeisha testified the two "[were not] necessarily arguing, arguing, but they [were] just having words back and forth." The exchange lasted a few minutes and ended with Victim saying he was going to walk to the top of the

road, which was the intersection of Emerald and Wingo. Tyeisha did not know anything about Payne lifting his shirt to show a firearm at that time.

After Victim walked toward Emerald, Payne got in his car to leave. Tyeisha assumed Payne was going home, which was right next door to their location. Payne turned out of the yard, got on Wingo, and turned right back into his yard. By then, Victim was at the top of the road. Tyeisha stated that once Payne got into the car, she believed they "started having words again because you could tell that they [were] . . . talking back and forth." Payne walked into the road and the two men were standing on Emerald having words when Tyeisha saw Payne try to punch Victim. She observed Victim move back so he would not get hit, and Victim then pulled out a handgun. Payne then "had . . . his hands. . . like 'I guess you don't want to fight' . . . [T]hey [were] still . . . kind of having words, because [Payne] kind of turned — — he turned around from him going back in the direction of the house." Victim was trailing behind Payne, and "they had to be still having words because [] Payne turned around and they [were] still, like, having words." Tyeisha explained that when she said Victim was trailing Payne, she meant that when Payne turned to walk in the direction of his house, Victim was coming behind him. Tyeisha testified she could tell they were still arguing as Payne was walking toward his house and Victim was following behind him because Payne turned around and faced Victim. Victim then "started firing" and Payne "started firing . . . right after that, it was consecutive." Tyeisha testified she could tell Victim fired first because she "could see it coming from . . . his direction."

In the middle of the shooting, Victim turned around and ran to get away. While he was running, Payne was shooting. Victim attempted to run between two trailers. When Payne stopped shooting, he got in his car and left. Tyeisha thought Victim had run between the trailers, but he had actually fallen on the ground. She did not see Victim fall but heard him gasping for air, and she went to him. When she got to Victim's location, Tyeisha saw Victim's gun right beside him.

Tyeisha stated there were only a few people with Victim at that time. One person was applying pressure on his wounds, and there was another person there with her as well. There was talk of someone coming to administer CPR, but Tyeisha testified she never saw someone actually doing so. Tyeisha stayed in the area of Victim about ten to fifteen minutes before she left the scene. At that time there were about thirty people out there, and law enforcement had not yet arrived. Tyeisha testified that there was no doubt in her mind that Victim shot at Payne first.

On cross-examination, Tyeisha acknowledged testifying in an earlier hearing that she had stated one person was putting pressure on Victim's wounds "and the other was trying to do CPR." She denied that occurred, though, explaining there was someone there who "kept saying she was going to give him CPR," but she was not doing that. Tyeisha confirmed that she observed the shooting from Hartzog's front yard, about a football field length away, and she could hear Victim gasping for air from that distance. She stated that when Payne left from Hartzog's home, he drove onto the road and made a right turn into his own driveway, parking parallel to his trailer on the end closest to Emerald; he got out of his vehicle, walked onto Emerald, confronted Victim, and had words with him; Payne took a swing at Victim, at which point Victim pulled out a pistol; Payne walked back toward his car and his home, at which point Victim shot at Payne; and Payne shot back at Victim. When asked if Payne shot over his shoulder or turned around, Tyeisha stated Payne turned around. She explained that Payne was walking toward his home, the two men were still "having words," Victim was following behind Payne, Payne turned around as they were having words, and then they started shooting. Tyeisha estimated Payne was five to ten feet from his car and five to seven feet from Victim. When asked where all this occurred, she stated, "At first it was in the road and then they came back in the yard and it was on the grass a little bit." They were in the road when Payne took the swing at Victim, and the shooting happened in the yard on the grass, not far from Emerald.

Payne testified concerning his version of the events of May 23, 2015. He stated he drove to the location and, like the testimony of Alicia and Tyeisha, said he was talking to Alicia, Tyeisha and Yvette. He was sitting in a chair at the bottom of the steps, and Tyeisha was by her car. Payne was laughing and listening to the ladies talk. He had been there for over twenty minutes when Victim walked from behind the home. Victim asked Alicia if he could buy two cigarettes. While Alicia was going into the home to get the cigarettes, Victim "said something to [Payne] that he could not quite remember." The two men "engaged in a verbal argument or exchanged words, and that was it." Payne remembered telling Victim, "I ain't worrying about it." Asked about the tone of their interaction, Payne stated he was calm but Victim "was more like, okay, okay, like, you know, I guess to like, we going to see about it, this, that, and the third." Victim never received the cigarettes. After their exchange, the women told Victim to leave.

Victim went to the top of Emerald and Wingo, standing at the edge of Payne's grandmother's yard. The women told Payne not to follow Victim, and Payne said he would not. Payne drove next door to his grandmother's home. Payne stated he

drove through the yard to get next door, and at this time Victim was at the top of the road at the intersection by Payne's yard. As Payne was exiting his car, parked at the edge of their trailer, he saw Victim coming. When asked what happened next, Payne replied, "We exchanged words. After he fired, I fired back in self-defense." Payne explained that after Victim fired at him, he was "backing up shooting . . . not paying attention to where [he] was shooting." He testified he was backing up because he was "afraid for [his] life." Payne did not recall how many shots were fired, but understood from a report that Victim was hit four times. He did not see where Victim ran because he was "looking back running." Payne testified that after the exchange of gunfire, he was scared. He jumped in his car and pulled away and, when he looked to his left, he saw Victim on the ground. Payne testified he did not believe he was at fault on May 23, 2015. He stated he responded in the manner that he did because Victim fired at him, he could not have taken another course, and he had no other choice than to respond as he did. He testified there was no doubt in his mind that Victim fired at him first.

On cross-examination, Payne acknowledged he knew Victim had a gun because he could see a bulge on his side when Victim first approached Hartzog's house. He testified he did not remember what they were arguing about, and stated "I just remember him saying certain words to me and I said I wasn't going to follow him up, I wasn't worried about it." When challenged as to why the women would have to tell him not to follow Victim if he was calm, Payne replied, "Because he went to the top of the road and stayed there." Asked if he "drove straight . . . across the grass," Payne responded affirmatively. When the solicitor asked if he had not gone "down to Wingo . . . and . . . back into the driveway," Payne stated, "I don't remember that, sir." He also stated he did not remember whether his car door was still open when he exited the vehicle and Victim started coming toward him and fired, but he thought that it was. He did not remember how many times Victim shot at him. Payne agreed with the solicitor that Victim was walking toward him as he was exiting his car, Victim started shooting at him, and Payne started "firing and backing up." The solicitor then asked how Payne backed up if he was standing at the car with the door open and Victim started shooting at him. Payne replied, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you." Payne agreed he was "backing up toward the house" and was not "paying attention where [he was] shooting." The solicitor asked Payne "When did you have the verbal confrontation with [Victim] in the middle of Emerald?" Payne stated he did not remember. He also testified he did not remember swinging at Victim in the middle of Emerald. The following colloquy then occurred:

[Solicitor]: What were you and [Victim] arguing about when you were standing in the middle of Emerald Lane after he had walked away, after you had driven up, and after you came back together? What were the two of you arguing about then?

[Payne]: I don't remember, sir.

[Solicitor]: Well, did it happen or did it not happen?

[Payne]: I don't remember if it happened or not. It was two years ago.

Payne testified he believed he had his gun on him when he exited the car. When asked why he was carrying a gun that night, Payne explained, "I had received threats from other individuals that . . . used to hang with him." He agreed that he received threats from people who "used to hang with [Victim]" but denied that he knew there was a problem between him and Victim. When asked if he thought there was a problem between him and Victim after they had their argument, Payne replied that Victim probably had a "hostile feeling" about him.

Former Barnwell County Sheriff's Deputy Brian Johnson testified he was the first officer to arrive at the incident location. He described the scene as chaotic with a large number of people—more than twenty—and testified "it was difficult, to say the least, to secure the scene." They had to call for additional units from Barnwell, Williston, and Blackville to control the crowd and secure everything. EMS stood by and would not enter the scene until it was secured. Chief Johnson testified Jerome Creech told him that Tyeisha Youmans was on the scene that night, and confirmed he had information on the night of the incident that Tyeisha was at the scene. He stated that Creech said he saw a female standing by Victim and another person he identified as Tyeisha, "and then the shooting started." He did not know if anyone "follow[ed] up with Jerome Creech."

At the close of evidence, defense counsel requested the trial court charge the jury that "[i]f the defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." He also sought a charge on voluntary manslaughter. The trial court declined to charge voluntary manslaughter, reasoning there was no factual basis that Payne acted in a sudden heat of passion or that his fear created an

uncontrollable impulse to do violence. The trial court also declined to give the requested "continuing to shoot" charge, stating such was "more or less a charge on the facts." The trial court thereafter gave the jury a very limited and general self-defense charge. The jury found Payne guilty of murder, and the trial court sentenced him to thirty-five years' imprisonment.

ISSUES

1. Whether the trial court erred in failing to instruct the jury on voluntary manslaughter when (1) the undisputed evidence showed Payne and Victim were in a heated argument immediately prior to the shooting; (2) there was additional evidence that Victim pulled a gun and shot at Payne immediately prior to Payne returning fire; and (3) the trial court based its decision not to instruct the jury on the lesser-included offense on the fact that Payne testified that he did not remember the content of the argument.

2. Whether the trial court erred in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.

STANDARD OF REVIEW

"In reviewing jury charges for error, we must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (quoting *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)). "To warrant reversal, a trial [court's] charge must be both erroneous and prejudicial." *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018) (quoting *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)).

LAW/ANALYSIS

I. Failure to Instruct Voluntary Manslaughter

"The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (quoting *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)). "In determining whether the evidence requires a charge on a lesser-

included offense, we view the facts in the light most favorable to the defendant." *Id.*

A. General Voluntary Manslaughter Law

Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing.

