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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Greenville County

The Honorable Perry H. Gravely, Circuit Court Judge

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THE STATE,

Respondent,

v.

ROBERT LEE BELCHER, III,

Appellant.

Appellate Case No. 2023-001378

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# INITIAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases:***

***Constitutional Provisions:***



***Statutes and Rules:***



***Other Authorities:***

## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge err by denying Appellant's motion for a directed verdict as to the offenses of murder, armed robbery, first degree burglary, larceny, and possession of a weapon during the commission of a violent crime when the state failed to present any direct or substantial circumstantial evidence of Appellant's guilt rather the evidence merely raised a suspicion Appellant was involved?

2.

Did the trial judge err by refusing to charge the jury that "The testimony of an accomplice should be received with great care and caution. You should consider whether the particular accomplice is testifying truthfully or falsely in order to obtain a favorable recommendation by the government in the sentencing of his own case. You should not convict the defendant on the uncorroborated testimony of an accomplice unless you believe that testimony beyond a reasonable doubt" when the instruction was a correct statement of the law and supported by the evidence presented?

(BOA, p. 1).

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge err by denying Appellant's non-specific motion for a directed verdict of acquittal on the charges of murder, armed robbery, first degree burglary, larceny, and possession of a weapon during the commission of a violent crime when there was direct evidence in the record from an accomplice supporting Appellant's major participation in the crimes?

2.

Did the trial judge err by adhering to our Supreme Court's precedent and the South Carolina Constitution's prohibition on comments on the facts by a trial judge which required him to deny Appellant's request to comment on the credibility of an accomplice's testimony?

## STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant Robert Lee Belcher, III, on October 6, 2020, for murder, armed robbery, first degree burglary, possession of a weapon during the commission of a violent crime, conspiracy, and petit larceny; all charged stemming from incident on New Years Eve 2017. R. p. * (Indictment).

A jury trial on all charges was held July 17-20, 2023. The Honorable Perry H. Gravely presided. (Tr. p. 1). Appellant was tried jointly with co-defendant Raymond Martinez, Jr.[1] Kenneth Gibson represented Appellant. Christopher Grubbs and Kaitlin Diaz represented the co-defendant, Mr. Martinez. (Tr. p. 1). On July 20, 2023, the jury found Appellant guilty as indicted. (Tr. p. 666, l. 24 – 667, l. 14). Judge Gravely sentenced him to forty-five years for murder, thirty years for armed robbery, twenty years for first degree burglary, five years for the weapons offense, time served for conspiracy, and time served for petit larceny with the active sentences to be served concurrently. (Tr. p. 683). This direct appeal follows.

[1] Mr. Martinez's direct appeal is also pending before this Court. He similarly raises an issue that the court erred in rejecting a request for a special charge regarding credibility of accomplice testimony. Appellate Case No. 2023-001201, IBOR filed April 17, 2024.

## RESPONDENT'S STATEMENT OF THE FACTS

On December 31, 2017, four individuals came together with the intent to rob victim, Jermaine ("Twin") Bruster.[2] Before the new year eve's celebration with friends could be begin, Jermaine would be found dead in his apartment, a visible gunshot wound to the chest, and the apartment he shared with Cedric McKinney ransacked. The jury heard the following evidence in support of Appellant's guilt in the crimes:

Jermaine's roommate, Cedric, testified that he last saw Jermaine in the apartment at approximately 5:30 pm. (Tr. p. 104). They had planned to attend a family party that evening at a different apartment in the complex. (Tr. p. 107). "Rico" is one of Cedric's cousins and Cedric is also related to Jermaine's long-time girlfriend Shelvis Gambrell who had also planned to attend the get together. (Tr. p. 103). Rico asked Cedric to let Jermaine know to pick up Shelvis for the new year eve festivities in the apartment complex and to bring the food she prepared. (Tr. p. 107, 135). Tiffany Gambrell, Shelvis's sister, had asked Rico to make the request. Tiffany also lived in a nearby apartment in the same complex. (Tr. p. 107, 129, and 130). When McKinney opened the door to his own apartment, Jermaine was "in the middle of the floor" gurgling on his own blood, or making some type of "snoring" sounds, and the home had been ransacked. (Tr. p. 108, ll. 6-19). Cedric "screamed for Tiffany" to come to the apartment, which she did, and immediately called 911. (Tr. p. 108, l. 24 – p. 109, l. 4). Though he attempted to aid in the investigation, Cedric felt the need to move into another apartment, which the leasing agency allowed. When McKinney returned in February to gather his things, he noticed his change jar – a repurposed cheese ball container – was missing. (Tr. pp. 116-117). He recognized the container in the Ingles image

