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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Daniel McLeod Coble, Circuit Court Judge
Appellate Case No. 2024-000488

THE STATE,

Respondent,

vs.

KENNETH GLENN LEWIS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S QUESTION PRESENTED

Whether the court erred by refusing to grant a continuance or a mistrial where the record showed appellant's ability to assist his attorneys and participate in his own defense – his competence to stand trial—continued to be severely compromised during his trial because of his medical problems and the injuries he suffered during trial?

RESPONDENT'S COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the trial court did not abuse its' discretion in denying the motion for a continuance or mistrial based on Lewis' alleged incompetence to stand or continue with trial where the trial court monitored the situation throughout the trial, questioned Lewis repeatedly, Lewis testified clearly and coherently under oath pretrial and during the trial, his memory problems were attributed to his old age not his falls before or during the trial, and Lewis understood the nature of the proceedings against him and had the present ability to consult with his counsel?

STATEMENT OF THE CASE

On November 9, 2020, Appellant Kenneth Lewis murdered Kyle Swofford in Spartanburg County. Lewis was arrested the same day shortly after the crime. Lewis was indicted by the Spartanburg County Grand Jury for the offenses of murder and possession of a weapon during the commission of a violent crime. (Ind. # 2021-GS-42-0688). His case was called to a jury trial on February 12, 2024, before the Honorable Daniel Coble, Circuit Court Judge. Ryan Beasley and Mark Moyer, Esquires, represented Lewis. Assistant Attorney Generals Joel Kozak and Jason Bridges represented the State. On February 15, 2024, the jury found Lewis guilty of murder and the weapon charge. Judge Coble sentenced Lewis to 30 years for murder and 5 years concurrent for possession of a weapon during the commission of a violent crime. (Tr. 1; 550, ll. 1-8; 554, l. 24 – 555, l. 4). Lewis appeals raising 1 issue. (IBOA, p. 1). This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

On November 9, 2020, Terri Lewis ("Terri"), the daughter of Appellant Kenneth Lewis ("Lewis"), was staying with a nurse while Terri was recovering from severe burns she received from a fire that occurred a few days earlier in her own mobile home in Roebuck, S.C. During the early morning hours of November 9, 2020, Terri decided she wanted to go back to her own home, also in Roebuck, and began walking toward her home. When the nurse noticed Terri missing, she called Terri's father, Lewis, starting a chain reaction of people looking for Terri. This included Terri's brother Brenton Lewis and his wife who located Terri at a family friend Junior Arnold's home sitting on the front porch talking to Arnold and Terri's boyfriend, the victim in this case Kyle Wofford ("Kyle"). (Tr. pp. 131-35; 142; 163-64; 246-48; 253-56; 260-61; 270-71; 383-85; 401-02; 411-15).

Brenton and his wife sat and spoke for about 20 minutes with Terri, Kyle, and Arnold. Everyone was calm and enjoyed the conversation. Brenton then told Terri that her father was worried about her and that they needed to drive to her father's house and see him. Terri and Kyle wanted to go home but Brenton insisted they go to Lewis' home. Brenton, his wife, Terri, and Kyle rode together in Brenton's SUV to Lewis' house located on Wingo Road in Roebuck, which is in Spartanburg County. As at the family friend's home, there were no arguments in Brenton's vehicle on the way to Lewis' home. Brenton, his wife, Terri, and Kyle arrived at Lewis' home before Lewis did as Lewis and the nurse had been out looking for Terri. (Tr. 131-35; 142; 156-59; 163-64; 246-48; 253-56; 260-61; 270-71; 383-86; 401-06; 411-15).

When Lewis and the nurse arrived, Lewis got out of his vehicle and immediately confronted Kyle and accused Kyle of setting his daughter on fire several days earlier. Lewis had

been told Kyle set his daughter on fire by 5 to 7 other people who did not witness the fire. Terri had previously told her father and the police that Kyle did not set her on fire. After being accused of setting Terri on fire, Kyle denied he set Terri on fire, and Terri told her father again that Kyle did not set her on fire. The argument between Lewis and Kyle escalated and Kyle eventually showed Lewis a machete that Kyle was wearing or carrying on his person. More heated words were exchanged including Lewis threatening to kill Kyle, and Lewis went in his home, searched for his shotgun and shells, loaded the gun, and came back out on his front porch. As Lewis was searching for the shotgun and shells or as he came out on the front porch, Kyle told Terri that he did not want any trouble and turned and left the yard and began walking down Wingo Road. Terri followed Kyle on foot. As Lewis came out on the front porch with the loaded shotgun, Lewis stated again that he was going to kill Kyle. (Tr. 131-38; 142-43; 149-52; 156-58, 163-65; 246-49; 256-58; 260-61; 270-71; 348-49; 352; 356-57; 361-62; 393; 395-401; 402-06; 415-19; 423-25).

Kyle and Terri continued walking down Wingo Road with Terri following behind Kyle. Wingo Road eventually intersects perpendicularly with Teresa Street. As Kyle and Terri walked down Wingo Road, Kyle cut behind an abandoned mobile home on the left side of Wingo Road exactly where Wingo Road intersects with Teresa Street. (Tr. 131-41; 142-45; 152-53; 156-60; 163-65; 246-49; 270-71; 389-90; 407-11; 419-21:423-24).

As this was occurring, Lewis came off his front porch with his loaded shotgun and got into his vehicle to chase or hunt Kyle down. His stated intent was to shoot or kill Kyle. As this was occurring, Brenton Lewis and his wife saw what was occurring and got in their vehicle to pursue Lewis and attempt to stop him from killing Kyle. Both heard Lewis state before leaving that he was going to kill Kyle. (Tr. 131-41; 142-45; 152-53; 156-60; 163-65; 167-68; 246-50; 270-71; 348-49; 363-65; 419-21; 423-25).

Lewis pursued Kyle down Wingo Road in his own vehicle and turned left onto Teresa Street and parked his vehicle, cutting off Kyle as he headed toward Teresa Street behind the abandoned mobile home. (Tr. 169-71; 246-50; 257-59; 270-71; 348-50; 360; 362; 354-65; 418-20; 425-27).

Because the crime occurred at about 10:00 a.m. in broad daylight, neighbors also witnessed the murder. This included 2 women sitting in their driveway watching the events unfold. Brenton Lewis and his wife also witnessed the crime as they pulled up behind Lewis right after Lewis stopped his vehicle cutting off Kyle's path. (Tr. 233-45;131-45; 146-60).

At this point, Lewis stuck his shotgun out the driver's window of his vehicle and shot Kyle once in the arm and chest. Shotgun pellets penetrated Kyle's chest and struck an artery. Kyle fled briefly on foot and collapsed behind the abandoned mobile home. Kyle died there on the ground from the shotgun blast with the machete underneath him. Lewis fled the scene in his vehicle and got rid of the fired shotgun shell casing. Lewis was arrested shortly thereafter when he reappeared at his home. (Tr. 131-45; 146-60; 161-66; 233-45; 263-73; 305-12; 348-50; 360; 362; 354-65; 425-27).

Lewis then made a series of incriminating statements to deputies and investigators. Many of these statements were video and audio recorded. Lewis admitted he hunted down Kyle and shot him with his shotgun. Lewis admitted he retrieved the shotgun from his home. Lewis admitted he found 2 shotgun shells in the home and loaded the shotgun with 1 shell before leaving the home. Lewis admitted Kyle had left walking down Wingo Road and his daughter Terri followed Kyle. Lewis admitted he followed Kyle down Wingo Road and turned left, parked his car, and shot Kyle out of his car window. Lewis stated in one statement he shot Kyle because Kyle either threatened to jump on Lewis in his own yard or jumped on Lewis in his own yard, so he followed him and shot him. (Tr. 167-70; 228-33; Court's Ex. 2; State's Ex. 1).