State v. Smith, 391 S.C. 408, 412-13, 706 S.E.2d 12, 14-15 (2011) (citations omitted). "[A]n overt, threatening act or physical encounter *may* constitute sufficient legal provocation." *Id.* at 413, 706 S.E.2d at 15. "For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing." *Id.* "Even when a person's passion has been sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).

"To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). "If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." *Id.* "Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." *Id.* at 597, 698 S.E.2d at 608.

"When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant." *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015).

Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. Rather, when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault—by some overt, threatening act—which could have produced the heat of passion.

State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) (citations omitted).

"A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. Nor is he entitled to a voluntary manslaughter charge merely because he was legally provoked. *Id.* at 597, 698 S.E.2d at 608. "Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation." *Id.* Though one's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion, the mere fact that one is afraid is insufficient, alone, to entitle a defendant to a voluntary manslaughter charge. *Id.* at 598, 698 S.E.2d at 609. "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence." *Id.* "Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." *Id.* at 598-99, 698 S.E.2d at 609.

A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not

justify it. This is the distinction between voluntary manslaughter and self-defense.

Id. at 599, 698 S.E.2d at 609. "[E]vidence of self-defense and voluntary manslaughter may coexist and . . . a charge on self-defense **and** voluntary manslaughter may be warranted" under the appropriate circumstances. *Id.*

B. Specific Voluntary Manslaughter Charge Cases

The parties cite to appellate decisions in which our courts have either found a voluntary manslaughter charge warranted or unwarranted based upon the facts of the case. We discuss several of the cases addressing the opposing determinations below.

In *State v. Gilliam*, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988), the defendant appealed his murder conviction, asserting he was entitled to a charge on the lesser-included offense of voluntary manslaughter. There, the defendant, who had been in a previous relationship with Daisy, physically assaulted Daisy at her place of work. *Id.* The defendant was angry with Daisy because Daisy persisted in making harassing phone calls to his wife. *Id.* Daisy also taunted the defendant, provoking his attack. *Id.* A few hours after his assault on Daisy, the defendant went to the Brown Derby to look for the victim—Daisy's lover—because Daisy had told the defendant that the victim wanted to see him. *Id.* The defendant testified that he had no intention of shooting the victim. *Id.* Upon the defendant finding the victim, "[t]he two men began arguing and [the victim] made threatening statements to [the defendant]." *Id.* "[The victim] then took a gun from his pocket and shot at [the defendant] before [the defendant] could reach his own gun." *Id.* "[The defendant] shot back at [the victim], killing him." *Id.* Our supreme court determined the evidence supported a charge of voluntary manslaughter, concluding "[the defendant's] testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion." *Id.* at 397, 373 S.E.2d 597.

In *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993), our supreme court reversed the defendant's murder conviction, finding he was entitled to a charge on voluntary manslaughter under the facts of his case. There, the defendant and some friends were outside a grocery store when the victim approached the group and began berating the defendant. *Id.* at 398, 434 S.E.2d at 273. The two men argued and "bumped chests," and the defendant aimed an unloaded pistol at the victim and pulled the trigger. *Id.* One of defendant's companions broke up the

fight, and the victim entered the grocery store. *Id.* After he loaded a clip of ammunition into his pistol and fired a single shot into a sign located nearby, the defendant followed the victim into the grocery store, and the two men began arguing and shouting at each other again. *Id.* "According to the State's witnesses, [the defendant] challenged the [victim] to 'take it outside,' to which the [victim] replied, 'Man, I am unarmed. Do you expect me to walk outside and let you kill me?'" *Id.* While there was some evidence that the victim spread his arms away from his body to show he had no weapon, the defendant's witnesses testified that the victim "belittled [the defendant] by telling him, 'You think you are a big man because you got a gun,'" and "then moved toward [the defendant] in a menacing fashion with his arms and hands outstretched toward [the defendant] as if to grab him." *Id.* After the victim raised his arms, the defendant shot him in the chest, the victim fell, and the defendant cursed the victim and then shot him again, this time in the head. *Id.* In finding the defendant was entitled to a voluntary manslaughter charge, the court determined, "[h]ere, there is testimony which, if believed, tends to show that the [victim] and [the defendant] were in a heated argument and that the [victim] was about to initiate a physical encounter when the shooting occurred." *Id.* at 399, 434 S.E.2d at 274. Noting that, in order to eliminate the offense of manslaughter as a lesser-included offense, "it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter," the court "conclude[d] that the trial [court] erred in refusing to instruct the jury regarding the offense of voluntary manslaughter." *Id.*

In *State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998), the defendant appealed his voluntary manslaughter conviction, asserting the trial court erred in submitting the issue of voluntary manslaughter to the jury. The evidence revealed the victim spoke with the defendant the day after the defendant's wife had barred the victim from a restaurant/bar attached to a motel run by the defendant and his wife. *Id.* at 540-541, 500 S.E.2d at 490-491. The defendant took the victim to speak with the defendant's wife and left. *Id.* at 541, 500 S.E.2d at 491. The victim and the defendant's wife argued, the wife stuck to her decision, and the victim angrily left the motel. *Id.* A few hours later, the victim's sister came to the motel and demanded to speak to the defendant's wife regarding the victim being barred from the premises. *Id.* According to the defendant, the sister was angry and threatened to physically attack his wife. *Id.* The defendant threatened to "kick her ass" if she tried to attack his wife, and the sister threatened to bring the family back later that night to "shut the place down." *Id.* The victim's brother and the victim arrived at the scene, and as the victim sat in his sister's car, the defendant approached the side of the car where the victim sat. *Id.* at 542, 500 S.E.2d at 491. An argument ensued between the defendant and the victim's sister, and she

informed the victim the defendant had threatened to "kick her ass." *Id.* According to the sister, the defendant stated, "Yes, I said it. I'll kick both of your asses," at which point the victim responded, "We'll settle this" and then turned to exit the car. *Id.* The sister testified there was a gun clipped to the victim's back, she saw the defendant had a gun in his hand, and she had exited the car when the defendant began shooting. *Id.* The sister stated the victim was never able to pull his gun out and fire it; that after the victim was hit with the first shot, he exited the car and began running, at which point his back was to defendant; and the defendant continued firing his gun. *Id.* The sister "unequivocally stated [the v]ictim never had a gun in his hand, or pointed a gun at [the defendant], while he was sitting in the car or before [the defendant] began shooting." *Id.* at 542-43, 500 S.E.2d at 491. The brother testified that as the victim was getting out of the car, the defendant pulled a gun from his pocket and began firing; the victim did not have a gun in his hand; the victim reached for his gun after the defendant fired the first shot; the victim staggered toward the back of the car as the defendant continued firing; after the first shot, the brother shouted for the victim to shoot the defendant, but the victim never raised his gun or fired at the defendant; and the gun fell from the victim's hand as he was being shot. *Id.* at 543, 500 S.E.2d at 492. The defendant gave a different version of the events surrounding the shooting. *Id.* He testified he was armed at the time because he was going home and it was his habit to take his gun home. *Id.* He did not think there would be a problem when the victim showed up because he believed they were on good terms. *Id.* He asked the victim to leave, but the victim ignored him or did not hear him. *Id.* He told the victim he had threatened to "whip [his sister's] ass[,] . . . but told [the v]ictim he did not mean it." *Id.* "He told [the v]ictim they did not need any problems, to which [the v]ictim responded, 'Yeah, we've got problems.'" *Id.* According to the defendant, "[the v]ictim got out of the car, took his sunglasses off with his right hand, and with his left hand pulled out a pistol." *Id.* He stated that the victim "cocked and pointed the gun at [him]," and as the victim was exiting the car, the brother yelled for the victim to shoot him. *Id.* at 543-44, 500 S.E.2d at 492. The defendant "got scared, pulled his own gun and fired." *Id.* at 544, 500 S.E.2d at 492. There was evidence the defendant fired his gun four times in rapid succession. *Id.* at 542 n.7, 500 S.E.2d at 491 n.7. An autopsy revealed the victim died of three gunshot wounds: two in the chest and one in the back. *Id.* at 544, 500 S.E.2d at 492. Our supreme court found no error in submission of the offense of voluntary manslaughter to the jury, stating as follows:

We find there is evidence in the record which would tend to show [the defendant] acted in sudden heat of passion upon sufficient legal provocation. [The defendant] was

in a heated argument with [the v]ictim and [the s]ister. He testified he was afraid for his life because [the v]ictim physically threatened him. Contrary to his argument, fear can constitute a basis for voluntary manslaughter.

Id. at 549, 500 S.E.2d at 495.

In *State v. Johnson*, 333 S.C. 62, 63, 508 S.E.2d 29, 30 (1998), our supreme court again reversed a defendant's murder conviction for failure to give a voluntary manslaughter charge. There, considering the evidence in the light most favorable to the defendant, the court noted the following facts:

[I]n the early morning hours of December 12, 1995, [the defendant] was "hanging out" with Frank Moore, Travis Croft, and the victim According to witnesses, [the victim] had taken the keys to [the defendant's] vehicle and wouldn't give them back to him. [The victim] then went into his house, and [the defendant] left. Moore and Croft were still outside [the victim's] house 15-20 minutes later when [the defendant] returned. [The victim's] live-in girlfriend . . . testified [the defendant] knocked on their door at approximately 2:00 AM and asked to speak to [the victim]. [The victim] came to the door and he and [the defendant] "had words." [The victim] then went outside and "sort of pushed [the defendant] off the porch." According to one witness, [the victim] was the first one to throw a punch. Another witness testified that "[the victim] was getting the best of [the defendant]." Several witnesses testified that, during the fight, [the defendant] took out a gun and shot [the victim] several times; [the victim] died a short time later.