[2] *See* Tr. p. 133, ll. 14-21. For convenience and to be consistent with the testimony, this section will refer to the victim as Jermaine, and the remaining individuals by their first names, as well.

showing Martinez after the murder. (Tr. p. 120). McKinney recalled there being approximately "75 to a hundred dollars" in the jar. (Tr. p. 121, l. 11).

Tiffany Gambrell testified that the family party was to be held at her apartment across the street from McKinney's apartment. (Tr. 131-132). She recalled the Cedric was screaming for her to come to the apartment around 7:50 pm. (Tr. 135).

Investigator Chad Maltby testified that he received a call around 8:30 pm to respond to the apartment for a "homicide-related incident[]." (Tr. p. 145, ll. 11-23). When he arrived shortly after 9:00 pm, the scene had been secured and EMS was present. (Tr. p. 149). He saw Jermaine "lying on his back" with "an obvious deformity to his upper left chest area that was consistent with a gunshot wound – the wound later confirmed to be the one fatal wound received. (Tr. p. 149, l. 22- p. 150, l. 11; *see also* Tr. p. 483). The apartment appeared "in complete disarray." (Tr. p. 150, ll. 14-21). While the investigation continued, and leads processed, little progress. However, after receiving information from Cedric about the change jar,[3] the investigator obtained subpoenas for "Coinstar records from the two closest locations" from the murder scene, one of which was an Ingles grocery store. (Tr. p. 167, l, 12 – p. 168, l. 21). The Ingles images showed Raymond Martinez, who the investigator personally recognized, at the Coinstar with the cheese ball container with change, and the investigator also obtain a receipt that show the use at 8:21 pm on December 31, 2017, the amount to be paid out was "71. 72." (Tr. p. 171, ll. 2-11; p. 172, ll. 15-22; p. 176; *see also* Tr. pp. 283-289). With Martinez identified, investigators developed Kirk "KP" Porter, Appellant, and Keyla "Kiki" Mansell as additional suspects. (Tr. pp. 177-178). Martinez was also known as "Ratchet." (Tr. p. 185, ll. 6-7). Investigator Maltby reached out to the girlfriends

[3] An inventory of items also reviewed that Jermaine's watch, "an Echo style watch," was also missing. (Tr. p. 166, ll. 8-17). The watch was not found. (Tr. p. 227, ll. 6-9).

Martinez and Appellant had at the time. When he interviewed Sherry McBee, Appellant's then girlfriend, she called Appellant with the investigator present, asked "why the police" were at her home, and "during the conversation he provided names of the people he knows, confirmed knowing … Ratchet, Raymond Martinez; Kiki … Keyla Mansell; KP, who's Kirk Porter" which was recorded. (Tr. p. 185, l. – p. 186, l. 25). Then, shortly after, "within the same afternoon" only an hour or two apart, Appellant called the investigator and denied knowing the individuals. (Tr. p. 187, l. 23-p. 188, l.18). In another call, Appellant could not "provide an alibi" though he made the statement "he smokes weed." (Tr. p. 189, ll. 5-22). Investigator Maltby turned to obtaining surveillance video at the apartment complex where Appellant lived with Sherry McBee and also where "Kiki" Mansell lived. (Tr. p. 196). He identified a grayish Mercedes around 7:04 pm, activity around the car, the car leaves, and returns around 7:36 pm., with more activity including opening and closing the trunk, then at 8:15 pm, it leaves again. (Tr. p. 199; *see also* Tr. p. 296-300). The apartments are approximately two miles apart. (Tr. 239). The investigator connected the Mercedes to Kirk Porter, though Porter's girlfriend, Francesca Troiso. (Tr. p. 200). He interviewed Porter and Porter "provided several facts, corroborated with other parts of [the] investigation linking all the defendants named together." (Tr. p. 206, l. 25 – p. 207, l. 2). Investigator Maltby then obtained arrest warrants for murder, possession of a weapon/violent crime, first degree burglary, conspiracy and petit larceny for each of the co-defendants, Porter, Martinez, Mansell and Appellant. (Tr. p. 207). Appellant's phone was seized at arrest. (Tr. p. 208). The phone showed the Appellant had contact information for the other three. (Tr. p. 209).