Lewis testified at trial that when he left his front porch with the shotgun, he intended to shoot Kyle. (Tr. 365, ll. 5-8). Lewis testified at trial both in an immunity hearing and before the jury claiming self-defense. (Tr. 69-88; 337-65). Lewis claimed Kyle threatened to cut his head off at Lewis' home and again after Lewis cut Kyle off at the intersection of Wingo Road and Teresa Street. (Tr. 69-88; 337-65). The trial judge rejected Lewis' claim of immunity, and the jury rejected Lewis' claim of self-defense, finding him guilty of murder and possession of a weapon during a violent crime. (Tr. 205-10; 549-51).

ARGUMENT

The trial court did not abuse its' discretion in denying the motion for a continuance or mistrial based on Lewis' alleged incompetence to stand or continue with trial as the trial court monitored the situation throughout the trial, questioned Lewis repeatedly, Lewis testified clearly and coherently under oath pretrial and during the trial, Lewis' memory problems were attributed to his old age not his falls before or during the trial, and Lewis understood the nature of the proceedings against him and had the present ability to consult with his counsel.

Background relevant to the issue on appeal

By the time this case proceeded to trial on February 12, 2024, Lewis was 76 years old. His health had declined to the point he could not walk well. Lewis had suffered several heart attacks in his life, a severe head injury long before this murder, a hip replacement, back issues, and other surgeries. He had retired about 1 year before the murder as he could not "roof" homes anymore. The case had been continued several times because of Lewis' health and medical procedures but not related to Lewis' cognition. Eventually, the victim's mother began complaining about the Solicitor's Office, specifically Deputy Solicitor Derrick Bulsa, and contacted all of the resident judges in Spartanburg complaining about the case. Lewis' was out on bond but required to wear an ankle bracelet. Victim's mother was angry about this and the delay in the trial. She also contacted witnesses in the case and alleged evidence was planted. The case was conflicted out to the Attorney General's Office because of the allegations the victim's mother made against Bulsa. An out of circuit judge, Judge Coble, was brought in because the victim's mother had spoken to every resident judge about the delay in the case going to trial or other complaints. (Tr. 1, 69-75; 337-43; 344-45; 355-57; See Tr. 436-44; 445-64).

What occurred relevant to this issue below

After the jury was selected, Judge Coble and the attorneys for the State and for Lewis discussed the fact Lewis fell in the shower at home sometime before coming to court the morning of trial. It is clear this was discussed in chambers and then put on the record. Judge Coble

questioned Lewis and was satisfied Lewis was physically well and competent to stand trial but stated the court would monitor the situation as the trial progressed and counsel was to bring anything in this regard to the court's attention. Defense counsel Beasley informed the court he had been meeting with Lewis for several years and never had any question about Lewis' competency to stand trial. Counsel Beasley informed the Court that that morning defense counsel Moyer had trouble communicating with Lewis and the family informed counsel that Lewis had fallen in the shower and hit his head. Judge Coble engaged in a colloquy with Lewis. Lewis informed Judge Coble he had fallen in the shower that morning and hit his head and he had had a concussion in the past. During the colloquy Lewis identified Beasley as his attorney, and Judge Coble as the judge. Lewis did not know who the Attorneys General were but the Judge informed him of the same. Lewis informed the Judge that he believed it was Monday morning, as it was. And, Lewis testified he was there for his trial. Lewis stated he understood his conversations with his attorneys, and he understood the jury selection process. After the colloquy, counsel Beasley stated he felt like Lewis was "okay" and so did Judge Coble. Counsel Beasley informed the Court that Lewis had some memory problems, from the past not from the fall in the shower, but he felt Lewis had the ability to proceed to trial. The trial proceeded from there into a "stand your ground" hearing at which Lewis testified extensively. (Tr. 41-45).

At the "stand your ground" hearing, the defense called the chief investigator and then called Lewis as a witness. (Tr. 48-68; 69-88). Lewis had no problem testifying at the hearing. Lewis started off by telling Judge Coble that he had fallen again, this time in the courthouse, getting over a hump in the carpet and hit the back of his head again. Lewis said he was okay except for a little dizzy headed. Lewis explained further that he had a fall on Saturday when he fell in the shower and hit the back of his head. He claimed he lost consciousness for 5 or 6 seconds. His son helped

him out of the bathtub. He also claimed he hurt his shoulder "real bad" in that fall. Lewis also informed Judge Coble that he had heart attacks 20 years ago and doctors damaged his vocal cords at that time. He also had another heart attack 3 to 4 months ago. Lewis further explained that he now used a walker because about 2 years before trial he started having his legs go out. He had surgery on his knee that went all the way up his leg. The knee replacement was 4 years before trial. At the time of the incident on trial, Lewis weighed a lot less and could get around "pretty good." Since he became unable to walk, Lewis had put on a lot of weight. Lewis also had problems breathing. He had by-pass surgery and stints placed in his groin area. Lewis explained he retired about 1 year before the incident on trial because he hurt his back bad. Lewis testified he now had memory problems, but he did not attribute those to any of the falls before or at trial but to the aging process. Lewis explained he did remember a lot about the incident on trial at this point in time. However, he explained he did know why he was in court, and that was because he was alleged to have murdered a man named Kyle. He understood that this was his trial for Kyle's murder. He told Judge Coble that he was able to participate with his attorneys in the trial. (Tr. 69-74).

As to the immunity issue, Lewis testified that in November of 2020, his daughter Terri was burned "real bad" on her side and her hands. Lewis went to the Augusta Burn Center to see Terri. Before he went, people were coming up to his front door and telling him that the victim, Kyle Wofford, threw gas on Terri and burned her. Lewis admitted he really didn't know what happened in the incident where Terri was burned. Lewis told Judge Coble he now had trouble remembering things and didn't remember a lot of what he said in court today. The more words he said, the less he remembered. He admitted he had watched the video of his interview with law enforcement at the Sheriff's Office. He admitted he had seen the video a couple of times at his attorneys' office and at court that day. Lewis testified the video refreshed his memory a little but not much. Lewis

vacillated whether he remembered a little bit or a good bit about the incident itself. Lewis explained that he was having memory trouble about everything, not just this incident. Lewis stated his memory started going bad about a year before trial and he thought it was due to old age. Lewis explained to Judge Coble that he had a concussion 20 years ago when he was hit by a drunk driver and he believed that also affected his memory. Lewis said his memory had gotten worse in the last year. (Tr. 75-77).

Lewis testified he remembered bits and pieces about the day of the incident on trial. He remembered he was looking for Terri and Kyle (the victim) the morning of the incident. He thought Kyle brought Terri to his house. Lewis testified he thought one of his sons brought them to his house, Ritchie. Lewis later corrected this to it was Brent who brought Terri and Kyle to his house. Lewis said Kyle got out of the car with some kind of machete and he, Lewis, went in the house and got his gun. Lewis explained that Kyle went down the road and Lewis shot him. Lewis claimed that was all he could remember about the incident. (Tr. 77-78).

