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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge
Appeal Case No. 2011-203746

THE STATE

RESPONDENT,

V.

JULIAN DEANDRE BATTLE,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

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2. Whether the trial court erred by charging the jury that it should consider evidence of flight in determining appellant's guilt?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court abused its discretion in denying Appellant's request for an involuntary manslaughter charge when there was no evidence establishing that the weapon over which the victim and Appellant allegedly struggled was the weapon used to kill the victim, and Appellant's actions otherwise did not support an involuntary manslaughter charge?

2. Whether the trial court abused its discretion in giving a jury instruction on flight evidence when Appellant made no objection to the charge and took no exception after the charge was given and instead argued it was not an improper charge, and where any error in the charge was harmless?

STATEMENT OF THE CASE

On September 12-14, 2011, Appellant Julian De'Andre Battle ("Battle") was tried by a jury for the murder of Rafael Dodd, and possession of a weapon during the commission of a violent crime. Appellant was tried in the Greenville County Court of General Sessions before the Honorable C. Victor Pyle, Jr., Circuit Court Judge. Daniel Eller, Esquire, represented Appellant. The State was represented by Assistant Solicitor Howard Steinberg of the Thirteenth Judicial Circuit. The first trial ended in a mistrial.

On November 17-19, 2011, Battle was tried before another jury and the Honorable C. Victor Pyle, Jr., Circuit Court Judge. He was again represented by Daniel Eller. The State was represented by Assistant Solicitor Steinberg. On November 19, 2011, Battle was convicted of murder and possession of a weapon during the commission of a violent crime. (Tr. 479). He was sentenced to life imprisonment for the murder conviction, and five years confinement on the possession of a weapon during the commission of a violent crime conviction. (Tr. 484). Before this Court is Appellant's direct appeal of both convictions. Battle requests this Court reverse his convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

STATEMENT OF FACTS

On December 24, 2009, Battle shot and killed Rafael Dodd. Dodd suffered a gunshot wound to the right upper shoulder. (Tr. 330). The projectile had passed from right to left through the right subclavian artery, through the esophagus, to his left, and back through the muscles of the left upper back and to exit the left upper back just below the top of the shoulder. (Tr. 330-31). The forensic pathologist testified that the shock wave of the missile passing closely to lungs caused hemorrhage around the lungs and caused bruising of the upper portions of the lungs. (Tr. 331). There was trauma to the right subclavian artery, and Dodd died as a result of bleeding out from that trauma. (Tr. 331).

The victim, Rafael Dodd, was the first cousin of Mikeya Shumate. (Tr. 37,130). Dodd, who was visiting from Memphis, was in town to see family during the Christmas holiday. (Tr. 56). On Christmas Eve, 2009, Shumate was in a relationship with Clintonian Dupri Owens. (Tr. 38-9, 131, 143, 166, 186). Owens is Battle's first cousin. (Tr. 38). Shumate was also good friends with her god-sister, Shameka Wells. (Tr. 37-8). Shumate also had another cousin, Jamaal Stewart. (Tr. 38, 83).

On Christmas Eve, there was a plan for Shumate, Wells, Owens, and Appellant to hang out and play cards at Wells' apartment. (Tr. 39, 131, 188). The group of four initially met up at Wells' apartment. (Tr. 131, 167). According to Wells, Owens and Battle showed up to her apartment first. (Tr. 55, see Tr. 188). Shumate showed up a little later. (Tr. 55, 188). Wells testified that someone in their group wanted to get some marijuana, and Shumate wanted to

stop by her aunt's place to let her cousins know that they would not be attending a get together. (Tr. 39, 56, 132, see Tr. 189). The four left together and went to Shumate's aunt's apartment. (Tr. 39-40, 56-7).

While there, the group met up with Dodd and Stewart.[1] (Tr. 38, 40, 83-4). Wells noted that at some point in time before Dodd and Stewart arrived at the aunt's apartment, Owens became agitated at the apartment. (Tr. 58). Also, Stewart testified that he sold Battle $5 worth of marijuana at the aunt's apartment.[2] (Tr. 84, 100, 101). While there, Shumate invited Stewart and Dodd to play cards with the group at Wells' apartment. (Tr. 84). Both Wells and Battle testified that Battle indicated he did not want to be around a lot of people that he did not know. (Tr. 40, 363). Battle further indicated that he wanted to hang out, party, and play cards at Wells' apartment. (Tr. 40).

Eventually, the original four in the group left Shumate's aunt's apartment. (Tr. 59-60, 191). They made one stop at a convenience store.[3] (Tr. 60-1). Then they returned to Wells' apartment. (Tr. 62, see Tr. 168). When they arrived, Stewart and Dodd were waiting outside of Wells' apartment building. (Tr. 41, 85, 192). Wells and Shumate both indicated that Owens and Battle were not aware that Stewart and Dodd were going to meet up with the group at Wells' apartment. (Tr. 62, 146, 192).

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[1] Wells noted that the two were not at Shumate's aunt's apartment when the group first arrived, but the two cousins did show up later. (Tr. 57).

[2] In his testimony at the prior trial, Stewart had indicated that he was not sure who purchased the marijuana from him, but he recalled it being either Appellant or Owens. (Tr. 101).