Investigator Maltby also determined that Jermaine was selling drugs, cocaine, from his apartment. (Tr. pp. 222-223).

Appellant's former girlfriend, Sherry McBee, confirmed in her testimony that Appellant would "hang out" with Keyla "Kiki" Mansell, who also lived in their apartment complex, and Raymond "Ratchet" Martinez and Kirk "KP" Porter. (Tr. p. 315, l. 25- p. 316, l. 14). She confirmed that Appellant was not with her during the evening on new year's eve in 2017. (Tr. p. 316). When he returned after midnight, he was "really emotional, like it was just a strange energy coming off him." (Tr. p. 317, ll. 17-21). When she asked him about the murder the next day, and showed him the victim's picture from a Facebook post, she recalled he basically shut down. (Tr. pp. 318-319). She testified she knew the victim through "friends of my family…." (Tr. p. 319, ll. 18-22). She recalled that he later was "crying one day on the edge of [her] bed. And he was like I did something bad" and was "rocking back and forth." (Tr. p. 320, ll. 18-21). He also asked that "if he killed someone [she] kn[e]w, would [she] tell on him or something like that…." (Tr. p. 321, ll. 14-16). She asked him to leave her home. (Tr. p. 320).

The jury also heard from Kirk "KP" Porter. He testified that he had pled guilty to voluntary manslaughter for his participation in the crime with the other charges from the incident dismissed along with unrelated charges. (Tr. p. 387). He confirmed that had a silver Mercedes at the time of the murder, and he was driving that car on the new year's eve. (Tr. pp. 392-393). That evening, he was with Appellant, Keyla "Kiki" Mansell, Raymond "Ratchet" Martinez at "KiKi's" apartment. (Tr. p. 395). He was aware that Sherry McBee lived one story down from her. (Tr. p. 395). "Kiki" suggested the robbery to obtain "cocaine and money." (Tr. p. 397). Appellant and Martinez were to go into the apartment while Porter and Mansell stayed in the car, which is exactly the plan they four followed. (Tr. pp. 398-400). While he parked away from the complex, he drove toward the complex to meet Appellant and Martinez. (Tr. p. 401). Martinez had the container of change with him, but not the "[d]rugs and money" the group expected. (Tr. p. 404).

He dropped Kiki and Appellant back at their apartment complex and took Martinez to the local Ingles to use the Coinstar machine. (Tr. pp. 406-407). As Investigator Maltby testified, Porter spoke to investigators and identified each of his co-defendants. (*See* Tr. pp. 410-412). He also identified a document with his signature that was not written by him, nor sent to the prosecution by him, that appear to indicate he wished to "recant my story" as to Appellant. He testified that Appellant approached him with the document, that he signed the document, but it was not his intent to recant nor did he recant any of his testimony. (Tr. pp. 420-423).

Former girlfriend Francesa Troiso confirmed that Porter was not with her a portion of that new year's eve, and that he was driving the Mercedes that night when he returned to her. She also confirmed that he knew Martinez. (Tr. pp. 490-491). Martinez's former girlfriend Candice Holsey testified that she had seen Martinez and Porter together; that she saw Porter and Martinez leave together on new year's eve, but returned later that night. (Tr. pp. 498-499). She also admitted that a paper tag she had on a car she had owned wound up on a silver Mercedes, and she had been aware that Keyla Mansell would "set up a lick" or stated differently, a robbery. (Tr. p. 499; *see also* Tr. p. 505).