Lewis claimed Kyle pulled something like a sword or a machete out enough to show it to Lewis, and Lewis' son asked Kyle what he was going to do with that. [This would have occurred at Lewis' home.] According to Lewis, Lewis' son pushed Kyle's head. Kyle said he was going to kill Lewis. According to Lewis, Kyle specifically said: "I'll cut your damn head or I'll cut your damn head off." Lewis stated that is when he went in his house and got his shotgun and found 2 shotgun shells. One of his sons had given him the shotgun years ago and Lewi hadn't used the gun in 20 years. Lewis remembered it was "him [Kyle] or me." According to Lewis, Kyle said he was going to get Lewis, and he would kill his daughter too. And Lewis said: "No, you ain't going to do that there now." (Tr. 77-80).

Lewis testified he got the gun from behind the dresser in his home where he kept it. Lewis remembered he, Lewis, was driving a Toyota 4 Runner at the time. Lewis testified he had to roll the window down on the Toyota 4 Runner to shoot Kyle but didn't remember rolling it down. Lewis testified the shotgun was in the Toyota as he rode down the road after Kyle, but he did not specifically remember where. Lewis remembered pointing the gun at Kyle after he caught up with Kyle, but claimed he could not remember firing it. Lewis remembered when he shot Kyle, Kyle was not close to him but about as far away as where the jury seats are in the courtroom from the witness stand. Lewis testified Kyle had the machete down and then was swinging at Lewis. Kyle said he was going to get Lewis, and Lewis fired the gun at him. Lewis testified Terri was somewhere behind Lewis, but Lewis did not know where she was. Lewis admitted his son then asked him if he shot Kyle and Lewis said "I shot at him, I don't know if I hit him or not." Lewis claimed he did not know what he did with the shotgun after the shooting or remember going for a ride after the shooting. Lewis remembered about 30 minutes later after he got back home the Sheriff's Office came to his house and questioned him about the shooting. (Tr. 80-83).

On cross-examination, Lewis admitted the location where he shot Kyle was about 3 houses away from his own house. Lewis admitted he did not witness Kyle burn Terri several days earlier. Lewis testified Kyle did tell him in the past that he threw something at Terri on another occasion, a bottle, which hit Terri in the back. [Judge Coble had excluded this evidence, but Lewis testified to it anyway]. Lewis admitted that his son Brenton [Lewis] picked up Terri and Kyle from another location and brought them to Lewis' house in the back of Brenton's vehicle. Lewis admitted that Lewis and Kyle then got in an argument in the front yard of Lewis' home. Lewis admitted he was mad at Kyle because he had heard from others that Kyle burned Terri on purpose. Lewis also admitted he got in an argument with Kyle in the front yard. Lewis admitted Kyle pulled the

machete out and Lewis claimed Kyle followed him up on the porch. [No one else saw this]. Lewis admitted that he, Lewis, went in his house and got the shotgun and when he came back out, Kyle was already walking down the road away from Lewis' house. Lewis admitted he did not shoot Kyle in Lewis' yard. Lewis could not remember getting in his car, but Lewis admitted he had to have got in his car because he shot Kyle later from his car. Lewis admitted Kyle was not assaulting Terri or dragging her down the road before the shooting occurred. In fact, Terri was following Kyle on foot. Lewis admitted that when he left his yard he went down the road to shoot Kyle. (Tr. 83-89).

After the conclusion of Lewis' immunity hearing testimony, Terri testified at the stand your ground hearing and then the court adjourned for the day. The following morning, February 13, 2020, Judge Coble went back on the record with Lewis. Judge Coble asked Lewis if he was okay. Lewis responded that he had a little emergency problem last night. He stated that because of his concussion and "some rib broke", fracture, the hospital checked him out. Lewis stated the hospital released him home, and he was at home, awake all night. Lewis claimed this was true for the last 2 days as well, *i.e.* he did not get any sleep. Judge Coble asked if he was sent home from the hospital the previous evening. Lewis explained that the hospital did send him home. Lewis explained the reason he went to the hospital was because he had fell out "here in the [courthouse] lobby going over that hump with the wheelchair, going through some woodchips and flipped over." Lewis explained the doctors at the hospital gave him some pain medication and he was taking it properly as the doctors prescribed. Lewis testified he was wearing an icepack and kept it on all night and this morning. Judge Coble instructed Lewis that if he was in pain or uncomfortable, to let his attorneys know and the court would take a break if needed. Lewis said "Okay." Judge Coble instructed Lewis to stay in his wheelchair and not use his walker, and the court would have

the Sheriff's Office assist Lewis every day getting in and out of his vehicle so there would be no more accidents. Lewis stated that he was okay with that and thanked the court. Judge Coble also told Lewis that the court had a wheelchair for him if he had to return or give up the wheelchair he was using. Judge Coble thanked Lewis for his assistance. The defense continued with their immunity presentation. (Tr. 129-30).

The defense called 2 more witnesses as to immunity and the State called 2 reply witnesses and submitted a video statement of Lewis taken at the crime scene. Each side then argued the immunity issue and Judge Coble took the matter under advisement. Judge Coble then heard other pre-trial motions. (Tr. 131-187; 188-204).

Judge Coble then stated on the record that he was going to keep monitoring Lewis and his health. Judge Coble stated that he wanted to make sure that Lewis continued to use the wheelchair in and out of the courthouse for his own safety, and that Lewis continued to abide by the doctor's instructions after his discharge from the hospital the previous night. Judge Coble stated that he would continue to monitor that situation during the trial. (Tr. 205).

After the lunch recess, Judge Coble denied the motion for immunity. The court then ruled on other pre-trial issues and took up a motion for a continuance by Lewis. (Tr. 205-212). Defense counsel Beasley moved for a continuance. Counsel admitted Lewis had fallen a couple of days ago, and counsel and Judge Coble questioned Lewis on the record, and Lewis seemed fine and coherent; he was ready to go forward to trial. Counsel stated that yesterday, during the lunch break, Lewis fell on the downstairs floor and cracked his skull. Counsel stated Lewis still wanted to go forward and came into court and testified at the immunity hearing. Counsel stated Lewis was having some memory issues but admitted Lewis had a history of memory issues. Counsel then stated Lewis also fell again when he was leaving the courthouse yesterday. Counsel stated he did

not think this fall hurt as bad as the second fall during lunch, but Lewis did have blood coming from the back of his head. Counsel stated when Lewis left the courthouse yesterday, he ended up going to the emergency room and he wasn't discharged until 3:00 a.m. Counsel stated Lewis had had no sleep. Counsel *alleged* Lewis was diagnosed with a fractured skull and concussion and fractured ribs. But he was here again for court. (Tr. 213-15).

Counsel stated he was trying to get the medical records from Spartanburg Regional Hospital where Lewis was treated and released. Counsel claimed because he just found out about this information that morning, it was very hard to get a HIPPA form signed and "figure it out, the doctors and everything else." Counsel passed up the HIPPA form order to Judge Coble, which counsel had signed by Lewis along with the doctor information of those who treated Lewis "last night." Counsel stated that "I think, based on the fact that he may be suffering from a concussion, which could affect his ability to participate in this court and assist us at the table as well as being in extreme pain with fractured ribs and a fractured skull, I think a continuance is appropriate based on - - especially what we're dealing with here, which is a murder trial and, you know, the chance of him going to jail for the rest of his life."(Tr. 214, ll. 6-19).