Id. at 63-64, 508 S.E.2d at 30.

The court noted our law provides that the appellate court must view the facts in a light most favorable to the defendant in determining whether the evidence requires a charge on voluntary manslaughter, and "[t]o warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Id.* at 65, 508 S.E.2d at 31. The court further observed that in *Lowry*, it "held the defendant

was entitled to a charge on voluntary manslaughter [when] the defendant and victim were in a heated argument and 'the [victim] was about to initiate a physical encounter' when the shooting occurred." *Id.* at 65-66, 508 S.E.2d at 31. The court then concluded, "Here, [the defendant] and the victim had 'had words' and were engaged in a fight at the time the shooting occurred. Under *Lowry*, it is patent [the defendant] was entitled to a voluntary manslaughter charge." *Id.* at 66, 508 S.E.2d at 31.

In *State v. Knoten*, 347 S.C. 296, 299-300, 555 S.E.2d 391, 393 (2001), the defendant—convicted of murder in the deaths of the victim and the victim's niece—appealed the trial court's refusal to instruct the jury on voluntary manslaughter in connection with the victim's death. The defendant "gave a number of inconsistent statements to police, each more inculpatory than the last." *Id.* at 301, 555 S.E.2d 393-94. In his second signed statement, the defendant stated that he and the victim had consensual sex. *Id.* at 301, 555 S.E.2d 394. He claimed that, afterwards, the victim became agitated, armed herself with a knife, threatened the defendant, cut him on his leg, and chased him out of the apartment. *Id.* The defendant then retrieved a foot-long steel bar from the trunk of his car and reentered the apartment. *Id.* The victim "cut him again, and he hit her over the head with the metal bar," causing the victim to collapse. *Id.* Our supreme court held, "Viewing the evidence in the light most favorable to [the defendant], a charge of voluntary manslaughter was warranted here." *Id.* at 303, 555 S.E.2d 395. The court agreed with the defendant's argument that, because there was evidence the victim cut the defendant before he struck her with the pipe, the trial court should have instructed the jury on voluntary manslaughter, in particular noting in the defendant's second statement he claimed the victim cut him twice; that after the first cut he was chased out of the apartment and retrieved a metal pipe from his car; and he reentered the apartment and killed the victim after she cut him again. *Id.* at 305, 555 S.E.2d 396. Because there was evidence to support a conviction for the lesser-included offense of voluntary manslaughter, the court reversed the defendant's conviction in the slaying of the victim. *Id.* at 309, 555 S.E.2d at 398.

In *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000), our supreme court found the trial court did not err in refusing to instruct the jury on voluntary manslaughter, determining there was no evidence of sudden heat of passion or sufficient legal provocation. There, the victim's friend attacked the defendant's friend, resulting in the defendant intervening to fight the victim's friend, and the victim then breaking up the fight. *Id.* at 99-100, 525 S.E.2d at 512. However, the victim's friend continued to behave hostilely, threatened the defendant's brother, overturned the defendant's stereo as he walked out, and promised to return. *Id.* at

100, 525 S.E.2d at 512. Once the victim and his friend went out the front door of the defendant's apartment, the defendant went out his back door; went next door to his mother's apartment where he retrieved a gun; and went out his mother's front door and stood in his front yard, where he claimed he heard shots being fired. *Id.* The defendant fired his gun, killing the victim. *Id.* The defendant claimed "he fired toward the ground, but the cause of the victim's death was determined to be a gunshot wound to the chest." *Id.* The shooting occurred three to five minutes after the victim and the victim's friend left the defendant's apartment. *Id.* The defendant stated he fired the gun because he was scared they might be coming back, he was scared they might come into his house and kill or hurt him and his brother, and he did not know what to do and "was scared." *Id.* "[The defendant] testified that he did not intend to shoot the victim, he was just scared and wanted to frighten [the victim's friend] and the victim away." *Id.* Viewing the evidence in the light most favorable to the defendant, the court noted that the victim's friend assaulted the defendant's friend and stole his jewelry; the defendant twice fought briefly with the victim's friend and was pulled off the victim's friend by the victim; and the victim's friend pushed over the defendant's stereo, after which the victim and his friend left the defendant's apartment. *Id.* at 102, 525 S.E.2d at 513. The court found these facts did not constitute sufficient legal provocation for voluntary manslaughter and, further, "there was no evidence presented that [the defendant] was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.'" *Id.* On the contrary, the court found that "by [the defendant's] own testimony, he shot at the men to scare them away," and the defendant's "testimony appear[ed] designed to support a charge of self[-]defense, not heat of passion." *Id.* Additionally, the court determined, "[e]ven if [the defendant] had been in the heat of passion during the confrontation in his apartment, three to five minutes had passed in which he had time to go to his mother's apartment and find his gun," and that "[f]ar from passion, these actions indicate 'cool reflection.'" *Id.*

In *State v. Childers*, 373 S.C. 367, 370, 645 S.E.2d 233, 234 (2007), the defendant became upset when the victim, his former girlfriend, refused to leave her mother's house to talk to the defendant. Later that night, the defendant saw the victim, the victim's sister, and the sister's ex-husband at a turkey shoot, where a confrontation ensued. *Id.* Evidence was presented that in the following early morning hours the victim, her sister, and the sister's ex-husband were standing in the victim's mother's yard talking after the turkey shoot when the defendant "suddenly appeared in the yard and shot the victim twice, at close range, in the head." *Id.* The defendant testified, however, that after the turkey shoot, he decided to walk from a friend's home to the victim's mother's home to talk to the victim. *Id.* at 370, 645 S.E.2d at 234-35. He claimed he carried a loaded gun during the walk to protect himself

from stray dogs and, as he approached the group standing in the yard, the sister's ex-husband shot at him first. *Id.* at 370, 645 S.E.2d at 235. The defendant stated that "[h]e returned fire, and in doing so, he shot the victim." *Id.* The defendant also testified "he did not visit the victim that night with the intention of shooting anyone, but he fired because he was fired upon." *Id.* at 370-71, 645 S.E.2d at 235. The majority of the court found the trial court did not err in failing to give a jury charge on voluntary manslaughter. *Id.* at 372, 645 S.E.2d at 235-36. Two of the justices determined this court erred in concluding the defendant was entitled to a voluntary manslaughter charge based on the fact that, although the victim did not provoke the defendant, the provocation by the sister's ex-husband could be transferred to the victim under the doctrine of transferred intent. *Id.* at 373-74, 645 S.E.2d at 236. They concluded, "[The defendant's] testimony does not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation by the victim because, contrary to the Court of Appeals' decision, the overt act that produces the sudden heat of passion must be made by the victim." *Id.* One of the justices concurred in result in a separate opinion, finding the defendant's own factual scenario "is completely void of any evidence remotely supporting a charge of voluntary manslaughter," because "[v]oluntary manslaughter, by definition, requires a criminal intent to do harm to another," and "according to the defendant's story, he had no criminal intent whatsoever." *Id.* at 375, 645 S.E.2d at 237 (Toal, C.J., concurring). Finally, two justices dissented from the majority on this issue, disagreeing with the State's contention that the defendant failed to present evidence that he was "inflamed by passion" when he returned fire and noting "the jury could have found the 'heat of passion' in [the defendant's] testimony that he fired back because he was scared and feared he would be shot at again." *Id.* at 378, 645 S.E.2d at 238 (Pleicones, J., dissenting; Moore, J., concurring in dissent).

In *Starnes*, 388 S.C. at 594-95, 698 S.E.2d at 607, the defendant and the two victims, Bill and Jared, were at the defendant's home when defendant shot the victims. Prior to the shooting, the defendant, Bill, and Jared had been at the defendant's restaurant, eventually leaving to go to a local bar. *Id.* at 593, 594, 698 S.E.2d at 606, 607. There was evidence presented that, while at the bar, Bill physically attacked the defendant in the bathroom. *Id.* at 594-95, 698 S.E.2d at 606-07. Later, after the three men left the bar, Bill told the defendant to take them to Jody Fogle's house to get drugs. *Id.* However, the defendant instead dropped Bill and Jared off at his house, picked up Jody, and brought Jody back to his house. *Id.* at 595, 698 S.E.2d at 607. The defendant testified as follows: he heard Jared cussing and saw him pointing a gun at Jody; he ran into the bedroom and retrieved his gun; as he exited the bedroom, Bill said "whoa" and pointed a gun at him; and

he shot Bill and then he turned and shot Jared. *Id.* He further stated, "I was scared and I was frightened. When Jared pulled the gun on Jody, it scared me." *Id.* at 599, 698 S.E.2d at 609. On appeal, the court acknowledged "[w]hile this testimony is evidence that [the defendant] was in fear, there is no evidence [the defendant] was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence," and determined "[t]he only evidence in the record [was] that [the defendant] deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." *Id.* Accordingly, the court concluded there was no evidence of sudden heat of passion upon sufficient legal provocation and, therefore, upheld the trial court's refusal to charge the jury on voluntary manslaughter. *Id.* at 599-600, 698 S.E.2d at 609.