Phone records confirmed that Porter was on of Appellant's "frequent contacts," and that Mansell was in his phone as well. Of note, the phone records reviewed showed calls from Appellant's phone around 6:57, and incoming call at 7:43 (not answered), and a 7:58 pm incoming call using a tower close to the apartment complexes. (Tr. pp. 537-538; pp. 546-548; *see also* p. 534 and 578).

As noted above, on this evidence, the jury convicted Appellant as charged.

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61, 65 (1973)). Appellate courts "are bound by the lower court's factual findings unless they are clearly erroneous." *Id,* (citing *State v. Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105 (2000)). " 'The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.' " *State v. Commander*, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting *State v. Bridges,* 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) (citations omitted)).

## ARGUMENT

**I. The trial court did not err by denying Appellant's non-specific motion for a directed verdict of acquittal on the charges of murder, armed robbery, first degree burglary, larceny, and possession of a weapon during the commission of a violent crime when there was direct evidence in the record from an accomplice establishing Appellant's major participation in the crimes which alone was a sufficient basis on which to deny the motion as credibility was for the jury.**

Presentation of the Issue at Trial:

At the close of the State's case, Appellant made a non-specific motion for a directed verdict of acquittal on all charges. The motion, in its entirety, is as follows:

> Judge, I'd move for a directed verdict based on the fact that the State has not met its burden. They have not provided sufficient evidence to prove my client guilty of any of these crimes beyond a reasonable doubt. Based upon that, Judge, we request that these charges be dismissed

(Tr. p. 550, ll. 8-13). With no particular argument going to particular evidence to address, the trial court similarly made a general ruling:

> THE COURT: And I believe that, based on the totality of the facts and the standard under which I must look at them and the circumstantial evidence, I'm going to deny your motion.

(Tr. p. 550, ll. 14-17).

Counsel argued that he would renew the directed verdict motion as part of his post-trial motion, but did not further elaborate on any specifics for the trial court's consideration. (Tr. p. 671).

Discussion:

"On appeal from the denial of a directed verdict," a reviewing appellate court considers "the evidence and all reasonable inferences in the light most favorable to the State." *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376,

381, 755 S.E.2d 457, 460 (2014)). "In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight." *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *Id.* "This court will reverse a trial court's ruling on a directed verdict motion if no evidence supports the trial court's decision or the ruling is controlled by an error of law." *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 860 (Ct. App. 2010). " If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005).

Here, Kirk Porter testified that Appellant with co-defendant Martinez executed active roles in the unauthorized entrance into the victim's home with intent to commit an armed robbery which led to the victim's murder. Specifically, according to Porter, they intended to rob victim of his drugs and money. (Tr. p. 398-401).

"A motion for a directed verdict of acquittal is properly refused where the determination of guilt is dependent upon the credibility of a witness, as this is a question that goes to the weight of evidence and is clearly for determination by a jury." *State v. Pitts*, 256 S.C. 420, 427, 182 S.E.2d 738, 742 (1971). The credibility of his testimony was for the jury. *Id.*, at 426, 182 S.E.2d at 741 ("The weight to be attached to the testimony of an accomplice is for the jury alone who must consider it in view of the other evidence and reach their conclusion on the view of the whole case."). Notably, the testimony from the accomplice is sufficient to support a conviction and need not be otherwise corroborated. *Id.* ("We have held in a number of cases that the weight to be given to a testimony of an accomplice is for the fact finding body and if the uncorroborated

evidence satisfies the jury of the defendant's guilt beyond a reasonable doubt, a conviction is warranted."). *See, e.g., Caminetti v. United States*, 242 U.S. 470, 495 (1917) ("there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them"). The trial court's ruling, though general, does reflect that he first considered direct testimony available in total *then* circumstantial evidence. (Tr. p. 550, ll. 14-17). That would be a correct and fair application of the standard. *Curtis,* 356 S.C. at 633, 591 S.E.2d at 605 (setting out denial of a motion is warranted were "there is *any direct evidence* or substantial circumstantial") (emphasis added).