Judge Coble then ruled on the continuance motion. He noted that he had discussed this potential issue earlier when Lewis had fallen and hit his head. Judge Coble noted he questioned Lewis "yesterday" just to get his understanding of what was happening, if Lewis could assist his counsel. Judge Coble determined Lewis could assist his counsel. Judge Coble noted he talked with Lewis again early "this morning" as well. Judge Coble noted Lewis seemed like he was still able to understand what was happening. Judge Coble noted his biggest concern was pain and comfort throughout the trial and had made sure Lewis had a wheelchair at all times. Judge Coble noted he talked with Lewis and his family to make sure Lewis was complying with his doctor's

orders. Judge Coble noted that Lewis was "discharged" from the hospital "yesterday." Judge Coble stated he was going to continue to make sure that Lewis was complying with his doctor's treatment and taking the proper medication. Judge Coble pointed out he received Lewis' HIPPA form and that form needed to be faxed to Spartanburg Regional Hospital immediately to get more information as well. Judge Coble ruled that at this point, he was going to deny the continuance motion. Judge Coble held again that he believed Lewis was able to assist his attorneys. Judge Coble reaffirmed that he was going to ensure Lewis was comfortable as much as possible during this trial. Judge Coble noted that it was a lot, but he had to balance our judicial system with the needs of Lewis as well. Judge Coble held that typically a defendant is required to be in court each day of his trial. Based on, so far, what he had heard, Judge Coble stated he needed to see the medical records as well to confirm the level of issues with Lewis. Judge Coble stated that if Lewis needed to be excused during the trial, he could be. Judge Coble stated he would consider a jury charge explaining to the jury where Lewis was if Lewis needed to be absent from the courtroom. Judge Coble noted he had to balance whether to continue the trial or not. "So I have to find a little bit of balance in my determination." The motion for a continuance was noted but denied. Judge Coble stated that he would continue to monitor and address this issue just like he had all week. And, defense counsel would bring it to the court's attention if Lewis needed a break during the trial, if he was uncomfortable, make sure Lewis had water, and Lewis took his medication. If Lewis needed to be excused at any point during the trial, Judge Coble would make sure of that as well. (Tr. 214, ln. 20 – 216, ln. 9).

The trial then started with opening argument and 2 witnesses testifying. At 2:14 p.m., defense counsel Moyer notified the Court that Lewis was "sleeping or something." According to Moyer, he nudged Lewis and Lewis came to. Moyer stated that Lewis told Moyer that he thought

he was going to pass out. His head was pounding. Judge Coble stated that if Lewis needed to get some water, to take him outside of the courtroom so he can use the restroom or take a short break. A recess transpired from 2:14 p.m. until 2:30 p.m. After the break, Judge Coble asked if there was anything from the State or the defense and Mr. Moyer said there was nothing from the defense. (Tr. 239, ln. 16 – 217, ln. 7).

The trial resumed with multiple witnesses testifying. There was a recess at 3:42 p.m. but no mention of Lewis or any medical problems with Lewis. (Tr. 290). The trial resumed at 4:05 p.m. The trial stopped for the jury at 4:10 p.m. for the day. Judge Coble then informed Lewis that he was still under the conditions of his bond; Lewis was to follow up with his medical exams, but Lewis needed to be in court the following day. However, if for some medical reason Lewis could not be in court, Lewis must notify his attorneys and let Judge Coble know as well. However, Lewis would still be on his ankle monitor in case he was needed in court. The trial stopped for the day at 4:12 p.m. (Tr. 293-94).

The trial resumed the following morning, February 14, 2024, at 9:40 a.m. Before bringing the jury in, Judge Coble had Lewis brought to the microphone and noted Lewis had fallen several times during the trial, and Judge Coble just wanted to make sure Lewis was feeling okay. Lewis stated he could hear the judge. Lewis pointed out both of his attorneys to the court. He also pointed out who the judge was and where he was. Lewis was asked if he was in court "yesterday" and Lewis said "yes." Lewis said he remembered a little bit of "yesterday" but not much. Lewis was asked if he was okay, and he said "I'm all right, I guess. I guess I'm okay. I am a little sore right in here" [pointing to his ribs]. Lewis also said he was hurting everywhere including his head. Lewis informed Judge Coble that he went to the doctor the previous day after court and he was discharged. The doctor told him not to do anything; not to be driving or anything like that. The

doctor gave him aspirins to take. Lewis said he was anaphylactic. Lewis said he was taking his medication as directed. Judge Coble noted Lewis was in a wheelchair and Lewis confirmed he had been taking the wheelchair to and from court as directed. Lewis said he did not have a problem with that because he could not walk. Lewis said he would continue to use the wheelchair. Lewis agreed if he needed a break or water, he would let his attorneys know and they would let the court know. (Tr. 297-99).

At this point, counsel Beasley made a motion for a mistrial based on the fact Lewis had fallen 3 times during the trial. According to Beasley, Lewis had 1 gash on his head when he got to trial the first day. And, the second day he ended up getting a whole new gash in his head and was bleeding during the course of the case. Counsel stated that Lewis had not been able to participate very much. Beasley stated: "His memory is, obviously, as seen in court, very bad." Beasley argued Lewis went to the hospital after the first day of trial, was there until 3:00 a.m., and didn't sleep. Then, the previous night, he was in the hospital almost to 11:00 p.m. Counsel stated they had been trying to get the medical records from Spartanburg Regional Hospital so they could help the court and help counsel assess what's really going on. Counsel stated he was told [by Lewis' family as indicated below] that Lewis fractured his skull, fractured his ribs, and suffered a concussion. Counsel admitted they had not gotten the medical records yet. Counsel explained he had e-mailed general counsel for Spartanburg Regional Hospital and was communicating with general counsel, and she was supposed to be getting the medical records. Counsel stated if he got the medical records, he would obviously bring those to Judge Coble's attention and let everyone review them and make an assessment from there. Counsel argued that based on the fact that Lewis has, apparently, according to the family and what they, the family, were told by the doctor, suffered a concussion and the fact that he hasn't been participating very much during this trial, asked that

a mistrial be granted. Counsel Moyer then argued that "yesterday" he was sitting closest to Lewis during the proceedings. According to Moyer, Lewis slept through a good bit of "yesterday's proceedings." According to Moyer, when Lewis was not sleeping, he mainly just looked at Moyer, "kind of a blank stare." Moyer stated he was not quite sure what Lewis' mental state was right now and the extent of participation he could be in the trial. (Tr. 300-01).

Judge Coble stated that at this point he was going to deny the motion for a mistrial. Judge Coble pointed out that as stated earlier he had been monitoring the situation since Monday morning when apparently Lewis had his first fall the night before, to make sure Lewis understood what he was doing there in court and was able to assist his counsel as best he could. Judge Coble ruled the trial was going forward and he would continue to accommodate Lewis legally and physically in the sense of taking as many breaks as needed and allowing him to be excused from court with Judge Coble's permission as much as is needed. Judge Coble noted that as to any legal issues, if needed the court would fashion some type of jury instruction after the parties figured out what type of instruction to give. Judge Coble pointed out he had questioned Lewis each day "including this morning." Judge Coble held Lewis knows what is happening, and that he is able to assist his attorneys at this point. Judge Coble noted that he did see Lewis sleeping "yesterday" and Monday. Judge Coble noted that he had been able to view Lewis during the trial and also view his previous hour and a half interview with the police to compare to his testimony given at the immunity hearing on Monday afternoon. Judge Coble noted that Lewis described then that he had memory loss prior to anything happening in this case as a natural progression in his life. Judge Coble noted this had happened before any falls in this case. Judge Coble noted the defense motion was noted for the record and Lewis would be allowed to supplement the motion when he received any medical records. Judge Coble noted he would continue to monitor the situation, but at this point, he was

denying the motion for a mistrial. (Tr. 301, ln. 12-302, ln. 14). The trial testimony continued and the State rested at 10:15 a.m. (Tr. 320). The defense moved for a directed verdict, which was denied. (Tr. 321-22).