[3] Shumate indicated that they also stopped by her mother's house on the way back to Wells' apartment. (Tr. 132).

Wells, Dodd, and Stewart walked up to Wells' apartment. (Tr. 41, 62, 85, 106, 133, 147, 192). Shumate, Owens, and Battle initially remained outside. (Tr. 133, 192; see Tr. 168-69). It was cold, wet, and drizzly outside. (Tr. 133). Dodd used the restroom used the restroom when they got into Wells' apartment. (Tr. 41, 85). Shortly after the three entered the apartment, Owens walked in and retrieved some liquor that was on the floor. (Tr. 85, 133, 137, 193). Stewart testified that Owens stated the liquor belonged to Appellant. (Tr. 85, 133).

While Wells, Dodd, and Stewart were in Wells' apartment, they heard a commotion outside. (Tr. 41, 62, 63, 86). Shumate and Owens had gotten into an argument.[4] (Tr. 42, 133, 168, 198). Wells noted that she could hear the argument, but she could not tell what they were saying. (Tr. 63). Wells testified that Stewart went downstairs to find out what was going on and to see if he could diffuse the argument. (Tr. 42, 64). Stewart testified that he went downstairs to calm down the situation and to encourage Shumate to go inside. (Tr. 87, 106-07). He noted that he encouraged all three to go inside the apartment. (Tr. 87, 110). At that point, Stewart indicated that Appellant was still at his car. (Tr. 87).

After Stewart went downstairs, the argument escalated. (Tr. 42, 64, 134, 147, 168, 193-94, 198). Stewart indicated that Owens got into his face at that time.[5] (Tr. 107, 108). Owens admitted that he approached Stewart and told

[4] Shumate testified that the discussion was regarding the change in plans and the inclusion of her cousins into the evening. (Tr. 133, 147). Owens indicated that the argument was regarding whether the two should be interacting with both families at that point in time. (Tr. 168, 192).

[5] Owens testified it was Stewart who got into his face. (Tr. 193).

Stewart to mind his own business. (Tr. 169). Shumate testified that Owens did not believe Stewart should say anything to him at that time. (Tr. 134, 147).

Wells testified that when Dodd exited the restroom, he asked what was going on. (Tr. 42). After Wells told him that she did not know, Dodd went downstairs. (Tr. 42). Stewart and Shumate both testified that approximately two minutes after Stewart went downstairs, Dodd came down. (Tr. 87-88, 134).

When Dodd got downstairs, he asked what was going on. (Tr. 43,). Wells indicated that Dodd sounded like he was concerned and that he was just trying to end the situation. (Tr. 43, 65). At that point in time, Wells walked down the stairs. (Tr. 43). Stewart noted that Dodd remained calm. (Tr. 89).

In response to Dodd's initial inquiry, Wells recalled hearing someone say that it was none of his business. (Tr. 43). Shumate also indicated that Appellant told Dodd that Dodd had nothing to do with the argument. (Tr. 136). Wells and Shumate both indicated that Dodd said it was his business because Shumate and Stewart were his cousins. (Tr. 43-44, 66, 136). Stewart and Shumate testified that Appellant moved towards the porch when Dodd came outside. (Tr. 88, 135). Owens was moving around, and Stewart indicated that it appeared that Owens was trying to shake Stewart up with his movement. (Tr. 88). Shumate testified that Appellant was initially attempting to get Owens to leave during his confrontation with Stewart. (Tr. 148).

Stewart testified that Battle stood right in front of Dodd, who was standing to Stewart's left on the porch. (Tr. 89). According to Stewart, Battle asked Dodd who he was, and Dodd explained that Shumate was his cousin. (Tr. 89).

Stewart testified that Dodd remained calm. (Tr. 89). Stewart noted that Dodd and Battle were bumping stomachs and telling each other to stop. (Tr. 90, 110-11). Shumate also intimated that the two were "bucking" before she heard the shot. (Tr. 139). They continued bumping until Stewart saw Dodd jake towards him. (Tr. 90). Stewart stated that Battle pulled Dodd towards him. (Tr. 111, 114). Then, he saw Battle "buck up" on Dodd. (Tr. 113). Then Stewart heard the gunshot. (Tr. 113; see Tr. 125). Stewart saw a gunshot go off of his left side. (Tr. 90; see Tr. 125). Stewart stated that Dodd was shot on Stewart's side to the left. (Tr. 90, 113). Stewart did not see the weapon, but Stewart's weapon was on his side. (Tr. 90, 114, 125). Stewart indicated that he did not know Dodd had a gun at the scene, and he was not aware that the gun found at the scene belonged to Dodd. (Tr. 119, 120).

Shumate testified that Appellant and the victim got into an argument. At some point, she heard a shot. (Tr. 137). Shumate noted that they all ducked down and everything got quiet immediately after the shot was fired. (Tr. 137).

Wells testified that she went downstairs, and then she heard a gunshot. (Tr. 44). After hearing the gunshot, she ran back up. (Tr. 44). After a few seconds, she did not hear anything, so she went back downstairs. (Tr. 44). Wells noted that she saw Shumate standing in the parking lot, and Stewart was standing on the porch. (Tr. 44). Wells did not see a struggle, nor did she see a flash from a gun. (Tr. 71). Wells further testified that she did not see anyone holding a gun. (Tr. 71).