In *Cook v. State*, 415 S.C. 551, 553-54, 784 S.E.2d 665, 666 (2015), the defendant and the victim, who lived in the same apartment complex, exchanged words via text message one afternoon. A couple of hours later, when the defendant, his girlfriend, and his cousin returned to the apartment complex, they found the victim sitting outside on the porch. *Id.* The victim "made a series of threatening comments directed at [the defendant] echoing similar sentiments from the text messages he sent earlier that day." *Id.* at 554, 784 S.E.2d at 666. Though "[the defendant] admitted [the v]ictim's last comment was 'enough to really strike [him] in [his] heart,' [the defendant] continued up the stairs without saying anything to [the v]ictim." *Id.* (third and fourth alterations in original). After eating some watermelon inside his apartment, the defendant "placed the watermelon rinds inside a plastic bag, grabbed his gun from under the couch, and went downstairs to discard the bag." *Id.* Once downstairs, the defendant "did not have a chance to get to the dumpster because [the v]ictim was approaching him, grimacing and threatening to shoot him in 'broad daylight.'" *Id.* The defendant stated that the victim "had one of his hands in his back pocket, acting as if he had a gun and was going to pull it out and shoot [the defendant] at any moment." *Id.* At the same time, the victim's nephew was approaching the defendant from the opposite direction "as if he was about to 'jump' him," and the defendant and the victim again exchanged words. *Id.* The defendant said "he tried to keep walking down the sidewalk, but [the v]ictim kept cutting him off," and the victim continued to approach him "huffing, grimacing, and threatening to kill him." *Id.* at 555, 784 S.E.2d at 667. The defendant said, "'the dude was coming up' and 'before I knew it, I fired a shot.'" *Id.* The defendant then fired a second shot and ran. *Id.* Both shots struck the victim in the face. *Id.* The defendant testified he fired the second shot "to make sure he was gone." *Id.* The defendant explained in his oral statement: "'I was terrified.' 'I didn't even sit there for a second. As soon as I saw him reaching I just shot.' 'I wasn't taking any chances.' 'It was either me or him,

man, it really was." *Id.* The victim's nephew testified concerning the events, stating he observed the victim get up and walk over to the defendant, that "from there on they were just talking real softly," and he "could hardly tell it was an argument." *Id.* The defendant then "stepped back, pulled out a gun and shot [the v]ictim." *Id.* The defendant "then walked over [the v]ictim, did some kind of gesture, shot [the v]ictim again, and ran." *Id.* The victim's girlfriend testified that once the defendant came downstairs, she saw the victim approach the defendant and say "keep my name out of all this mess y'all got going on out here. I don't have nothing to do with that." *Id.* According to her, "[t]he next thing she heard was a gunshot," and "after seeing [the v]ictim fall to the ground, . . . she saw [the defendant] walk over [the v]ictim and shoot him again." *Id.*

Cook filed a petition for post-conviction relief, which was denied. *Id.* at 556, 784 S.E.2d at 667. Our supreme court subsequently granted Cook a direct appeal on the issue of whether "the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter because there was no evidence that he was acting in the sudden heat of passion." *Id.* Our supreme court agreed the trial court committed error, stating as follows:

We do not believe the facts of this case support a finding that [the defendant] shot [the v]ictim in the sudden heat of passion. Here, [the defendant] stated he tried to walk away from [the v]ictim, but [the v]ictim kept cutting him off. The fact that [the defendant] was trying to walk away from the conflict does not suggest [the defendant] was incapable of cooling off. In addition, [the victim's nephew] testified that [the defendant] and [the v]ictim were talking softly and that he could hardly tell they were arguing. This too does not suggest that [the defendant] was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during [the defendant's] statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest [the defendant] shot [the v]ictim either with malice or in self-defense.

Id. at 557, 784 S.E.2d at 668.

In *Niles*, conflicting evidence was presented regarding the shooting death of the victim when the defendant, his fiancé, and Ervin Moore met the victim to purchase marijuana. 412 S.C. at 518, 772 S.E.2d at 878. The defendant and Moore testified at trial, and their testimony was at odds as to whose idea it was to rob the victim and whether the victim or the defendant fired the first shot. *Id.* Moore testified the defendant decided to rob the victim and Moore's role in the robbery was to identify the marijuana. *Id.* at 519, 772 S.E.2d at 878-79. Moore stated that he joined the victim in the victim's vehicle, and the victim produced the marijuana for his inspection. *Id.* at 519, 772 S.E.2d at 879. As Moore returned to their vehicle, the defendant had already exited that vehicle and Moore told the defendant the victim had the drugs. *Id.* The defendant leaned into the passenger-side door of the victim's car and spoke to the victim. *Id.* Moore heard two shots, saw the defendant leap into the back seat of his own car, and heard the victim fire a weapon in response. *Id.* The defendant and the victim shot back and forth multiple times, and the defendant had the drugs that he had stolen from the victim. *Id.* at 519-20, 772 S.E.2d at 879. The defendant, on the other hand, testified Moore acted alone, with Moore going over to the victim's vehicle to purchase the drugs. *Id.* at 520, 772 S.E.2d at 879. He then saw Moore and the victim fighting in the victim's vehicle and realized Moore was robbing the victim. *Id.* According to the defendant, Moore exited the victim's vehicle with the stolen drugs and dove back into his car, the victim drew a gun and shot at them, and the defendant grabbed his gun and returned fire. *Id.* The defendant maintained he was concerned with stopping the shooter and for his fiancé's safety, testifying:

So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

Id. (omissions in original).

A majority of our supreme court "agree[d] with the State that there was no evidence that [the defendant] acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter." *Id.* at 521-22, 772 S.E.2d at 880. It found the defendant's own testimony failed to "establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable*

impulse to do violence" but, rather, the defendant had testified "that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of [his fiancé] rather than of perpetrating violence upon the victim." *Id.* at 522-23, 772 S.E.2d at 880. The majority further concluded, "Because [the defendant], by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts." *Id.* at 523, 772 S.E.2d at 881. The dissent, on the other hand, would have found "the unprovoked shooting by [the victim] amounted to evidence sufficient for a jury to infer that there was legal provocation," and "[the defendant's] testimony that he immediately returned fire out of fear for himself and his fiancé[] provided evidence from which a jury could find that [the defendant] was acting pursuant to an uncontrollable impulse to do violence." *Id.* at 525, 772 S.E.2d at 882 (Pleicones, J., dissenting).

Finally, neither party cites this court's 2017 opinion in *State v. Oates*, 421 S.C. 1, 803 S.E.2d 911 (Ct. App. 2017). There, the defendant—who was convicted of voluntary manslaughter—challenged the trial court's decision to give a voluntary manslaughter instruction to the jury, asserting there was no evidence of sudden heat of passion. *Id.* at 7, 803 S.E.2d at 915. The facts of that case reveal as follows.

The defendant, who had been hired by a homeowner's association to tow illegally parked cars, placed a disabling device, or "boot," on the victim's minivan. *Id.* at 8, 803 S.E.2d at 915. The victim, his brother, and his brother's neighbor approached the defendant requesting he refrain from towing the minivan. *Id.* at 7-8, 803 S.E.2d at 915. According to the defendant, he felt intimidated by the three men. *Id.* at 8, 803 S.E.2d at 915. The defendant told investigators the men were "running 'a little abruptly' and were 'hooting' and 'hollering.'" *Id.* The defendant further stated both the victim and his brother "jumped up on the truck's running board and started talking to him through the window and [the v]ictim told [the neighbor], 'Go get my shotgun.'" *Id.* The brother instructed the defendant to take the boot off the vehicle, and the defendant told him he would call his office and they would "work this out." *Id.* The defendant "then heard 'a round being chambered' as well as [the v]ictim stating, 'You're [going to] take this off right now and I'm leaving,' to which [the defendant] responded, '[T]hat's fine.'" *Id.* (second and fourth alteration in original). The defendant stated he stalled to regain his composure. *Id.* The brother verified that the victim "pulled a gun out of his pants, ratcheted the gun, and stated, 'Nobody's going to take my car,'" and that the defendant "seemed very nervous." *Id.* The defendant indicated the brother

grabbed his keys and the lock tool to release the boot, and the victim asked the defendant if he had any paperwork on his minivan, indicating "he did not want law enforcement to 'come look' for him." *Id.* at 9, 803 S.E.2d at 915. The defendant took the opportunity to open his glove box and remove his gun while he showed the victim his ledger. *Id.* at 9, 803 S.E.2d at 916. The defendant indicated he heard the brother yell something in Spanish, and the victim looked at the defendant and told him to "[c]ome get this s**t off now." *Id.* The defendant then described as follows: The victim unlocked his truck door and opened it; as the victim stepped off the running board, the defendant observed him reach back and grab his pistol with his right hand; as the defendant was exiting the truck, the victim was "already in motion and he's in draw;" and the defendant reacted. *Id.* 9-10, 803 S.E.2d at 916. He testified:

I [exited] straight out my door stepping off of the metal running boards . . . and I was [exiting] out, and I looked and my line of sight was through him straight down to the ground. It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any information on his vehicle and . . . ah, bye, bye, Preston . . . regardless, he was in motion, he was in draw and I reacted.

Id. at 10, 803 S.E.2d at 916 (alterations and omissions in original). The defendant stated he "remember[ed] the very first shot," and the victim was "still a threat to [him]," so he "discharged again." *Id.* The defendant did not know how many times he pulled the trigger, but remembered two shots. *Id.*

Other witness's accounts conflicted with the defendant's. *Id.* According to the brother, the victim put his gun in his waistband after the brother told him to put it away, and the victim never pulled out his gun again. *Id.* The brother further "expressly stated there was 'no arguing, . . . no fighting, . . . no bad words' and [the v]ictim never talked to, threatened, or 'attempt[ed] to do anything to [the defendant].'" *Id.* (second alteration and omissions in original). The victim's widow also testified that the victim was directing traffic around the minivan and tow truck when the defendant shot the victim. *Id.* at 10-11, 803 S.E.2d at 916. Further, "[t]he testimony of [the v]ictim's widow, [the brother's] wife, and [the] neighbors, as well as a video from [one of the neighbor's] home surveillance camera, indicated [the v]ictim was walking or running away from [the defendant] when [the

defendant] began shooting him." *Id.* at 11, 803 S.E.2d at 916. An autopsy revealed the victim had been shot six times. *Id.* at 11, 803 S.E.2d at 917.