The defense then stated it intended to offer a defense including Lewis testifying. Judge Coble then conducted a colloquy with Lewis about his right to testify or not testify and what that entailed. (Tr. 323). During the colloquy, Lewis informed the court that he could hear the court and its' questions. Lewis also told the court that he could understand what the court was about to do, review with him right to testify and not testify in his trial. After Judge Coble explained Lewis' rights to him, Lewis stated on the record that he understood everything Judge Coble explained to him about his right to testify and not testify. Lewis indicated he had no questions about what Judge Coble had explained to him. Lewis told Judge Coble that he had discussed with his attorneys his right to testify and not testify. Lewis said he did not need any more time to discuss this with his attorneys. Lewis informed the judge that after consulting with his attorneys he had decided **to testify.** (Tr. 323-25).

Counsel then indicated they intended to introduce Lewis' statement to law enforcement at the Sheriff's Office under Rule 803(5) because of Lewis' lack of memory of the incident on trial. Counsel stated Lewis only remembered bits and pieces of the shooting, but his memory was clear when he was interviewed by the Sheriff and it was fresh in his mind. The State argued the tape could not come in under Rule 803(5) because Lewis was a party not a witness and heavy redactions would have to be made to the tape as the court had ruled a lot of the matter contained in the tape was inadmissible. Defense counsel Moyer stated that if the tape could not come in, Lewis' testimony could not come in because his memory was so sketchy about the event. And, the defense would have to renew their motion to have him examined for purposes of whether he was competent

to stand trial. [No such motion had ever been made, only a continuance and a mistrial motion]. Defense counsel argued that the whole point of Rule 803(5), SCRE, is when the witness can no longer remember since the incident. Lewis could not testify fully and accurately as defined by the Rule because of his memory loss. There was a long discussion by the court how the videotaped interview of Lewis at the Sheriff's Office did not actually fall under Rule 803(5) because it was not written; however, Lewis written statement taken at the end of the interview did fit under 803(5) as a recorded recollection and was admissible. Further, Judge Coble ruled that he would allow 40 minutes and 10 seconds of the videotaped interview of Lewis at the Sheriff's Office under his authority as to the mode of trial under Rule 611(a), SCRE. Judge Coble noted he had previously heard Lewis testify, and heard of his memory loss and compared that to what he stated on the interrogation video in 2020. Judge Coble pointed out that Lewis discussed many of the same things that the Judge was letting in on the interview tape, and the Court was letting in more than what was required. Judge Coble offered to allow counsel to play Lewis' testimony from the immunity hearing to the jury if counsel wished. The Judge noted counsel's motions for the record. Counsel wanted more in from the interview tape because Lewis discussed with the interrogator other things about the shooting itself, but the Court denied that request noting this objection as well. The trial then continued. (Tr. 326-36).

The trial then resumed with Lewis testifying. Lewis told the jury he was 76 years old and **told the jury his birth date**. Lewis also told the jury he was having problems with his memory which started in the last year, but he did not attribute the memory problems to anything occurring during the trial. Lewis said he had knee surgery, stomach surgery, and he had a concussion which was years ago. He was in a comma for about 14 days. And, he had had other head injuries. He also had a heart attack in the last year, about 3 or 4 months ago. Lewis could not talk well because

doctors damaged his vocal cords. Lewis told the jury he had 2 head injuries in the courthouse during trial, and he fell in the shower at home. He explained the fall in the shower was about a week ago. He hit his head in the bathtub and his back. Because he hurt his back he can't do anything anymore. Lewis told the jury about the 2 falls in the courthouse and how he had to go to the hospital and got out at 4:00 a.m. and went the previous night and got out around 11:00 p.m. Lewis told the jury he had a couple of marks on the back of the head now because of the falls. Lewis explained to the jury that he retired shortly before this incident happened because he could not work anymore as a roofer. Lewis also told the jury he had a heart attack several years ago as well. (Tr. 338-43).

Lewis testified before the jury that he barely knew Kyle before the incident. Kyle was dating his daughter Terri. Lewis claimed he remembered parts of this incident and other parts he did not remember. Lewis remembered shooting somebody. He then testified he remembered the incident clearly. He then testified that he did not remember everything, "not really." Then under leading questions he said he did not remember much of the incident. Lewis then testified he remembered sitting down with an investigator after the incident and telling what happened but he could not remember all of it today. Lewis first said it was not fresh in his memory back then but then contradicted himself and said it was fresh in his mind back then because it was the same day. The video of Lewis' interview with law enforcement at the Sheriff's Office was then played for the jury in Lewis' presence. Lewis then testified under oath that he was able to watch the video [Note: later counsel said Lewis fell asleep during the playing of the video]. Counsel then questioned Lewis about the incident after playing the video to the jury in Lewis' presence. (Tr. 343-46).

As to the incident, Lewis testified he remembered Kyle coming over. He testified Kyle had a machete or sword and was swinging it around like he was going to hit Lewis. And, Kyle hollered something at Lewis like "I'll cut your damn head off with it, you old goat." Lewis claimed he didn't see much of the sword and Kyle was pointing it around the car. (Tr. 346-47).

Lewis said he did not remember a written statement, but he signed something. Counsel then read Lewis' written statement into the record under 803(5), SCRE [recorded recollection]. Lewis acknowledged he was able to hear counsel read his statement into the record. There is no mention in the written statement of the sword or machete. Lewis testified *he remembered* telling the investigator that Kyle had a sword. Lewis said he believed *he told* the investigator that Kyle pulled the sword and swung it. Lewis testified he was *sure of it*, but the investigator did not put that in Lewis' written statement.[1] Lewis claimed he didn't read the statement. (Tr. 346-50).

Lewis testified that when Kyle threatened him in his yard, Lewis went in his house and got his shotgun. When Lewis came outside, he could not remember if Kyle was still there or he had started walking down the road already. Lewis admitted that at some point, Kyle left Lewis' yard and started walking down the road. When Kyle started walking down the road, Lewis got in his car with his shotgun. On direct examination, Lewis claimed he could not remember why he got in his car. He testified he remembered he was mad at Kyle for hurting his daughter when he drove down the road. Lewis claimed he told Kyle: "you will never hurt her again." Lewis testified: "I think what I done, pulled up down there and shot him out the car window." Lewis claimed that Kyle was coming at him with the sword before he shot him. "He was going to cut my head off then with it. I don't know. He was swinging it around down there at the trailer park." Lewis said

[1] Lewis' memory was correct. The investigator who took the statement admitted that Lewis told him about the machete [or sword] and the investigator failed to put that fact in Lewis' written statement.