Appellant's argument rests in large measure on attempting to convince this Court that Porter's testimony should not be believed. (BOA at 9). That is not the test. That Appellant attempts to rely on the wrong portion of the test is also apparently in that he repeatedly discusses "substantial circumstantial evidence," (BOA at 7-9), but resolution here does not depend on "substantial circumstantial evidence" as there is direct evidence from Porter. Again, Porter's testimony is direct evidence sufficient to support the denial of the motion. Even so, there is additional evidence in the record which would also work to defeat the motion.

For example, Appellant's girlfriend at the time of the crime testified that shortly after the murder, Appellant, crying in her home, admitted that he "did something bad" and wondered if she would tell on him if he killed someone she knew, (Tr. p. 320-321); Martinez was captured on video with a change jar taken from the victim's apartment on the night of the murder, (Tr. p. 171-172); Martinez's girlfriend placed Martinez and Porter together on the night of the murder, (Tr. p. 498-499); and phone records tended to corroborated Appellant's presence in the area at the time of the crime, (Tr. p. 537-538; pp. 546-548). These circumstances also tightly link to show other substantial evidence of major participation and guilt. *See generally State v. Rogers*, 405 S.C. 554,

567, 748 S.E.2d 265, 272 (Ct. App. 2013) ("Circumstantial evidence ... gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury.").

Again, though, that circumstantial evidence is not the critical point as the direct evidence of Appellant's major participation is ample support to deny the motion.

## II. The trial court did not err by adhering to our Supreme Court's precedent and the South Carolina Constitution's prohibition on comments on the facts by a trial judge which required him to deny Appellant's request to comment on the credibility of an accomplice's testimony.

Presentation of the Issue at Trial:

As part of the State's case, the State presented one of the co-defendants who had previously pled guilty to voluntary manslaughter, Kirk Porter. Both Appellant and co-defendant Martinez joined in a request for the trial court to charge a federal district court pattern instruction that, essentially, that the testimony "should actually be received with great caution and care." (Tr. p. 561, l. 21-562, l. 8). Appellant's counsel argued that the requested language "is a standard jury instruction that is given" in federal trials. (Tr. p. 561, ll. 11-14; *see also* R. p. * (Defense Exhibit 8, Request to Charge). The State objected to the federal instruction as in this jurisdiction the instruction "would be an improper comment on the facts" and credibility evaluation is covered sufficiently in the general instructions. (Tr. p. 560, ll. 7-15). The trial court denied the request for these reasons:

> THE COURT: All right. And like I said, I just briefly reviewed through some of these cases, and they kind of discuss different angles of accomplice's testimony and whether they should be admitted or not, one of them. I just believe that -- and it may be that they allow that in Federal Court. I just believe that this seems to be more of a charge on the facts and kind of puts an angle from the judge's perspective of almost, well, you need to believe this -- you don't need to believe this because … I think it's just a little more than what the state courts in South Carolina usually go to. And I think the spirit of that is covered in my general comment about believability of witnesses.

(Tr. p. 562, ll. 9-21).

The trial court also noted that defense counsel was not prevented from making arguments on credibility. (Tr. p. 562, lines 22-23). At the conclusion of the jury instructions, counsel for

both Appellant and Martinez maintained an objection to the trial court's declining to give the instruction. (Tr. p. 650, l. 23-p. 651, line 2).

Discussion:

There are two separate considerations for this issue. First is the prohibition in S.C. Const. art. V, § 21 that "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Second is that "[t]he purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To that end, "there is no error if the charge actually given sufficiently covers the substance of the request." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). The trial court here was correctly guided by these controlling considerations. Therefore, there was no error and Appellant is due no relief. *Id*, ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."). Indeed, Appellant's request would *invite* error under the state constitution and established precedent.