This court disagreed with the defendant's assertion that the trial court erred in "charging the jury on the lesser-included offense of voluntary manslaughter because there was no evidence of the element of 'sudden heat of passion,' i.e., that [the defendant] was acting under an uncontrollable impulse to do violence and was incapable of cool reflection as a result of fear." *Id.* at 23, 803 S.E.2d at 923. After analyzing our supreme court's decisions in *Cook* and *Starnes*, this court held:

In the present case . . . the jury could have reasonably inferred from the evidence that when [the defendant] shot [the v]ictim six times, he was acting under "an uncontrollable impulse to do violence" even if the jury could have drawn an equally reasonable inference that [the defendant] acted in a "deliberate, controlled manner." Admittedly, several witness accounts of the entire incident are comparable to witness accounts of the defendant and the victim "talking softly" in *Cook*. Further, [the defendant] told police that before he fired the fatal shots, he was in "conservation mode." When asked how many shots he fired, [the defendant] initially stated he remembered two shots and then compared his reaction during the incident to his reaction during a prior incident: "But I don't know when I . . . I know . . . I knew the first time on Hilton Head, I remember I emptied it . . . Well, that . . . that was a panic fire . . . the first time. *This time, I had a little bit more composure.*" (emphasis added). [The defendant] also explained to police that the numerous shots fired at [the v]ictim were his attempt to disable [the v]ictim from killing [the defendant] and that he kept shooting until he saw [the v]ictim's gun slide across the road beneath him. The jury could have reasonably inferred from all of this evidence that [the defendant] was acting in a "deliberate, controlled manner."

However, unlike the lack of *any* evidence of sudden heat of passion in *Cook* and *Starnes*, there is some evidence in the present case from which the jury could have

reasonably inferred that [the defendant] was "incapable of cool reflection" and was acting under an "uncontrollable impulse to do violence." First, neither *Cook* nor *Starnes* involved six gunshots to the same victim as does the present case. Further, one of [the brother's] neighbors . . . was sitting in her family's car in their driveway after returning from a restaurant when she heard "a lot of people outside yelling." She testified she saw "one of the guys" stepping onto the truck's "side rail" and "they were just getting very argumentative and just going back and forth." Her husband . . . testified that as he was going into his house to obtain some personal belongings and returning to the car, he "could hear a dispute" and when he was back in the car, he heard gunshots fired in "rapid succession."

Id. at 25-27, 803 S.E.2d at 924-25 (second through sixth omissions in original) (citations omitted). This court further noted the evidence from the brother that the defendant was very nervous before the victim ratcheted his gun, and the defendant's statement that when the victim asked him about the paperwork, that was when he "got really scared." *Id.* at 27, 803 S.E.2d at 925. This court concluded: "The jury could have reasonably inferred from all of this evidence that when [the defendant] shot [the v]ictim six times, he was 'incapable of cool reflection' and was acting under an 'uncontrollable impulse to do violence' such that there was sufficient evidence of [the defendant's] sudden heat of passion." *Id.* at 28, 803 S.E.2d at 925-26.

C. Analysis

Viewing the evidence in a light most favorable to Payne, we find the trial court erred in refusing Payne's request to charge the lesser-included offense of voluntary manslaughter. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant."); *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608 ("To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter."); *id.* ("If there is *any evidence* from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." (emphasis added)); *id.* at 597, 698 S.E.2d at 608

("Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given.").

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *Smith*, 391 S.C. at 412-13, 706 S.E.2d at 14. We acknowledge that, under Payne's testimony alone, the evidence may be insufficient to support a jury charge of voluntary manslaughter. However, we are not limited to considering a defendant's *trial testimony* on the matter. *See Knoten*, 347 S.C. at 305-09, 555 S.E.2d at 396- 98 (noting, in spite of the State's contention the defendant was not entitled to a voluntary manslaughter charge because he recanted his confession at trial, one of defendant's statements to police that was introduced at trial supported such).

The State acknowledges there is arguably sufficient evidence of legal provocation from Tyeisha's testimony, but challenges the sufficiency of evidence of sudden heat of passion. We agree that there is clearly evidence of legal provocation, as both Tyeisha and Payne testified Victim fired his gun at Payne first during their encounter near Payne's home. *See Smith*, 391 S.C. at 413, 706 S.E.2d at 15 ("[A]n overt, threatening act or physical encounter *may* constitute sufficient legal provocation."). The question thus becomes whether there is *any* evidence Payne acted in "sudden heat of passion" when he shot Victim. *See id.* ("For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing."); *id.* ("To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter." (emphasis added) (quoting *Pittman*, 373 S.C. at 572, 647 S.E.2d at 168)). "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *Id.*

Admittedly, there was testimony that the witnesses did not know what Payne and Victim argued about, Tyeisha described it as "[not] necessarily arguing, arguing, but . . . just having words back and forth," and Payne himself testified he could not recall what he and Victim argued about at Hartzog's trailer or if there was even an argument during the second encounter. Further, Payne testified, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you," and Payne agreed he was "backing up toward the house" and was not "paying attention where [he was] shooting." However, as in

Oates, though there are some factual similarities with *Cook* and *Starnes*, we find "unlike the lack of *any* evidence of sudden heat of passion in *Cook* and *Starnes*, there is some evidence in the present case from which the jury could have reasonably inferred that [Payne] was 'incapable of cool reflection' and was acting under an 'uncontrollable impulse to do violence.'" *Oates*, 421 S.C. at 27, 803 S.E.2d at 925 (quoting *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609).

In *Lowry*, our supreme court determined the defendant was entitled to a charge on voluntary manslaughter noting, "testimony which, if believed, tend[ed] to show that the [victim] and [the defendant] were in a heated argument and that the [victim] was about to initiate a physical encounter when the shooting occurred." 315 S.C. at 399, 434 S.E.2d at 274. In the case at hand, evidence was presented that: Payne and Victim engaged in a verbal argument and "exchanged words" outside Hartzog's trailer; Tyeisha described hearing arguing and stated that when she walked up to the porch to see what was happening, Payne and Victim were still interacting, "going back and forth," and they were "having words back and forth"; the exchange was such that the women at Hartzog's trailer told Victim to leave and told Payne not to follow him; Victim went to the top of the road and stayed there; Payne drove across the yard to his home as Victim walked on the street in the direction of Payne's home, at which point there was a second encounter between Payne and Victim; Victim walked toward Payne as he was exiting his car; Tyeisha stated the two "started having words again because you could tell that they [were] . . . talking back and forth"; Alicia testified that when Payne encountered Victim again up the road, he and Victim had another verbal dispute, Payne got out of his car, they were still arguing, Payne turned to go back to his car and she "[was] not sure if something was said or what happened, but . . . when he turned back around to face [Victim], [Payne] began shooting at him" and when Payne turned to go back toward his car, he never made it to the car, but turned back around and "just started firing" at Victim; Tyeisha testified Payne tried to punch Victim and Victim then pulled out a handgun; Payne then "had . . . his hands. . . like 'I guess you don't want to fight'" and "they [were] still . . . kind of having words; Payne turned away from Victim, going back in the direction of his house; Victim trailed behind Payne, and they were still having words and arguing; Payne turned around facing Victim as they were still having words and then Victim "started firing"; Payne's response to Victim firing at him was to fire back, and Payne "started firing . . . right after that, it was consecutive"; Tyeisha could tell Victim fired first because she "could see it coming from . . . his direction"; Payne was "afraid for [his] life" during this time; although Victim turned around and ran away, Payne kept shooting; and Victim was shot four times.

As noted,

A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not.

Starnes, 388 S.C. at 599, 698 S.E.2d at 609. Like *Oates*, we acknowledge there was evidence presented from which the jury could have reasonably inferred that Payne was acting in a "deliberate, controlled manner," however, there was also evidence presented from which the jury could have reasonably inferred Payne was acting under an "uncontrollable impulse to do violence." 421 S.C. at 26-27, 803 S.E.2d at 924-25. Specifically, there was evidence presented that Payne and Victim were in an argument outside Hartzog's trailer that was heated enough for the women to instruct Victim to leave and Payne not to follow Victim when Victim walked away; when Payne drove the very short distance to his home and exited his vehicle, Victim approached him; an argument ensued between the two which was of enough intensity for both Tyeisha and Alicia to observe such was occurring from a significant distance away; the argument was such that Payne tried to punch Victim; Payne turned away from Victim, walking toward his home and Victim followed him, continuing the argument; Victim fired his gun at Payne first, causing Payne to return fire and shoot Victim four times, even though Victim was running away as Payne continued to fire at him; and Payne testified he was "afraid for [his] life." Additionally, Alicia testified "I'm not sure if something was said or what happened, but he — — when [Payne] turned back around to face [Victim], he began shooting at him," and when Payne turned to go back toward his car, he turned back around and "just started firing" at Victim. Accordingly, viewing the evidence in a light most favorable to Payne, there is evidence from which the jury could have reasonably inferred the lesser, rather than the greater, offense was committed such that the trial court erred in refusing Payne's request to charge voluntary manslaughter. *See Starnes*, 388 S.C. at 596, 698 S.E.2d at 608 ("If there is *any evidence* from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." (emphasis added)).

II. Failure to Charge Continuing To Shoot

We need not address the failure of the trial court to charge Payne's requested "continuing to shoot" language because the prior issue is dispositive, and whether the matter may arise on retrial will be dependent on evidence admitted, arguments raised, and whether the essence of any appropriate language is contained in the trial court's charge. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive); *State v. Mekler*, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue, noting whether the issue would arise on retrial and its resolution would depend upon the evidence and testimony then presented).

CONCLUSION

For the foregoing reasons, we reverse Payne's conviction and remand for a new trial.

REVERSED AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.

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

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2017-002014

RECEIVED

Aug 26 2021

Opinion No. 5846 (S.C.Ct.App. filed August 11, 2021)

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

DEMONTAY MARKEITH PAYNE,

APPELLANT.