Owens testified that after the victim came downstairs, he was loud. (Tr. 169). Owens indicated that the victim went straight to Appellant when he came down. (Tr. 198). In a statement Owens gave a couple hours after the shooting, he had noted that Appellant told the victim to keep his hands off of him. (Tr. 170-71). Owens testified that the confrontation between Appellant and the victim was behind Owens. (Tr. 173, 195). Owens heard the gunshot, but did not see the shooting. (Tr. 173, 195, 198). When Owens turned around, the victim was already over the railing laying down. (Tr. 173, 196).

Appellant's Version of What Occurred at the Shooting

Appellant testified that he and his cousin, Owens, initially went to Wells' apartment to meet up with Wells and Shumate to hang out. (Tr. 358, 377). He stated that after Shumate arrived, someone indicated they wanted to smoke marijuana, and it was determined that they could get the marijuana from either Stewart or Dodd.[6] (Tr. 358-59). Appellant testified that the group left Wells' apartment and drove over to Stewart's mother's apartment (Shumate's aunt). (Tr. 359). After waiting first at Shumate's aunt's apartment, and then Shumate's mother's apartment, the group did eventually meet up with Stewart and Dodd. (Tr. 359-60). Appellant had met Stewart before, but had not met Dodd before. (Tr. 360). Appellant indicated that Owens got annoyed at Shumate for taking too long talking with her cousin. (Tr. 360-61).

[6] Appellant testified that either Wells or Shumate purchased the marijuana later that evening. (Tr. 380). Appellant also indicated that he did not smoke marijuana that night. (Tr. 380).

Appellant denied that he was anti-social that night. (Tr. 381). He indicated that he did not want to be around Shumate's family because he had not planned on being around anyone but Shumate, Wells, and Owens that night. (Tr. 381). He stated that it was Owens who really got upset. (Tr. 381).

The group eventually left, and on the way back to Wells' apartment, they stopped by a convenience store to pick up cigars and refreshments, and made a quick stop at Owens' mother's house. (Tr. 362). Then the group returned to Wells' apartment. (Tr. 363). Appellant testified that when they arrived back at Wells' apartment, Shumate initially went over to Stewart's and Dodd's car and talked with them. (Tr. 363). Stewart and Dodd went upstairs with Wells. (Tr. 363). Appellant noted that it appeared that Wells and Shumate had expected the two cousins to be at Wells' apartment. (Tr. 363). He further indicated that he was not aware that Stewart and Dodd would be at the apartment. (Tr. 363).

Appellant testified that Owens and Shumate got into an argument over the fact that Stewart and Dodd were at Wells' apartment. (Tr. 364). Appellant stated that he tried to calm down Owens. (Tr. 364). Then, Stewart came downstairs, and according to Appellant, Stewart started cursing at Owens. (Tr. 364). That led to an argument between Stewart and Owens. (Tr. 364-65). Appellant claimed that he attempted to get Owens to leave twice. (Tr. 365). After the first attempt, Appellant asked Owens to retrieve the alcohol from inside Wells' apartment. (Tr. 365-66, see Tr. 382). It was after Owens came back down with the alcohol that the argument with Stewart occurred. (Tr. 366). Appellant stated that Stewart never said anything about going into the apartment. (Tr. 382).

Instead, according to Appellant, Stewart cursed at Owens and may have mentioned something about Christmas. (Tr. 382-83). Shortly after Stewart came downstairs and started arguing with Owens, Dodd came downstairs. (Tr. 366-67).

Appellant asserted that Dodd went straight to Appellant when he came downstairs. (Tr. 367). Appellant thought they were about to fight. (Tr. 367). Appellant claimed that Dodd stated he could kill Appellant and get away with it. (Tr. 368, 383). Appellant also claimed that Dodd stated Appellant must be the man with all of the money. (Tr. 368). Appellant indicated that he interpreted that statement as a sign Dodd intended to rob Appellant. (Tr. 369). Appellant stated that the victim was taller than Appellant, and it was like the victim was talking down to him. (Tr. 369, 378). Appellant testified that the victim started putting hs hands on Appellant. (Tr. 369). Appellant responded by telling the victim to keep his hands off of Appellant. (Tr. 369). While the victim was pushing Appellant, Appellant claims the victim pulled out his gun. (Tr. 369). Appellant indicated he grabbed the victim's right hand and twisted his other hand. (Tr. 369). He grabbed the right hand because that was the one with the gun in it. (Tr. 369). Appellant contended that the gun was pointed at Appellant and Owens, and he was trying to get it away from their direction. (App. 369-70, 376).

Appellant then testified that he twisted, and the gun went off. (Tr. 370). He stated that he did not intend to pull the trigger of that gun, and he did not intend for the gun to fire. (Tr. 370). Appellant also indicated that he did not know where the gun was pointed during the struggle. (Tr. 376).