Kyle and Terri were living in a trailer park down that way. Lewis claimed Kyle said he was going "to cut my damn head off through the car. He could reach in there. That's all I can remember. I don't remember much about it." Lewis claimed he always felt threatened by Kyle. Then he claimed he was not threatened by Kyle. Then he claimed again he was threatened when Kyle came at him with the machete. Lewis then admitted he had been told by someone that Kyle set his daughter on fire, but that person did not witness Kyle do this. Lewis admitted he didn't really know if Kyle had set Terri on fire or not. There were 6 or 7 people who came up to his house and told him this. Lewis claimed Kyle had hurt his daughter before by throwing a bottle at her and struck her. Lewis admitted he went to the Augusta Burn Center and saw his daughter, after first going to Spartanburg Regional Hospital, but the helicopter carrying Terri was leaving that hospital. Lewis testified Terri looked pitiful at the Augusta Burn Center. He admitted he didn't like Terri being around Kyle. Lewis claimed *he remembered* that every time he saw Kyle he looked like he was on drugs. (Tr. 337-55). Thus ended the direct examination of Lewis before the jury.

On cross-examination, Lewis told the jury that he was in a wheelchair "today" for court. However, at the time of the shooting, he was not in a wheelchair. Lewis admitted he was moving around good at the time of the shooting. Lewis told the jury that he now thinks there is something wrong with his legs and he needs surgery. Both of his legs now hurt. And, at the time of the incident he could drive his car, but he could no longer do so. (Tr. 355-56).

Lewis admitted Terri was his daughter and he had known her his whole life and he trusted her. He admitted he trusted Terri more than the people who told him Kyle set Terri on fire. Lewis was asked wasn't it true that on the videotape recording he told police officers twice that Terri told him that Kyle did not set her on fire. Lewis claimed he could not remember that. Lewis admitted that the day of the crime, he sent his son Brent to find Terri because Terri was missing. Lewis then

admitted that Brent brought Kyle and Terri to his house and Kyle and Terri were together. Lewis admitted that when they got to his house, he and Kyle got in an argument because Kyle got out of the car with the machete and said he was going to cut Lewis' head off. Lewis then admitted he did not tell police in the interview that Kyle said he was going to cut his head off and his memory was better on the day of the incident than the time of trial. Lewis then denied he ever said anything to Kyle. Lewis remembered he went in the house and got his gun after Kyle threatened him. Lewis admitted he had to look for his gun, find it, find shotgun shells, and load the gun. Lewis could not remember if Kyle had left Lewis' yard when Lewis came outside the house with the shotgun. But Lewis admitted Kyle went down the road. Lewis remembered he got in his car and drove about ¼ of a mile where Kyle threatened to cut his head off and he shot Kyle out the window. Lewis remembered he told Kyle before he shot him that he would never hurt Lewis or his daughter again. Lewis admitted he was mad at Kyle for burning his daughter several days earlier when Kyle showed up at the house the day of the murder. Lewis claimed he went to the store and then came back and saw Kyle down the road and pulled up next to him. Lewis admitted he was extremely mad at Kyle for burning his daughter. He admitted he was mad a Kyle for throwing gas on his daughter before Kyle even got to his house because Lewis had seen his daughter at the Burn Center and how she looked. Lewis admitted Kyle was walking away from his house when he followed him. Lewis remembered when he left his house with the gun, he intended to go shoot Kyle. "Yeah, I meant to shoot him. I'm not going to lie about that. I meant to shoot him." (Tr. 355-65). (Tr. 365, ll. 5-8, on the quote).

After Lewis' testimony before the jury, defense counsel Moyer put the following on the record:

> MR. MOYER: One little matter just like to put on the record that, while we were playing the video [the interview at the Sheriff's Office for the jury], that Mr. Lewis

had fallen asleep at the stand. When I began asking him questions again, I had to wake him up. Thank you.

THE COURT: Noted for the record. 1:30.

(Tr. 365, ln. 25 – 366, ll. 6). Three (3) more defense' witnesses testified, and the defense rested. (Tr. 493).

Judge Coble then stated all mistrial motions were renewed and denied again. (Tr. 494). Lewis moved for a jury instruction on self-defense which the State opposed, but Judge Coble agreed to give. The State and Lewis then gave their closing arguments to the jury, and Judge Coble instructed the jury on the law. (Tr. 501-45). The jury deliberated about 2 hours and returned a verdict of guilty. (Tr. 550). Before sentencing, Lewis moved for a new trial and renewed his motions for a mistrial including so our client can be evaluated for fitness to stand trial. Judge Coble denied those motions for the reasons previously stated. (Tr. 551). Sentencing then took place and there was no discussion of Lewis' competency, only a discussion of his age and medical problems in relation to sentencing. Judge Coble sentenced Lewis to 30 years for murder and 5 years concurrent for the weapon charge. (Tr. 554-55).

Importantly, Lewis never submitted any medical testimony or medical records whether during the trial or even after the trial relevant to his capacity to stand trial. No medical records, scans, x-rays, or sworn affidavit of any medical professional were introduced in evidence or submitted with a motion for a new trial substantiating any of the allegations defense counsel made of Lewis' alleged injuries or medical conditions during the trial. (Tr. 1-556 [trial record]; Post-trial Motion for a New Trial; Order Denying Motion for a New Trial).

Standard of Review

Competence to Stand Trial

The test for determining whether a criminal defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349, *cert. denied,* 518 U.S. 1026 (1996). The test is not whether the defendant is actually cooperating with his lawyer, but rather if he has the mental capacity to do so. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), *cert. denied,* 484 U.S. 1020 (1988). The trial court's determination of competency will be upheld if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, *supra;* State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998). "[G]reat deference is given to trial judge who sits in a better position to ascertain the defendant's faculties." State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007); *See* State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002) (holding the court did not err in refusing to order a second competency evaluation where deference was given to the trial judge who was able to view the appellant's demeanor); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Bell, 293 S.C. 391 360 S.E.2d 706 (1987).

Motion for a Mistrial

Although the decision is vested in the sound discretion of the trial court, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), a mistrial is proper only where it is dictated by "manifest necessity" or "the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (citing Illinois v. Somerville, 410 U.S. 458, (1973); Wade v. Hunter, 336 U.S. 684 (1949)).

Whether a mistrial is manifestly necessary is a fact specific inquiry. Gilliam v. Foster, 75 F.3d 881 (4th Cir.1996); *see also* State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977); State v. Ravencraft, 222 S.C. 139, 71 S.E.2d 798 (1952) ; Ex parte Prince, 185 S.C. 150, 193 S.E. 429 (1937) (holding that the inability of the jury to agree upon a verdict is regarded as presenting a case of legal necessity for a mistrial); State v. Rector, 166 S.C. 335, 164 S.E. 865 (1931) (finding that a mistrial was manifestly necessary where a juror admitted prejudice); *but see* Prince, 279 S.C. 30, 301 S.E.2d 471 (a mistrial was not dictated by manifest necessity where the jury requested to rehear more than 2 hours of testimony after deliberating for 5 ½ hours)."It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Gilliam, 75 F.3d at 895. A trial judge's decision to grant or deny a mistrial will not be reversed on appeal absent an abuse of discretion amounting to an error of law. Council, 335 S.C. at 12, 515 S.E.2d at 514; State v. Rowlands, 343 S.C. 454, 457–58, 539 S.E.2d 717, 719 (Ct. App. 2000).

Motion for a Continuance

The grant or denial of a motion for a continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010)(quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)). Even if there was no evidentiary support, "[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant." Geer, 391 S.C. at 190. 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005);

see State v. Wyatt, 317 S.C. 370, 372-73, 453 S.E.2d 890, 891-92 (1995)(stating error without prejudice does not warrant reversal).