PETITION FOR REHEARING

On August 11, 2021, this Court issued an opinion in the captioned case that reversed the lower court's denial of a voluntary manslaughter charge, and remanded the matter for a new trial. Pursuant to South Carolina Appellate Court Rules 221 and 240, Respondent, the State of South Carolina, petitions for rehearing and asks the Court to consider the following points that Respondent submits the Court misapprehended or overlooked.

SUMMARY OF ARGUMENT

Respondent submits that this Court has misconstrued the facts of this case in finding evidence demonstrating the heat of passion element for voluntary manslaughter. The facts relied upon by this Court disregard the context in which the evidence was presented and are insufficient to satisfy the legal standard warranting a voluntary manslaughter charge. Moreover, the review of a jury charge is performed while taking the evidence in the light most favorable to the requesting

party, but the “light most favorable” standard also requires the court to only accept the *reasonable inferences* of the evidence presented. “To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense.” *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006). “The court looks to the totality of the evidence in evaluating whether such an inference has been created.” *Id*; *State v. Sims*, 426 S.C. 115, 130, 825 S.E.2d 731, 738 (Ct. App. 2019), reh'g denied (Apr. 19, 2019), cert. denied (Aug. 16, 2019). The inferences taken by this Court to satisfy the heat of passion element for voluntary murder cannot be reasonable in the face of comprehensive evidence presented by the defense’s witnesses that demonstrate Appellant’s mental state was not subject to an uncontrollable impulse for violence.

This court also improperly applied Supreme Court precedent set forth in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001) and *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) by disregarding in its entirety the trial testimony of Appellant in this court’s analysis and in selectively relying upon state’s evidence in an attempt to piece together a narrative supporting the element for heat of passion. This Court should grant rehearing, reverse, and affirm the ruling of the lower court.

RELEVANT HISTORY AND FACTS

Appellant and Devante Odom (hereinafter “Victim”) encountered each other on the porch of the home belonging to Stacey Hartzog. Stacey Hartzog, Yvette Walker, Alicia Youmans, and Tyeisha Youmans were present at the time. (R. p. 14). During the encounter Appellant and Victim “ha[d] words” with each other over the course of a couple of minutes. The encounter ended and Victim walked up the street toward the intersection of Emerald Road and Wingo Estates. According to Appellant, he got in his car to go home which was in the same direction that Victim

had walked. Appellant arrived home, exited his car in the vicinity of Victim, and moments later Victim is ultimately shot and killed by Appellant. The precise testimonies of three witnesses are imperative to the voluntary manslaughter issue:

Alicia Youmans

Alicia Youmans testified on behalf of the State. In pertinent part, she testified that when Victim arrived at the porch he asked to buy two cigarettes from her. She did not abide the request because Victim and Appellant began to argue. (App., p. 16, lines 1-23). Her cross-examination revealed that she believed Appellant was responsible for starting the argument because Appellant lifted his shirt to Victim to show the presence of his gun. (App., p. 29, lines 15-18; p. 33, lines 1-10). She could not testify as to the topic of argument, but noted that the argument ended when Victim walked away and Appellant got in his car. Victim walked up Wingo Estates toward Emerald Road. (App., p. 17, lines 2-25). Appellant drove his car on to Wingo Estates and drove up towards Emerald Road. (App., p. 19, lines 1-5).

Victim had reached the intersection by the time Appellant arrived, wherein another verbal dispute arose and Appellant exited his vehicle.¹ She then testified, “they was still arguing or whatever, and he turned to go back to his car. I’m not sure if something was said or what happened, but he – when he turned back around to face Mr. Odom, he began shooting at him.” (App., p. 19, line 1 through p. 20, line 25). Alicia testified that Victim attempted to run away once Appellant began shooting. (App., p. 22, lines 2-21). Alicia did not see Victim with a gun, nor did she see a gun in his vicinity when she reached the location where he fell. (App., p. 26, line 1-14).

¹ Alicia’s statement to police indicated that Appellant “got out of his car swinging his arms. After that they got real close to each other, and that’s when Montay Payne pulled out his gun and shot Devante Odom.” (App., p. 35, lines 19-24).

Tyeisha Youmans

Tyeisha testified that she was in her car changing the music and did not initially notice Victim's arrival. However, she heard what she thought to be arguing and approached the porch. (App., p. 109, line 5 through p. 110, line 2). She then testified that Appellant and Victim were not "necessarily arguing, arguing, but they was just having words back and forth" and that it only lasted a few minutes. (App., p. 110, lines 6-19). She testified that Victim walked up the road to the intersection, and thereafter Appellant got in his car to leave to go home. (App., p. 110, line 20 through p. 111, line 15).

She testified that in doing so, Appellant and Victim "I guess . . . started having words again because you could tell that they was, like, had to be talking back and forth" down the street. (App., p. 113, lines 2-6). She clarified that Appellant had exited his car and walked into Emerald Road for this to occur. She testified that she saw Appellant swing at Victim, and Victim responded by pulling a gun out. (App., p. 113, line 7 through p. 114, line 13). After Victim pulled out his gun, Tyeisha testified that "Mr. Payne, like I said, he had, like, his hands like that, like I guess you don't want to fight or something like that?" (App., p. 114, lines 21-23). She explained that at this point Appellant turned around and headed back toward his house. She testified that Victim followed Appellant and that they still appeared to be arguing back and forth as he did so. (App., p. 114, line 23 through p. 115, line 25; p. 116, lines 2-4; p. 128, lines 8-21). After walking some distance back to his home, Appellant turned and faced Victim. (App., p. 116, lines 3-25). Tyeisha testified that when Appellant turned around Victim started firing at Appellant. She testified that Appellant then started firing back, and that amidst the shooting, Victim turned to run back toward the trailers on Emerald Road. (App., p. 117, line 4 through p. 118, line 5). Tyeisha confirmed that she witnessed these events from approximately 100 yards away. (App., p. 126, lines 11-24).

Appellant Demontay Payne

Appellant testified that once Victim arrived at Stacey Hartzog's home "he said something to me that I can't quite remember. But we engaged in a verbal argument or exchanged words, and that was it." (App., p. 152, lines 10-12). Appellant testified that though he could not recall the topic of the argument, he recalled telling Victim "I ain't worrying about it." (App., p. 152, lines 18-19). Appellant further testified that he was calm during the exchange, but that Victim was less so. (App., p. 152, line 20 through p. 153, line 1). Appellant testified the girls told Victim to leave. Victim left and walked up the road to the intersection of Emerald Road and Wingo Estates, which was in the vicinity of Appellant's grandmother's home. (App., p. 153, lines 4-18). Appellant further testified that the girls told him not to follow Victim. Appellant responded by informing the girls that he was not going to follow. Appellant testified on cross-examination that the girls telling him not to follow was due to Victim's choice to stay up at the top of the intersection, not as a result of Appellant's demeanor. (App., p. 154, lines 9-14; p. 161, line 19 through p. 162, line 4). Appellant then told Tyeisha he was going home (his grandmother's home) and left in his car. (App., 154, lines 9-24).

Appellant next described how the violent altercation took place. He testified that, "After [driving home], as I was getting out of the car, he was coming towards, he fired, and I fired back." (App., p. 155, lines 10-11). Appellant clarified that when he pulled up to the edge of his trailer, he saw Victim coming. Appellant testified that they exchanged words, and Victim fired at him, and he "fired back in self-defense." (App., p. 155, lines 12-24). Appellant further testified as to the manner in which he fired his gun, describing that he was backing up shooting and not paying attention to where he was shooting. He testified that the reason he was backing up was, "because he was afraid for his life." (App., p. 156, lines 3-12). Appellant could not recall how many shots

he fired and only knows how many times he shot Victim because of the police report. (App., p. 156, lines 13-21). Appellant testified that he did not see where Victim ran, as he was “looking back running.” (App., p. 157, lines 2-4). He then explained that, “after everything – after all the fire exchange[d], [he] was scared” and made the decision to jump in his car and leave. (App., p. 157, lines 2-8). Appellant was then asked: “when he fired at you, what went through your mind?” He responded by saying: “That the bullet was going to kill me or either I was going to lose something that I would never be able to get back.” (App., p. 159, lines 6-12). He agreed with counsel’s questioning that he could not “have taken another course” and “had no other choice” but to respond as he did. (App., p. 159, lines 13-18).

Appellant’s cross-examination added further testimony. Appellant reiterated that he could not recall the topic of the argument. (App., p. 160, line 21 through p. 161, line 6; p. 167, lines 16-21). He agreed that he was calm in comparison to Victim, whom he agreed was out of control. (App., p. 161, lines 16-18). He testified that Victim started shooting at him before he could even close the door to his car. (App., p. 164, lines 1-4). He testified: “When you’re backing up not looking, you can’t see who you’re shooting at or what you’re shooting, you just know you’re shooting to get someone away from you or anything that’s firing at you away.” (App., p. 164, lines 16-20). Appellant could not remember whether or not he had a subsequent verbal confrontation with Victim in the middle of Emerald Lane, prior to the shooting taking place. (App., p. 167, lines 7-12; p. 167, line 22-24). Appellant testified that he does not remember swinging at Victim. (App., p. 167, lines 13-15). Appellant denied having any knowledge of a preexisting dispute between him and Victim. (App., p. 168, lines 20-22). When asked if there was a problem between them after their argument on the porch, Appellant felt only that Victim “probably had a hostile – hostile feeling about me.” (App., p. 168, line 23 through p. 169, line 3).