> When I twisted the gun, Mr. Dodd was pulling back trying to take the gun back. He was trying to pull his arm back and that's when the gun actually went off so I wasn't sure if his hand or my hand or his finger or my finger actually pulled the trigger. I know I did not intend to do it.

(Tr. 370, ll 13-8).

Appellant stated that he never held the victim's pistol in his hand. (Tr. 389). He also denied that he fired the gun into the victim's body. (Tr. 389). Appellant claimed he never actually grabbed the gun; instead, he grabbed the victim's hand and twisted it towards him. (Tr. 389). He maintained that he could not say for sure that he touched the trigger of the gun. (Tr. 389). Appellant also stated that he never told an investigator that he shot the victim in the chest. (Tr. 407, 409). He did tell Owens that the victim was shot with his own gun. (Tr. 409).

After the Shooting

When Wells went outside, she saw the victim hanging over a railing. (Tr. 71, 72, 73, 74). Owens and Battle were standing over Dodd as he was falling over a rail. (Tr. 44). Stewart testified that Owens and Battle held Dodd's body over the rail immediately after the shooting. (Tr. 116, 117). Wells also stated that sometime after the shooting, she saw Dodd lift a gun and aim it at Owens. (Tr. 47, 75). Wells noted that based upon that, she tried to get Shumate to move out of the way. (Tr. 47). When Wells looked back at Dodd again, he was dead. (Tr. 47).

Stewart testified that he started to dial 911 on his cell phone, but Appellant took the phone away from him. (Tr. 90, 91, 121). Shumate also testified that

Appellant and Owens took Stewart's phone as they left the scene. (Tr. 138, 140). Owens also confirmed that Appellant took Stewart's phone as they left. (Tr. 174).

Wells stated that she heard Battle say that the gunshot was just a flesh wound, and that Dodd would be alright. (Tr. 45, 76, 77). In speaking of Appellant, Wells stated, "He was calm. He made light of it like it's just a flesh wound, he'll[victim] be alright." (Tr. 45, ll 14-5). Stewart testified that Appellant stated, "[d]on't worry, it's nothing but a graze wound," as he walked away from the scene." (Tr. 91, ll 4-5; see Tr. 120-21). Shumate also testified that Appellant was saying, "oh, it ain't nothing but a flesh wound, he'll be alright." (Tr. 138, ll 6-7). Shumate also indicated that Appellant did not show any remorse after the shooting. (Tr. 138). She stated that Appellant "just stood there, fixed his clothes, popped his collar and that's when he was like he said again, he'll be alright, it ain't but a flesh wound." (Tr. 138, ll 11-4).

Owens testified that after the shooting, he and Appellant left the scene. (Tr. 175). They went to Owens' mother's house. (Tr. 175). He noted that Appellant was telling Owens to calm down, and Appellant twice said "I fucked up, just calm down." (Tr. 176, ll 8-9). Owens indicated that Appellant did not say anything about the victim pulling out a gun. (Tr. 176). Owens testified that he never saw Appellant with a pistol. (Tr. 196, 205, 206).

Owens also testified that after Appellant was released from jail, Owens talked with him about the shooting. (Tr. 177). Owens recalled that Appellant told him that the victim pulled a gun on him, and Appellant reacted by grabbing it.

(Tr. 177). The gun went off. (Tr. 177). Owens stated that Appellant told him that he grabbed the back of the gun, and he turned the gun away from Appellant. (Tr. 178, 182). Owens noted that Appellant did not tell him where the gun was pointed when he did the demonstration. (Tr. 201, 202).

Shumate testified that she had seen Appellant with a gun before. (Tr. 207). She noted that he carried a gun because he did not trust anyone. (Tr. 208).

After the gun went off, Appellant indicated the victim's body went over the railing. (Tr. 370-71, 387). Appellant noted that the victim's gun went with the victim. (Tr. 371). At that point, Appellant stated he saw Stewart; Stewart reached for something that Appellant thought was a gun, and Appellant knocked it out of Stewart's hand. (Tr. 371, 390). Appellant denied that he took Stewart's phone, but thought the phone may have been what he knocked out of Stewart's hand.[7] (Tr. 371, 390, 391).

Appellant denied that he was carrying a gun that night. (Tr. 372, 378, 388, 413). He acknowledged that he and Owens ran and left the scene in Appellant's car. (Tr. 372). He noted that he ran because the victim had just tried to kill him, and Appellant thought Stewart was going to try to pick up the victim's gun and shoot at Appellant. (Tr. 397). Appellant denied that he told his cousin that Appellant messed up after the shooting. (Tr. 398). Instead, Appellant contended, "I said in the car to my cousin that that was fucked up what they tried

[7] Appellant also denied tossing Stewart's phone either between Wells' apartment complex and Owens' mother's house, or between Owens' mother's house and Spartanburg. (Tr. 393).

to do. I never said the words I fucked up." (Tr. 397, ll 16-8). They drove to Owens' mother's house. (Tr. 372). Appellant indicated that his car had a flat tire when they left the scene, so he borrowed Owen's mother's car to get home to Spartanburg. (Tr. 372-73, 398).