Law/Analysis

The mental competency of the defendant to stand trial is a baseline inquiry by the court. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). "The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." State v. Bell, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987), *cert. denied,* 484 U.S. 1020 (1988)(citing Dusky v. United States, 362 U.S. 402); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *cert. denied,* 525 U.S. 1077 (1999); State v. Nance, 320 S.C. 501, 466 S.E.2d 349, *cert. denied,* 518 U.S. 1026 (1996); State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980). Great deference is given to the trial judge who makes this decision because he sits in a better position to ascertain the defendant's faculties. Colden, 372 S.C. at 441, 641 S.E.2d at 920; Weik, 356 S.C. 76, 587 S.E.2d 683 (where deference was given to the trial judge who was able to view the appellant's demeanor). The test is not whether the defendant is actually cooperating with his lawyer, but rather if he **has the ability to do so**. McLauglin v. State, 352 S.C. 476, 480, 575 S.E.2d 841, 843 (2003)(the test of mental competence does not focus on whether a defendant in fact cooperates with his counsel; the question is whether he has sufficient mental capacity to do so if he so chooses). A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense may not be subjected to trial. Drope v. Missouri, 420 U.S. 162 (1975); State v. Blair,

275 S.C. 529, 273 S.E.2d 536 (1981); Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). Competency is required to ensure that the defendant has the capacity to understand the proceedings and to assist counsel. Godinez v. Moran, 509 U.S. 389, (1993); State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002), adhered to on reh'g, 354 S.C. 382, 581 S.E.2d 834 (2003). The trial court's determination of competency will be upheld if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, *supra;* State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998); Bell, *supra.*

As a beginning point, a criminal defendant is presumed to be sane and competent to stand trial, and it is presumed that a defendant has the requisite capacity to be held responsible for the commission of a crime. State v. Smith, 298 S.C. 205, 379 S.E.2d 287 (1989). It is a matter of common sense that a defendant charged with the commission of a horrific act did not, in all likelihood, commit such act while his mind was in a normal condition, however, the fact that a defendant committed a heinous offense is not conclusive evidence that a defendant is incompetent or insane. State v. Lewis, 328 S.C. 273, 404 S.E.2d 115 (1997); State v. Gardner, 219 S.C. 87, 64 S.E.2d 130 (1951). Similarly, it is to be expected that a defendant facing serious charges and a potential lengthy period of incarceration will be depressed or plagued with feelings of hopelessness, however, such depression and feelings will not render a defendant incompetent to stand trial or assist in his defense. Patterson, v. State, 253 S.C. 382, 171 S.E.2d 235 (1969).

That a defendant may have some difficulty in understanding the procedures by himself will not preclude a finding of competency, where a defendant's trial counsel can explain any procedures or discuss any matters with the defendant. Sims v. State, 313 SC. 420, 438 S.E.2d 253 (1993). Thus in Sims, where the defendant was medicated and had difficulty understanding the factual and legal proceedings by himself, it was sufficient for purposes of determining competency, if these

matters could be explained to the defendant one-on-one by his attorney. The Sims Court analogized this procedure to an attorney representing a person who does not speak or understand the English language, and must have matters translated. Although time consuming, such a process does not render the defendant incompetent. Sims, 313 S.C. 420, 438 S.E.2d 253. Thus, for a defendant to be competent to stand trial, he must have (1) a rational as well as a factual understanding of the charges against him and (2) the *ability* to consult with his attorney with a reasonable degree of rationale understanding. Godinez v. Moran, 509 U.S. 389; Drope v. Missouri, 40 U.S. 162; Dusky, 362 U.S. 402; Kelly, 331 S.C. 132, 502 S.E.2d 99; Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993); Jeter v. State, 308 S.C. 230, 417 S.E.2d 594; State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980).

The statutory injunction, that an examination for competency be ordered when the circuit judge "has reason to believe" that a defendant is not mentally competent to stand trial, involves the exercise of the discretion of the trial judge in evaluating the facts presented on the question of competency. State v. White, 364 S.C. 143, 611 S.E.2d 927 (Ct. App. 2005); State v. Drayton, 270 S.C. 582, 243 S.E2d 458 (1978); S.C. Code Ann. Section 44-23-410. Thus, despite the mandatory language contained in 44-54-410, the decision of whether to order a competency examination is within the discretion of the trial judge, whose decision will not be overturned absent a clear showing of an abuse of discretion. Drayton, *supra*; State v. Weik, 356 S.C. at 83, 587 S.E.2d 683 (2002; White, *supra*; State v. Singleton, 322 S.C. 480, 472 S.E.2d 640 (Ct. App. 1996). This is so, because the determination of whether there is "reason to believe" a defendant lacks a certain mental capacity necessarily requires the exercise of discretion. State v. Bradshaw, 296 S.C. 642, 644, 239 S.E.2d 652, 653 (1977); White. Therefore, the trial judge has the inherent discretionary authority to order an independent psychiatric evaluation *if* he believes that a defendant is not fit to stand trial

or *if* he believes the defendant's mental competency would be an issue in the trial. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420.

A defendant must be competent throughout his trial, and not just the commencement. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). If a question of a defendant's competency arises during the trial, it is the duty of the trial judge to determine if the defendant is competent to proceed. Drope, 40 U.S. 162; Walton v. Angelone, 321 F.3d 442, 459 (4th Cir. 2003); Weik, 356 S.C. 76, 587 S.E.2d 683. However, the standard for competency remains the same, hence the language "the standard for competency to stand or continue trial" has repeatedly been used by the Courts. Bell, *supra*. Thus in Weik, *supra*, the State's experts diagnosed the defendant as suffering from schizotypal personality disorder, but competent to stand trial; the defendant's experts diagnosed the defendant as suffering from paranoid schizophrenia and incompetent to stand trial; and all experts agreed that the defendant was "hyper-religious," heard voices, and suffered from paranoid beliefs involving the CIA and the Masons. The trial court ruled the defendant was competent to stand trial. During the trial of the case, the defendant's attorneys asked the judge to have the defendant re-examined for competency, after they reported to the court that the defendant was talking about voices telling him what to do. Defendant's attorneys questioned the defendant's ability to assist them, and whether he was competent to choose between continuing with the jury trial or entering a plea. The trial judge refused the request to order a competency re-examination, the trial continued, and the defendant was convicted. The South Carolina Supreme Court affirmed the defendant's conviction, holding the defendant had not shown a clear abuse of the trial judge's discretion, deferring to the ruling of the trial judge who was able to view the defendant's courtroom behavior and demeanor. Id.

The record shows, here Judge Coble was fully aware of this legal standard and followed it throughout the trial constantly monitoring Lewis, observing him, questioning him on the record, questioning his family, listening to his testimony at the immunity hearing and at trial before the jury, and comparing it to Lewis' statements to police at the scene and during the investigation the day of the crime. Walton v. Angelone, 321 F.3d at 459 ("Even if a defendant is mentally competent at the beginning of the trial, the trial court must continually be alert for changes which would suggest that he is no longer competent"); Drope, 40 U.S. 162 (information concerning defendant's suicide attempt during trial, when considered with psychiatric information available prior to trial and wife's testimony concerning his strange behavior and his attempt to kill her shortly before trial, created sufficient doubt of defendant's competence to stand trial so as to require further inquiry on the issue); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (defendant was competent to stand trial where from trial testimony it was apparent defendant clearly understood the questions he was asked and responded to the questions in an appropriate manner; at no time did the defendant indicate he did not understand what counsel was asking him); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (where defense expert testified defendant was not competent, it was not error for trial judge to find the defendant competent where the same expert testified the defendant possessed a rationale understanding of the courtroom proceedings, understood the role of the judge, solicitor, defense counsel, and jury and followed advice of counsel not to testify, although ignored advice of counsel to not make closing statement to the jury).