THIS COURT'S OPINION

In reversing the lower court, this Court provided a recitation of facts and a lengthy survey of South Carolina cases that have previously addressed whether a voluntary manslaughter charge was warranted at trial. *The State, Respondent, v. Demontay Markeith Payne, Appellant.*, No. 2017-002014, 2021 WL 3520616, at *7-14 (S.C. Ct. App. Aug. 11, 2021). However, the opinion fails to identify and consider numerous substantially important facts that provide context to the evidence presented. *State v. Starnes*, 388 S.C. 590, 597–98, 698 S.E.2d 604, 608 (2010) (Our Supreme Court has cautioned on the frequent struggle to untangle the interplay between murder, voluntary manslaughter, and self-defense, and that the struggle may be the result of prior precedent being taken out of the evidentiary context, and removing any boundaries as to what circumstances give rise to a “sudden heat of passion upon sufficient legal provocation.”); *State v. Sims*, 426 S.C. 115, 131, 825 S.E.2d 731, 739 (Ct. App. 2019), reh'g denied (Apr. 19, 2019), cert. denied (Aug. 16, 2019).

The evidence here demonstrates the complete lack of uncontrollable impulse and the lack of a requisite connection between the legal provocation and the supposed evidence of heat of passion. As such the court's ruling is based upon unreasonable inferences without support in the record. Moreover, the opinion relies upon misapplications of law stemming from both *Knoten* and *Funchess*. As a result, this Court's decision to reverse and remand Appellant's conviction for a new trial was reached in error and should be reconsidered.

Application of the Facts Under the Any Evidence Standard

This Court set forth an extensive explanation of the law regarding when a voluntary manslaughter charge is warranted. Paramount to the application of the facts in this case is the courts recitation that states:

Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given.” *Id.* at 597, 698 S.E.2d at 608.

...

When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant.” *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015).

...

A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion.” *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. Nor is he entitled to a voluntary manslaughter charge merely because he was legally provoked. *Id.* at 597, 698 S.E.2d at 608. “Moreover, there must be evidence that the heat of passion was *caused* by sufficient legal provocation.” *Id.* Though one’s fear immediately following an attack or threatening act may *cause* the person to act in a sudden heat of passion, the mere fact that one is afraid is insufficient, alone, to entitle a defendant to a voluntary manslaughter charge. *Id.* at 598, 698 S.E.2d at 609. “[I]n order to constitute ‘sudden heat of passion upon sufficient legal provocation,’ the fear must be the result of sufficient legal provocation **and cause** the defendant to lose control and create an uncontrollable impulse to do violence.” *Id.* “Succinctly stated, to warrant a voluntary manslaughter charge, the defendant’s fear must manifest itself in an uncontrollable impulse to do violence.” *Id.* at 598-99, 698 S.E.2d at 609.

The State, Respondent, v. Demontay Markeith Payne, Appellant., No. 2017-002014, 2021 WL 3520616, at *7 (S.C. Ct. App. Aug. 11, 2021) (emphasis added). The need for a voluntary manslaughter charge will not arise simply because the evidence demonstrates the existence of an argument and subsequent violence. And, as is demonstrated, the law does not simply allow for the checking of boxes as to: heat of passion, legal provocation, fear, and uncontrollable impulse to do violence. Instead, each of these facets, fear being the only one not explicitly mandatory², is interconnected to the others, and the necessary causal relationship set forth by *Starnes* can only be

² Respondent is reticent as to the consequences of identifying fear, as opposed to anger, as a foundational emotion for “*heat of passion*”. Nevertheless, the existing law dictates that fear alone is insufficient, and it must manifest in an uncontrollable impulse to do violence.

evaluated when the evidence *is considered in the context presented at trial*. *Id.* at 598, 698 S.E.2d at 608.

Moreover, the requirement that the reviewing court must view the facts in the light most favorable to the defendant, leaves out the standard language which requires that this only be done to the extent of drawing *reasonable inferences*. To this point, this Court has previously held that the “any evidence” standard applied to review of denied charges for lesser included offenses is subject to analogous treatment as is given to directed verdict motions lacking sufficient circumstantial evidence. As such, the record must show “any direct evidence or any substantial circumstantial evidence” in order to demonstrate that the denial of a lesser included offense was in error. *State v. Gilmore*, 396 S.C. 72, 80, 719 S.E.2d 688, 692 (Ct. App. 2011). This Court has also set forth that “[t]o justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense. *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006). “The court looks to the *totality of the evidence* in evaluating whether such an inference has been created. *Id.* (emphasis added). “When the evidence supporting a request for a charge on a lesser-included offense is purely circumstantial, we examine the record to determine if there is *sufficient circumstantial evidence* to permit a reasonable inference that the defendant is guilty only of the lesser crime.” *Gilmore*, 396 S.C. at 80, 719 S.E.2d at 692. (emphasis added). In this case, this Court failed to consider the fact that it was relying entirely on circumstantial evidence spliced together from the record, absent the context the evidence was presented in, and without consideration of the direct evidence from Appellant that flatly opposes the contention that he acted in a heat of passion. As such this Court has reached and relied upon unreasonable inferences in reversing the trial court’s decision.

These unreasonable inferences are based upon five pieces of circumstantial evidence this Court set forth as tending to show Appellant's mental state was one of an uncontrollable impulse to do violence. These include: 1) there was evidence of an argument "heated enough" for the women to instruct Victim to leave and Payne not to follow; 2) there was testimony, even witnessed at a distance, that a second argument occurred; 3) there was evidence that Payne tried to punch Victim; 4) Victim fired his gun first, causing Payne to return fire, striking Victim four times, despite Victim running away; and 5) Payne testified he was afraid for his life. *The State, Respondent, v. Demontay Markeith Payne, Appellant.*, No. 2017-002014, 2021 WL 3520616, at *16 (S.C. Ct. App. Aug. 11, 2021). Each of these evidentiary grounds set forth by the court lacks the context and causal relationship needed to satisfy the any evidence/substantial circumstantial evidence standard for charging voluntary manslaughter.

Regarding the first piece of evidence, there is indeed evidence of an argument, and there is evidence that someone told Appellant not to follow Victim. However, neither of these facts addresses Appellant's state-of-mind as it pertains to the creation of an uncontrollable impulse to do violence. This Court disregarded consideration of such contextual evidence.

The context surrounding this first piece of evidence demonstrates that this exchange between Appellant and Victim included Appellant telling Victim: "I ain't worrying about it"; that Appellant testified he was calm during and after the exchange of words with Victim; that Appellant told the women he had no intention to follow Victim; that Appellant testified their instruction not to follow was based on Victim's actions, not on Appellant's demeanor; and that *both* Tyeisha and Appellant testified that Appellant left to go home, as opposed to rekindle an argument with Victim. (App., p. 152-154; p. 162). This additional evidence, which is *necessarily* contextual, reveals that in no way did this initial argument with Victim cause Appellant to enter into a heat of passion

state-of-mind or even cause Appellant to become mildly angry. As demonstrated, *all* of the evidence is to the contrary, as it shows Appellant was capable of cool reflection after the argument ended. Heat of passion does not arise simply from the existence of an argument.

This Court's second piece of evidence, that witnesses viewed a second argument from a distance, is likewise without any context or support demonstrating a change in the state-of-mind of Appellant. The evidence available demonstrates an argument took place, but there is no basis to demonstrate the topic of the argument or to demonstrate that it had an impact upon Appellant's state-of-mind that caused an uncontrollable impulse to do violence. To the contrary, Appellant's testimony demonstrates that he still could not recall the subject of the argument, or even if a second argument took place. Appellant also testified that Victim's attack took place before he could even fully exit his vehicle. (App., p. 167; p. 164). Appellant testified that he bore no dispute against Victim, and that if such a dispute existed, it existed solely by Victim expressing hostility toward him. (App., p. 168-169). The existence of an argument cannot satisfy the heat of passion element without also having legal provocation, and that such legal provocation *caused* Appellant to experience an uncontrolled impulse to do violence. The supposed second argument, and particularly Appellant's clear lack of impact by it, demonstrates that it provides no evidence in support of a voluntary manslaughter charge.

Third, this Court identified evidence that Appellant threw a punch at Victim. This is the first instance of any violence, but violence alone cannot demonstrate Appellant was suffering an *uncontrollable impulse* to do such violence. When the evidence in connection to this punch is considered, it is demonstrated to be decidedly unimpulsive and fully controlled. First, Appellant testified that he does not even recall throwing a punch. More importantly, Tyeisha testified that after the punch was thrown and Victim pulled out his gun, Appellant made the decision to put his

hands up in a fashion demonstrating that he did not further expect to fight. In doing so, the only evidence available demonstrates that Appellant was in control of his actions and did not continue with violence. Therein, he demonstrated both control, deliberation, and specifically, the capability for cool reflection. (App., p. 114).

While this is sufficient to show Appellant's state-of-mind was not one bearing heat of passion, the evidence further shows that after this supposed exchange, and despite Victim having his gun pulled, Appellant disengaged from the altercation and walked back toward his home. (App., p. 114-115). Appellant's decision demonstrates he was not only *capable* of cool reflection, but actually *chose to do so*. The opinion cites long quotations that included Appellant's decision to turn around and walk away, but the opinion pays this fact no weight in evaluating Appellant's requisite state-of-mind. It is axiomatic to conclude that one who deliberately disengages from an argument cannot also be said to bear an *uncontrollable impulse* for violence as a result of that argument. The context and surrounding circumstances of the evidence presented do not support the elements for voluntary manslaughter, and neither the jury nor the court can "reasonable infer" support for such elements by citing only to the violence and never to a defendant's choice to disengage, turn around, and head home.

Fourth, this Court cites the testimony demonstrating that Victim started shooting first at Victim, and that Appellant fired back in response striking Victim four times, even though Victim was running away. Here again, the analysis lacks any proof that Victim's attack caused Appellant to succumb to an uncontrolled impulse for violence, and the context surrounding that evidence which proves the contrary was disregarded by this Court. It should not be, as it is discerning.