Appellant spoke with then Sergeant (now Lieutenant) Taylor of the Uniformed Patrol Division. (Tr. 212, 399). Both Taylor and Appellant testified that Appellant indicated he was going to turn himself in to law enforcement. (Tr. 212, 399). Appellant claimed that he was on his way to turn himself in, but he stopped by his fiancée's house. (Tr. 399). He also stated that he could not drive to the police station because his aunt had already picked up the car he borrowed on the previous night to get to Spartanburg. (Tr. 400). Appellant claimed that he left his fiancée's house and went to a friend's house to get a ride. (Tr. 401). He further asserted that he fell asleep at the friend's house, and that was where he arrested. (Tr. 401-02).

Police Investigation

No projectiles of cartridge casings were recovered from the scene. (See Tr. 225-26, 231-32, 235-36, 249, 250, 262). A firearm was found at the scene near the victim. (Tr. 235, 236, 249). The firearm contained seven unfired cartridges, six in the magazine and one in the chamber. (Tr. 236-241). No fingerprints were found on the firearm or the magazine to the firearm. (Tr. 251, 252).

Investigator Jones, the lead investigator in the case, testified that she took a statement from Appellant on the evening he was arrested. (Tr. 260, 269-84).

During the course of the statement, Appellant told Jones that he and Owens initially went to Wells' apartment, and she was the only one there. (Tr. 277). According to the statement, Appellant saw the victim and Stewart pull up in a car to Wells' apartment as the original four were walking up to Wells' apartment. (Tr. 277). Appellant stated that Owens got upset and told Appellant that they (i.e. Appellant and Owens) would be leaving. (Tr. 277-78). According to the statement, Appellant asked Owens to retrieve his alcohol from the apartment. (Tr. 278). Appellant indicated that an argument ensued. (Tr. 278). Jones testified that Appellant further stated as follows:

> Jamaal said what the fuck are you talking about. While we were trying to leave, Jamaal said, y'all ain't going nowhere. Rafael said, what the fuck's wrong with y'all. I kept saying we were just trying to leave. Rafael kept asking where my money was. Rafael then pulled out a pistol and pointed it me and Pri. Meka and Keya were having money problems. They acted like they didn't know what they were doing. He put the gun in my face. I'll be honest with you I can't explain what is," and then there's a pause, "I grabbed it and turned it back towards him. He pushed me with his right hand. We struggled and I don't know if I pulled the trigger or not. It went off and I dropped the gun. I ran off and I told Pri to call the police. I had a flat tire on my car. I couldn't use my cousin's phone because it was a touch screen. We went to my father's house and he knew something was wrong with me. Pri said do you think that boy got shot. I said, no, I thought he just fell trying to duck after it went off.

(Tr. 278, ll 4-22). In the statement, Appellant went on to state that he eventually tried to change the flat tire on his car that night at Owen's mother's house. (Tr. 279). He also stated that he ended up going to his fiancée's house and resting. (Tr. 279). While there, he received telephone calls from his father and mother, both indicating that the police were looking for him. (Tr. 279). In the statement, Appellant indicated that he then spoke with Sgt. Taylor on the phone. (Tr. 279).

Appellant stated in the statement that he then left his fiancée's house and went to another individual's house with the intent of asking for a ride to Greenville. (Tr. 279). Appellant stated that he fell asleep on the couch, and Spartanburg police were outside when he was awoken. (Tr. 279).

Jones testified that Appellant never indicated the weapon went off accidentally. (Tr. 286). She also noted that the pistol found at the scene was not the murder weapon because it was fully loaded when it was found on the scene. (Tr. 286-89).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN INVOLUNTARY MANSLAUGHTER CHARGE; THE WEAPON OVER WHICH APPELLANT AND THE VICTIM STRUGGLED WAS NOT THE MURDER WEAPON.

Standard of Review

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

The presence of evidence to sustain a conviction for the crime of a lesser degree determines whether it should be submitted to the jury. State v. Rucker, 319 S.C. 95, 98, 459 S.E.2d 858, 860 (Ct. App. 1995) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976)); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999). It is not error to refuse

to charge the lesser included offense unless there is evidence tending to show that 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) (citing State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); State v. Mickle, 273 S.C. 71, 254 S.E.2d 295 (1979).

How the Issue Arose at Trial

After the defense rested, there was a jury charge conference. (See Tr. 415). During that conference, the State objected to the inclusion of an involuntary manslaughter charge. (Tr. 415). The trial court requested argument from Appellant regarding whether to charge involuntary manslaughter. (Tr. 415). Appellant argued that involuntary manslaughter would be an appropriate charge in his case. (Tr. 415).

> Your Honor, the case is Casey versus State and there is also the case of State versus Light which is a 2005 decision. A charge of involuntary manslaughter will be probative if there's evidence of weapon discharge during a struggle between the victim and the defendant. And as a result of that State versus light case, 363 SC 325, it's a citation, there's been evidence of a struggle over the weapon between the victim and the defendant, Mr. Battle is entitled to an involuntary manslaughter charge.

(Tr. 415, l 17- 416, l 1). In response, the State contended the evidence did not fit an involuntary manslaughter charge. It noted that there was not a true struggle because, under Appellant's theory, he was able to point the weapon back towards the victim. (Tr. 416). The State contended that Appellant's actions under his testimony would constitute pointing and presenting a firearm, and it would not fit within an involuntary manslaughter framework. (Tr. 416).