It has long been established in this jurisdiction that a request for a jury charge that includes language that "testimony of an accomplice or co-conspirator must be weighed with great care and be scrutinized closely, carefully and cautiously" should be rejected. *State v. Mikell*, 257 S.C. 315, 328, 185 S.E.2d 814, 820 (1971).[4] Our Supreme Court found that the instruction constituted a "charge on the facts" and "to give the requested charge would have invaded the province of the

[4] Appellant has not yet requested to argue against precedent, nor is required to for briefing. Rule 217, SCACR. However, there could be no need for argument against precedent to this Court which is bound to apply the precedent of the Supreme Court. *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (" it is incumbent upon the court of appeals to apply" the Supreme Court of South Carolina's "precedent.") (citing S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Thus, Respondent submits the issue may be adequately and swiftly resolved by application of *Mikell*.

jury." *Id.* The language offered in the *Mikell* case was more comprehensive[5] than the one requested here but the key takeaway remains that the instruction not only singles out a particular

[5] The request in *Mikell* is included in the opinion as follows:

> 'The testimony of an accomplice or co-conspirator is testimony from a tainted source.
>
> 'The testimony of an accomplice or co-conspirator must be weighed with great care and be scrutinized closely, carefully and cautiously. This testimony, which is subject to great suspicion, must be viewed with distrust and acted on only after due and careful deliberation.
> 'The motives of an accomplice or co-conspirators in testifying and the circumstances under which his testimony is given, should be considered in determining how much weight and credibility his testimony should be given.
>
> 'In determining the weight and consideration of the testimony of an accomplice or co-conspirator, you must consider whether there has been any promise to him or indication of favorable treatment for him, or actual benefit conferred, promised or indicated by the circumstances of the case.'

*Mikell*, 257 S.C. at 328–29, 185 S.E.2d at 820.

The current acceptable charge in the federal district court, District of South Carolina, pattern instructions is:

> You have heard testimony from an accomplice, someone who said he or she participated in the commission of a crime.
>
> The testimony of an accomplice should be received with great care and caution.
>
> You should consider whether the particular accomplice is testifying truthfully or falsely in order to obtain a favorable recommendation by the government in the sentencing in his own case.
>
> You should not convict the defendant on the uncorroborated testimony of an accomplice, unless you believe that testimony beyond a reasonable doubt.

witness, but also has the court doing so. Our Supreme Court has expanded on that principle in several more recent cases. Those cases provide hefty persuasive support for the older *Mikell* precedent on this particular charge.

In *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), our Supreme Court considered whether a trial court should instruct the jury on a principle plainly stated in a statute – the provision in S.C. Code Ann. § 16-3-657 that "testimony of a victim" of criminal sexual conduct "need not be corroborated in prosecutions under Section 16-3-652 through 16-3-658. That the provision was intended to be shared with juries was noted in an earlier case, *State v. Rayfield*, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006). However, in *Stukes,* our Supreme Court noted the dissent in *Rayfield* observed that an instruction on that provision "has the potential for creating more problems than solutions, for it might cause confusion when read with the general charge on witness credibility" and would appear to single out the witness's testimony which would amount "to be a comment on the facts by the court." *Stukes,* 416 S.C. at 499, 787 S.E.2d at 482-483. The Court found that such a charge was indeed a common on the facts that would be prohibited by S.C. Const. art. V, § 21, reasoning, "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." *Id.*, at 499, 787 S.E.2d at 483. *See also State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989) ("Under South Carolina law, it is a general rule that a trial judge should refrain

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Ruschky & Shealy, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina, p.* 662-663 (2024 Online Edition). This appears to the charge Appellant relied upon. (R. p. * (Defense Exhibit 8)).