This fourth piece of relied upon evidence demonstrates for the first time under any testimony, from any witness, that there is evidence of sufficient legal provocation.³ If Tyeisha and/or Appellant are to be believed, and Victim shot first, the law dictating the need to charge voluntary manslaughter requires the following:

- 1) There must be evidenced that the legal provocation *caused* the Appellant's heat of passion;
- 2) That if Victim's attack caused Appellant's fear, there is evidence that that fear "must be the result of legal provocation and *cause* the defendant to lose control and create an uncontrollable impulse to do violence."

Starnes, 388 S.C. at 597-99, 698 S.E.2d at 608-09. This particular issue is where this Court, and others, have lost the plot as to differentiation between self-defense and voluntary manslaughter. It cannot be so simply argued that legal provocation via gunfire, resulting in fear, and the defendant's reaction to "do violence" by firing back satisfies as evidence to warrant a voluntary manslaughter charge. To do so would be completely indistinguishable from the elements of self-defense. The decision to charge voluntary manslaughter demands an assessment of the state-of-mind of the defendant, and that the fear or anger involved from the provocation caused an uncontrollable impulse for violence. This Court's characterization of the evidence in this case fails to establish the necessary causal relationship demanded in *Starnes*, disregards the evidence that would demonstrate the absence of that causal connection, and further demonstrates that the record does not support the finding that an uncontrolled impulse for violence existed. The context of the evidence is key, but the context was not considered.

³ As only Tyeisha and Appellant testified that Victim shot first, Alicia's testimony depicting an unprovoked, undefended, and malicious shooting by Appellant, cannot be deconstructed and utilized in part to establish the elements of voluntary manslaughter. (*Infra*; See *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976)).

Tyeisha testified that Victim shot first, but she did not offer any testimony as to whether Appellant's reaction to fire back was the result of an uncontrolled impulse. Nor did she testify as to the emotions that Appellant was feeling at the time and how he responded to those emotions. Nor did she even offer testimony as to the subject matter of the argument before gunfire ensued. However, Appellant was able to testify to his state-of-mind, and thereby provided *direct evidence* as to this state-of-mind. His testimony demonstrated 1) he explicitly fired back in self-defense; 2) he was "backing up shooting"; 3) he was not paying attention to where he was shooting (demonstrating no desire to harm); 4) he was "looking back running"; 5) that he stated "when you're backing up not looking, you can't see who you're shooting or what you're shooting. You just know you're shooting to get someone away from you, or anything that's firing at you away" (demonstrating no desire to harm); 6) he could not recall how many shots he fired; 7) he only knows how many times Victim was struck because of the police report; and 8) Appellant's *decision* to return fire was the only *option* he believed he had under the circumstances. (App., p. 155-157; p. 159; p. 164). These statements provide direct evidence as to Appellant's state-of-mind and they directly refute the court's inference that Appellant knew Victim was running away or how many times he had struck victim.

This evidence is exclusively indicative of an individual *trying to get away* from violence. Contrary to this court's findings, the record is devoid of evidence which would characterize Appellant's actions as an uncontrolled desire to do violence against another out of fear or anger. Evidence taken in the light most favorable is limited to only the reasonable inferences that can be drawn from that evidence. None of the defense's evidence can be reasonably inferred to show that Victim's attack created an uncontrolled impulse to desire violence. The simple act of shooting back at Victim does not demonstrate Appellant's state-of-mind. All of the correlating evidence

that does relate to state-of-mind demonstrates that it was a *decision* made by Appellant who desired to get away from violence and to get the ensuing violence away from him – it therefore cannot be reasonably inferred as an uncontrollable desire to do violence upon another.

Lastly, the court cites to the quotation that Appellant was “afraid for [his] life.” However, a careful reading of the record demonstrates that this statement from Appellant was the response given for “why [he] was backing up” after being shot at by Victim. (App., p. 156, lines 8-12). Not only was this precise quote not useful to this Court in demonstrating heat of passion, it is decidedly against a finding of heat of passion, as it demonstrates that Appellant reacted to his fear by *trying to get away*, not by succumbing to an uncontrolled impulse to do violence. As was succinctly stated in *Starnes*, the same applies to the case at hand:

[W]hile [defendant] testified he shot . . . out of fear, there is no evidence he was out of control as a result of his fear or was acting under an uncontrolled impulse to do violence. The only evidence in the record is that Appellant deliberately and intentionally shot [victims] and that he either shot the men with malice aforethought or in self-defense.

Id. at 599, 698 S.E.2d at 609. Therefore, based upon the facts of this record, it is an entirely unreasonable inference to find that Appellant’s fear *caused* an uncontrollable impulse for violence, as is required by law. The conviction should therefore be affirmed.

Application of Law Under Knoten and Funchess

This Court provides a partial concession that “Payne’s testimony alone” may leave the evidence insufficient to support a jury charge for voluntary manslaughter. However, the opinion then relies upon *State v. Knoten*, 347 S.C. 296, 305-09, 555 S.E.2d 391, 396-98 (2001) and attempts to dodge the utility of such testimony in favor of the circumstantial evidence it has chosen to focus upon. Therein, this Court stated:

We acknowledge that, under Payne's testimony alone, the evidence may be insufficient to support a jury charge for voluntary manslaughter. However, we are not limited to considering a defendant's *trial testimony* on the matter. See *Knoten*, 347 S.C. at 305-09, 555 S.E.2d at 396-98 (noting, in spite of the State's contention the defendant was not entitled to a voluntary manslaughter charge because he recanted his confession at trial, one of defendant's statements to police that was introduced at trial supported such).

The State, Respondent, v. Demontay Markeith Payne, Appellant., No. 2017-002014, 2021 WL 3520616, at *15 (S.C. Ct. App. Aug. 11, 2021). This Court's reliance upon *Knoten* is such a way is misplaced. In *Knoten*, the Court did not feel that the defendant's recanted statements to police introduced at trial could be ignored as evidence of defendant's state-of-mind, even if it was not consistent with subsequent trial testimony. *Id.* Understandably so, as such would constitute a question for the jury as to which of defendant's stories they find most credible. The court's reliance on *Knoten* seems simply inapplicable, as there is no self-contradictory testimony at issue in Appellant's case.

Respondent acknowledges that this Court is not limited to any certain portion of the evidence, but likewise, *Knoten* does not stand for the proposition that the court can evaluate only the evidence it chooses, in isolation of the remaining evidence, or outside the context for which the evidence was offered. Respondent argues precisely the opposite; this Court erred because it focused solely on "certain evidence" that in isolation might pass muster to warrant the requested charge. To do so is in contradiction to this Court's previous holdings that "the evidence presented must allow a rational inference the defendant is guilty only of the lesser offense" in order to justify the requested charge and "the court looks to the totality of the evidence in evaluating whether such an inference has been created." *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673. *Knoten* does not relieve the court of that responsibility.

Lastly, this court also erred in failing to abide by the limitations set forth in *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976). Therein, the Supreme Court set forth that reversal of a denial of a lesser included offense charge cannot be based upon the contention that the jury would accept in part and reject in part the evidence presented by the State in support of the greater charge. *Id.* at 430, 229 S.E.2d at 332. This limitation is monumentally important to the case at hand, because this Court expressly did so by relying upon part of Alicia's testimony to supplement the complete absence of heat of passion demonstrated by the defense.

Alicia's testimony described Appellant as clearly having a state-of-mind that desired violence. However, that evidence cannot be excised from Alicia's remaining testimony that such a state-of-mind was one that acted *in malice* by shooting Victim without any threat of violence or any legal provocation. Alicia's testimony as to how the shooting took place does not support voluntary manslaughter, and under *Funchess*, this Court cannot therefore take the portions of that testimony that might be inferred to satisfy the heat of passion element and pair them with defense's assertion that legal provocation existed when Victim shot first. Such a limitation is further demonstrated by again referring to the need to show that the heat of passion was *caused* by the legal provocation. *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. The seemingly brutal violence described by Alicia lacks a causal connection due to the absence of legal provocation. The legal provocation supposedly testified to by Tyeisha and Appellant lacks any proof that it caused Appellant to succumb to a heat of passion state-of-mind. To disregard *Funchess*, and permit the mix and match of facts, such that the elements are satisfied, would essentially render all murders worthy of voluntary manslaughter charges. This court erred in doing so.

Conclusion

For all the foregoing reasons, Respondent respectfully requests this Court grant rehearing, reconsider and reverse its ruling, and affirm the lower court.

Respectfully submitted,

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Columbia, South Carolina
August 26, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2017-002014

Opinion No. 5846 (S.C.Ct.App. filed August 11, 2021)

THE STATE,

RESPONDENT,

v.

DEMONTAY MARKEITH PAYNE,

APPELLANT.

CERTIFICATE OF SERVICE
Appellate Case No. 2018-001647

RECEIVED

Aug 26 2021

SC Court of Appeals

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing and Certificate of Service has been forwarded to Appellant's counsel, Susan Hackett, Esq., via email today, August 26, 2021 to shackett@sccid.sc.gov, and to her assistant at kkasperski@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 26th day of August, 2021.



Donna D'Alessio, Legal Assistant for
W. Joseph Maye
Assistant Attorney General

The South Carolina Court of Appeals

The State, Respondent,

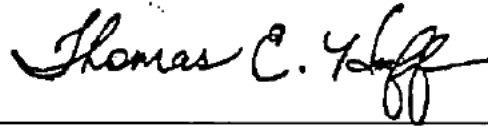
v.

Demontay Markeith Payne, Appellant.

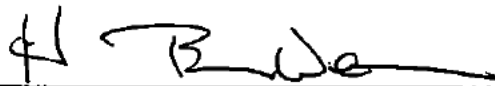
Appellate Case No. 2017-002014

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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FILED
Aug 31 2021

John William Weeks, Esquire
The Honorable Doyet A. Early, III