> This is not a case where a gun is on the ground, as some of the cases have shown, and you were to jump for a gun at the same time and the gun were to go off, that's one case. But when you have this case scenario where he pointed the gun back at him because I thought that he was going to killed me, there's other cases, but I don't have them in front of me, it was either self-defense or murder or voluntary manslaughter.

(Tr. 416, ll 14-21). Appellant responded by noting that

> [n]one of the State's witnesses presented testimony that they saw any gun period. The only gun that was produced is actually in evidence. All the other testimony in evidence is that there was a struggle over that weapon and it's clear that there was a struggle and therefore he's entitled to a charge on involuntary.

(Tr. 416, l 25 – Tr. 417, l 6).

Ultimately, the trial court disagreed and decided not to choose involuntary manslaughter. (Tr. 417).

Relevant Facts and Argument

A. Appellant was not entitled to an involuntary manslaughter charge because there was no evidence presented at trial that the victim was killed by the weapon over which Appellant and the victim allegedly struggled.

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006). To constitute involuntary manslaughter, there must be a finding of criminal negligence. State v. Wigginton, 375 S.C. 25, 35, 649 S.E.2d 185, 190 (Ct. App. 2007) (citing State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003)). Criminal negligence for involuntary manslaughter is statutorily defined as "the reckless disregard of the safety of

others." S.C. Code Ann. § 16-3-60 (2007). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

"A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense." Crosby, 355 S.C. at 51, 584 S.E.2d at 112. Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

Appellant here claims that he was entitled to an involuntary manslaughter charge because he testified that he and the victim struggled over a weapon, and the victim died as a result. Respondent submits this argument is without merit.

First, there was no testimony or evidence establishing that the victim died as a result of a gunshot from his own weapon. To the contrary, the physical evidence indicated that the victim's gun was not fired the night of the shooting.

Iona Ooten, the forensics officer who recovered the victim's gun from the scene, testified that when she secured the pistol for transport, she removed an unfired cartridge from the chamber of the gun. (Tr. 239). She also removed the magazine from the firearm, and subsequently removed the unfired cartridges that were in the magazine. (Tr. 240). Ooten indicated there were six unfired cartridges in the magazine. (Tr. 241). James Armstrong, a criminalist for the

Greenville County Department of Public Safety who was qualified as an expert in firearms examination and ballistics at trial, testified that the maximum capacity for the victim's gun was seven cartridges, six in the magazine and one in the chamber. (Tr. 312-13, 316, 317).

Furthermore, none of the eyewitnesses to the confrontation testified that they saw the victim's gun fire during the shooting. In fact, the other eyewitnesses' testimony indicated they were unaware that either Appellant or the victim had firearms until after they heard the gunshot. Stewart testified that when the shooting occurred, he did not see the weapon from which the shot was fired. (Tr. 91, 114, 125). Wells also did not see the shot fired. (Tr. 44). She heard the shot, and her immediate response was to duck down until it appeared safe to head outside. (Tr. 44). She did not see the victim's weapon until she saw the victim raise it and point it at Appellant and Owens while the victim was on the ground. (Tr. 46-7, 75). She noted during cross-examination that she did not see anyone holding a gun. (Tr. 71). Shumate testified that she heard the shot, but she did not see the gun or anyone pull the trigger. (Tr. 137, 154). Owens also indicated that he did not see gunshot fired because the shooting was behind him. (Tr. 173). Further, Owens testified that Appellant did not say anything about the victim pulling out a gun when they were driving away from the scene. (Tr. 176).

Even Appellant's testimony does not support a finding that the victim was shot by his own firearm. Appellant claimed he never actually grabbed the gun; instead, he grabbed the victim's hand and twisted it towards him. (Tr. 389). He maintained that he could not say for sure that he touched the trigger of the gun.

(Tr. 389). Appellant also stated that he never told an investigator that he shot the victim in the chest.[8] (Tr. 407, 409). Appellant maintained during his trial that he was not aware of where the victim's gun was pointed when it fired. (Tr. 407). The crux of Appellant's testimony and argument at trial was not that he fired the victim's gun; it was that if the victim died from his own gun, and if Appellant had any connection to the shot being fired, it was purely by accident. (See Tr. 370, 389-90).

The lack of testimony and evidence establishing that the victim's gun was the weapon that killed the victim supports the trial court's denial of the request for the jury charge. Implicit in the cases that recognize a defendant is entitled to an involuntary manslaughter charge when there is a struggle over a weapon is that the weapon in the struggle was the one used in the homicide. For instance, in Tisdale, while there were two competing versions of how the shooting occurred, there was no contention that the weapon fired was the one that killed the victim. In Tisdale, Tisdale's co-defendant had testified that the Tisdale and the victim struggled over the victim's gun, and during the course of that confrontation, two shots were fired. Tisdale, 378 S.C. at 124, 662 S.E.2d at 411. The co-defendant noted that he was not sure who had the gun when the shots were fired, but the defendant had the gun afterwards. Id. The defendant in Tisdale alleged that he and the victim struggled over the victim's gun, the gun discharged, and the victim went still. Tisdale, 378 S.C. at 124, 662 S.E.2d at 412. Similarly, in Casey, there was a struggle over a shotgun, and the victim died from injuries that resulted

[8] He did tell Owens that the victim was shot with his own gun. (Tr. 409).

from a gunshot apparently resulting from that struggle. Casey, 305 S.C. at 446, 409 S.E.2d at 391-92.