While the *Mikell* proposed language also included an express declaration of a "tainted source" that was not singled out as the "breaking point" for the consideration of the charge; rather, the entirety of the charge was at issue.

from all comment which tends to indicate to the jury his opinion *on the credibility of the witnesses*, the weight of the evidence, or the guilt of the accused.") (emphasis added). The Court also found the instruction would be confusing to the jury finding that "[s]pecifying this qualification applies to one witness creates the inference the same is not true for the others." *Stukes,* at 500, 787 S.E.2d at 483. There, the confusion was evidenced in *Stukes* by the jury's question whether they must accept the testimony as true. *Id.*

In *Cone v. State*, 443 S.C. 487, 495, 905 S.E.2d 368, 372 (2024), our Supreme Court visited the ruling in *Stukes* again not to restrict, but to *extend its reach* to argument by the parties, deciding that a jury should never been informed of the statutory provision. Simply, to single out the witness may foster an incorrect perception that the law requires a certain belief attach to the witness's credibility. *See State v. Smith*, 227 S.C. 400, 409–10, 88 S.E.2d 345, 350 (1955) ("the real objective of the constitutional provision against charging on the facts is to leave all questions of fact to the jury to be decided according to their own judgment, unbiased by an expression or even intimation of any opinion from the judge").

Here, though other jurisdictions may have statutes that prohibit conviction on uncorroborated accomplice testimony, *see Bennett v. State,* 144 S.W.2d 476, 480 (Ark. 1940) (referencing statute providing "no person may be convicted on the uncorroborated testimony of an accomplice"); *see also* 1 *Wharton's Criminal Law* § 10:15 (16th ed.) ("as a result of statute and caselaw, it is now commonly required that the accomplices' testimony be corroborated"), that is not the case in South Carolina. Notably, federal precedent has a focus not on simple credibility, but on corroboration. For example, in *United States v. Lee,* 506 F.2d 111 (D.C.Cir. 1974), the district court noted that while "[i]n some jurisdictions there is an absolute prohibition, typically set by statute, against conviction on the uncorroborated testimony of an accomplice. More generally

the rulings permit a conviction on this basis provided a cautionary instruction is given." *Id.*, at 118. *See also* However, federal precedent also indicates a failure to charge the provision does not always require reversal, making an argument that the charge must be given for fundamental fairness rather difficult to sustain. *See, e.g., United States v. Gibson,* 105 F.3d 1229, 1233 (8th Cir. 1997) ("This Court had held that the language referred to by Gibson is only required when the testifying witness' statements regarding the defendant's participation in a crime are uncorroborated" and when there is corroboration, a defendant does not show error); *United States v. Laing*, 889 F.2d 281, 288 (D.C. Cir. 1989) ("We conclude that Brown's testimony was sufficiently corroborated so as not to require an accomplice instruction."). Even so, there is no statute or case law in this jurisdiction that requires such a charge, even as a "best practice" or preference. To the contrary, it offends our Constitutional provisions and case law. Further, the record shows that the jury was not without guidance in terms of a credibility analysis.

Here, the trial judge gave a detailed charge concerning the determination of credibility of the any of the witnesses:

> Let's talk about credibility of witnesses because that's one of the tools that you will have in making your decision here today. Now, you may, in making your determination of the -- credibility just means believability. So when you're evaluating testimony, you can consider how a particular witness looked on the stand, whether they had a particular bias, whether they had some interest in the outcome, all of those you can consider in determining whether they're believable.
>
> You may accept a portion of a witness's testimony but reject the remaining portion; you may accept all of a person's testimony against several other witnesses, or you may reject his testimony or her testimony based on other witnesses. Again, you may accept one half, one portion of it and reject the remaining portion of it. As to each piece of evidence, you're to look at that, and you're to give it the weight and value you feel is appropriate.

(Tr. 632, l. 12 – p. 633, line 3).

Given that such a broad charge is not even required, *see State v. Bamberg*, 270 S.C. 77, 82, 240 S.E.2d 639, 641 (1977) (finding trial court's "refus[al] to instruct the jury to take into consideration the interest or bias of the witness and to observe his demeanor … was within his discretion" and no prejudice was shown"), there could be no apparent error. Consequently, had the charge not been otherwise inappropriate, the failure to give the precise charge requested would simply be harmless. Yet, as asserted above, the charge is not appropriate as it would constitute an improper comment on the facts prohibited under the South Carolina Constitution and would create unnecessary confusion or misleading of the jury by the emphasis on one witness's testimony.

## CONCLUSION

For all the foregoing reasons, Respondent submits this Court should affirm.

Respectfully submitted,

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