In State v. Light, the defendant was found to be lawfully armed in self-defense, and the struggle over the weapon was over the weapon that went off and killed the victim. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008). Similarly, in State v. Brayboy, this Court noted that in his statement, the defendant indicated that he and the victim initially struggled over the gun, the gun hit the floor, and both the defendant and victim both reached for the gun. Brayboy, 387 S.C. 174, 177-78, 691 S.E.2d 482, 484 (Ct. App. 2010). The defendant obtained the gun, and in his statement, he indicated that gun went off as he was swinging his arms while arguing with the victim. Id. at 178, 691 S.E.2d at 484. Again, the weapon over which the two struggled was the gun that ultimately killed the victim.

Appellant was not entitled to an involuntary manslaughter charge. Unlike those cases where a struggle over a weapon was enough for an involuntary manslaughter charge, the struggle in this case was not over the weapon that killed the victim. Thus, the struggle would not trigger the necessity of an involuntary manslaughter charge because Appellant's actions would not fit within either of the two scenarios where an involuntary manslaughter charge is warranted.

B. Appellant was not entitled to an involuntary manslaughter charge even if the victim's gun was the weapon that fired the fatal shot; under Appellant's version of events, Appellant's actions were not unlawful and he did not act with reckless disregard for the safety of others prior to the shooting.

Furthermore, assuming *arguendo* there was evidence the victim's gun was the weapon that killed him, Appellant was still not entitled to an involuntary manslaughter charge. First, Appellant could not show that he was engaged in an unlawful activity not amounting to a felony that would not naturally tend to lead to death. By his account, his actions in grabbing the victim's arm were in self-defense, and not an attack on the victim.

Second, Appellant could not show that he was engaged in a lawful activity with reckless disregard for the safety of others. According to Appellant's testimony he was not acting in reckless disregard for the safety of others. To the contrary, his testimony indicated that he was specifically attempting to protect himself and his cousin because, according to Appellant, the victim had the gun pointed in their direction before he grabbed the victim's arm. (Tr. 369-70). Appellant never admitted that he pulled the trigger. (See Tr. 369-71, 389). In fact, Appellant testified that he never actually grabbed the gun. (Tr. 389). Instead, he maintained that he only grabbed the victim's hand. (Tr. 389). In all, there was no evidence that Appellant negligently handled a loaded gun, indicating his actions were clearly distinguishable from cases like Brayboy, 387 S.C. at 180, 691 S.E.2d at 485; State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008); and Light, 378 S.C. at 648-49, 664 S.E.2d at 468-69. By his account, he never actually handled the gun.

Altogether, Respondent submits the trial court did not abuse its discretion in denying the request for an involuntary manslaughter charge. If Appellant's testimony was to be believed, he would have been entitled to a self-defense charge, which he received. However, nothing in his testimony reflected that he acted negligently or in reckless disregard for the safety of others. As a result, the denial of the charge was correct. This argument should be denied, and Appellant's convictions should be affirmed.

II. APPELLANT'S ARGUMENT THAT THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON FLIGHT AS EVIDENCE OF GUILT IS NOT PRESERVED FOR APPELLATE REVIEW; EVEN IF THE ARGUMENT WAS PRESERVED, ANY ERROR BY THE TRIAL COURT IN GIVING AN INSTRUCTION WAS HARMLESS.

How the issue arose at trial

During its charge of the jury, the trial court gave the following instruction:

> I charge you, ladies and gentlemen, that voluntary flight of a person either there or soon after the commission of a crime, is a circumstance not sufficient in itself to establish guilt but is a circumstance that you the jury may consider in connection with all the other evidence in determining the guilt or innocence of a person.

(Tr. 464, ll 16-22).

After completing the charge, the trial court asked if there were any exceptions to the charge given. He initially asked the State for any objections. (Tr. 471). After a brief discussion regarding whether during a supplemental instruction, the trial court should use the word "voluntary" when discussing manslaughter, the State requested the trial court instruct the jury that flight cannot be considered evidence of guilt.

> I would ask for that and I would also ask that you reinstruct the jury as to – I believe Your Honor's instructions are correct but the Supreme Court said that there can't be any mention of flight being evidence of guilt in a jury charge and I would ask you to please say something along the lines of any evidence of flight should be something that you can consider if you feel necessary. I would not ask any other charge outside of that.

(Tr. 471, ll 14-22).

> Appellant then responded as follows:
>
> Your Honor, first I would object to the term voluntary. If you're only going to charge on manslaughter, there's no reason to confuse the jury. Secondly, **I believe your charge did say they're not**

supposed to consider that as guilt but it is something they can consider as far as flight evidence. And third, Your Honor, I would just renew our prior objection request to include involuntary manslaughter as a charge to the jury.

(Tr. 471, l 23 – 472, l 6). The trial court declined to give any further instructions.

Standard of Review

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." State v. Miller, 397 S.C. 630, 635, 725 S.E.2d 724, 727 (Ct. App. 2012)(quoting State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct.App.2011)). "In general, the trial court is required to charge only the current and correct law of South Carolina." Miller, 397 S.C. at 635, 725 S.E.2d at 727 (quoting Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Miller, 397 S.C. at 635, 725 S.E.2d at 727 (quoting State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct.App.2004)). "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." Miller, 397 S.C. at 635, 725 S.E.2d at 727 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003)).

A. Appellant's argument is not preserved for appellate review.

Contrary to Appellant's assertions, this issue is not preserved for appellate review. Appellant did not object or take exception to the trial court's instruction regarding flight as evidence of guilt. Instead, Appellant attempted to refute the State's argument that the charge given was improper by asserting the trial court's instruction did not indicate the jury could consider flight as evidence of guilt.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004)(quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed.2002)).

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. Dunbar, 356 S.C. at 142, 587 S.E.2d at 694; State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(argued

one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal).

Here, Appellant failed to properly preserve this issue in two respects. First, Appellant did not object to the court's instruction. As already noted, Appellant instead attempted to argue that the instruction was proper because it instructed the jury not to consider flight evidence as evidence of guilt. Second, Appellant did not join in with the State's objection and argument that the instruction was improper and should be recharged. See, e.g., State v. Nichols, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) (issue not preserved where defendant did not join in co-defendant's objection). Since this issue is not preserved for review, it should be dismissed.

B. Any error by the trial court in giving this instruction was harmless.

"Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (citing Lowry v. State, 376 S.C. 499, 510–11, 657 S.E.2d 760, 766 (2008)).

The instruction that was given by the trial court regarding flight was arguably improper. In State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980), the Supreme Court held it was in appropriate for trial courts to give a jury instruction regarding the law of flight evidence as evidence of guilt. While the instruction given in this case specifically avoided stating that flight constituted evidence of guilt, the fact there was an instruction on flight is arguably inconsistent with the Supreme Court's determination in Grant.

That being said, any error by the trial court in giving the instruction he gave was harmless. First, Respondent submits the instruction that was given minimized the significance of flight evidence as evidence of guilt. The instruction specifically noted that flight is not sufficient to establish guilt, but the jury could consider it with all of the other evidence in deciding guilt or innocence. This was not inconsistent with how evidence of flight can be considered by a jury. See Grant, 275 S.C. at 408, 272 S.E.2d at 171; see also State v. Pagan, 369 S.C. 201, 208-09, 631 S.E.2d 262, 266 (2006); State v. Walker, 366 S.C. 643, 654-55, 623 S.E.2d 122, 127-28 (Ct.App.2005).

Second, there was overwhelming evidence of Appellant's guilt in this case. As noted in the argument to the first issue, there was no evidence the victim's gun was the one that killed the victim. There was testimony establishing Appellant carried his own pistol on other occasions. (Tr. 207-08). There was no question that he was involved in a confrontation with the victim, the confrontation was heated, and the victim was killed during the confrontation. Also, Appellant's actions after the shooting supported a finding that he acted with malice in killing the victim. He prevented Stewart from calling 911 by either knocking away or taking his cellphone. (Tr. 90-1, 121, 138-40, 371, 390). Several witnesses indicated he tried to downplay the gunshot by claiming it was only a flesh wound. (Tr. 45, 76, 77, 91, 120-21, 138). Some of the testimony reflected that Appellant was emotionless and unapologetic about shooting the victim.[9] (Tr. 45, 76, 77,

[9] Shumate testified that after the shooting,

> that's when he talking about that's what real niggas do. If you going to do something, that's what real niggas do, it ain't nothing but a

91, 120-21, 138). Also, later after the shooting Appellant told Owens to calm down, and Appellant twice said "I fucked up, just calm down." (Tr. 176, ll 8-9). Owens indicated that Appellant did not say anything about the victim pulling out a gun. (Tr. 176).

Altogether, there was more than sufficient evidence to support the murder conviction outside of the evidence of flight. As a result, any error by the court in giving an instruction on flight evidence was harmless. Appellant's convictions should therefore be affirmed.

> flesh wound. After that Dre ain't have no remorse. Dre just stood there, fixed his clothes, popped his collar and that's when he was like he said again, he'll be alright, it ain't but a flesh wound.

(Tr. 138, ll 8-14).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm her convictions in the murder of Rafael Dodd and for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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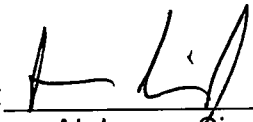
By: 
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June 28, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge
Appeal Case No. 2011-203746

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JULIAN DEANDRE BATTLE,

APPELLANT.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matters designated by Appellant to be included in the Record on Appeal, Respondent proposes the following be included:

Transcript pages 225-28, 234-57

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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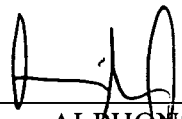
By: 
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THE STATE,

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CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, David Alexander, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 28th day of June, 2013.

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