Here the record shows Judge Coble did not abuse his discretion in finding Lewis competent to stand trial and continue with trial. State v. Colden, 372 S.C.428, 641 S.E.2d 913 (Ct. App. 2007). In Colden, this Court found the trial judge did not err in refusing to grant a motion for a mental competency evaluation of the defendant, where the judge questioned the defendant, and the

defendant conclusively revealed his ability to answer questions rationally, appropriately, and on point; the defendant demonstrated a manifest understanding of the proceedings, the roles of the various participants, and the charges he was facing, the defendant offered nothing to demonstrate that the defendant's mental state was such as to render him unfit for trial; additionally, there was no evidence of irrational behavior before or during the trial, nor prior medical opinion concerning competency as to require a competency evaluation. Colden, 372 S.C. 428, 631 S.E.2d 913.

In State v. Burgess, 356 S.C. 572, 590 S.E.2d 42 (Ct.App.2003), this Court identified 3 factors to be considered in determining whether further inquiry into a defendants' fitness to stand trial was warranted. These are: (1) evidence of irrational behavior; (2) demeanor at trial; and (3) prior medical opinion regarding ability to stand trial. In Burgess, the defendant's demeanor during the motion was very appropriate and at the hearing she understood the proceedings, the roles of the various trial participants, and the charges leveled against her. "Beyond counsel's statements regarding his inability to talk intelligently with Burgess and his opinion that she could not assist in her defense, counsel offered nothing to demonstrate that Burgess's mental retardation was such as to render her unfit for trial." Burgess, 356 S.C. at 576, 590 S.E.2d at 44. This Court noted the trial judge did not experience any difficulty in conversing with Burgess and her testimony at a suppression hearing "seem [ed] to undercut any question of her competency." Id.

In the present case, Lewis testified multiple times at trial, pre-trial and before the jury and was able to answer his attorney's and the Solicitor's questions. (Tr. 69-88; 337-65). Lewis also engaged in multiple colloquies with Judge Coble and answered the court's questions appropriately (Tr. 41-45; 129-30; 214-15; 293-94; 297-99; 323-26). Lewis also consulted with his attorneys and made the informed decision to testify at the immunity hearing **and to testify before the jury** and testified appropriately each time. (Tr. 323-26). Lewis also knew the purpose of the proceeding; he

was on trial for the murder of Kyle Wofford. (Tr. 74). Finally, Lewis' attorneys, even though they obtained a HIPPA order or subpoena from Judge Coble, never produced any medical records or scans proving Lewis was not competent to stand trial and offered no medical testimony or medical records from any of the medical professionals who treated Lewis at Spartanburg Regional Hospital and released Lewis from their care that Lewis actually suffered from any of the conditions that Lewis' family informed counsel Lewis suffered from as a result of the falls. (Tr. 1-556 [trial record]; Post-trial Written Motion for a New Trial; Order Denying Motion for a New Trial). Colden, *supra*; Burgess, *supra*. *See also* Weik, 356 S.C. 76; 587 S.E.2d 683 (a defendant has the burden of proving he is incompetent to stand or continue with trial by a preponderance of the evidence); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998)(same); State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980).

Similarly, in State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004), the South Carolina Supreme Court found that where psychiatrists testified that Hill had frontal lobe damage from a gunshot wound to his brain and some memory loss after the trauma; that the defendant had difficulty with his memory during the time leading up to the crime, but admitted that it was possible the defendant does remember what happened during the crime, and that the defendant understood the charges against him and could follow the proceedings if he paid attention, the defendant was competent to stand trial. Id.

The record shows that here Lewis had memory problems that even he did not attribute to any of the falls before or during trial. (Tr. 338-43). Lewis attributed his memory problems to his age and stated it was something that started about a year before trial. (Tr. 338-43). Lewis was able to answer his counsel's questions and the Solicitor's questions during the immunity hearing **and** before the jury showing that Lewis could communicate with his counsel and assist his counsel

in preparing and presenting his defense. (Tr. 69-88; 337-65). Lewis also knew he was on trial for Kyle Wofford's murder. (Tr. 74). During the colloquies with Judge Coble, Lewis informed Judge Coble that he was able to communicate with his attorneys and understand them and he understood he was on trial for murder. (Tr. 41-45; 129-31; 214-15; 293-94; 297-99; 323-26). During his colloquy with Judge Coble about his right to testify, Lewis informed Judge Coble that he had fully communicated with his attorneys about his decision whether to testify or not, and he had decided after those consultations with counsel that he was going to testify before the jury. (Tr. 323-26). Lewis then testified before the jury and was able to answer his counsel's questions and the prosecutor's questions appropriately and in a self-protecting manner. (Tr. 337-65). Lewis claimed some memory problems but attributed those before the jury to his age not any falls before or during trial. (Tr. 338-43). However, Lewis could remember numerous details of the incident in which he shot Kyle especially those that helped his claim of self-defense, and presented his self-defense claim in a self-protecting manner. (Tr. 337-65). Additionally, the record shows his memory problems dealt mainly with answering questions about facts that if he admitted them, they would incriminate him. (Tr. 337-65; State's Ex. 1/ Court's Ex. 2; Tr. 169-70 [Body cam video of Lewis at the scene]; Tr. 356-57 [statements Lewis made during interrogation at the Sheriff's Office played for the jury,] Tr. 345-46).[2] Lewis also specifically remembered threats he alleged the victim made to him and specific things the victim did before Lewis shot the victim. (Tr. 337-65). Lewis had no problem answering his attorney's questions before the jury and he had no problem answering the

[2] Three and a half (3 ½) years later, Lewis' daughter Terri and his daughter-in-law also had problems when answering questions about what they told police the day of the incident that would incriminate Lewis. (Tr. 370-427; Compare Tr. 269-71; State's Ex. 10 [Body cam video of Terri at the scene). Terri claimed she was on pain medication the day of the incident and the daughter in law claimed she was in shock; therefore, both claimed what they said the day of the incident that incriminated Lewis may not be accurate. Both claimed their memories were better 3 ½ years later.

Solicitor's questions before the jury. (Tr. 337-65). Thus, the record clearly shows Lewis had the present ability to communicate and assist his attorneys in preparing and presenting his defense and he knew he was on trial for the murder of Kyle Wofford. (Tr. 69-88; 323-26; 337-65). State v. Drayton, *supra*; *See* State v. Burgess, 356 S.C. 572, 575-76, 590 S.E.2d 42, 44 (Ct.App.2003) (holding appellate court would not second guess trial judge's denial of motion for psychiatric examination where defendant had not previously been adjudicated incompetent to stand trial, trial judge found defendant's demeanor during proceeding appeared appropriate, and the record showed defendant understood the proceedings, roles of participants and charges against her); State v. White, 364 S.C. 143, 148, 611 S.E.2d 927, 930 (Ct. App. 2005)(similar).

Judge Coble did not err in finding Lewis was competent to stand trial or continue with trial. State v. Bellue, 260 S.C. 39, 194 S.E.2d 193 (1973). In Belue, the defendant attempted suicide during trial. The South Carolina Supreme Court held that the trial judge did not abuse his discretion in denying a motion for a mistrial, where the trial judge was able to converse with the defendant and observe his conduct during the trial and was satisfied that the defendant was able to proceed with the trial of the case. Id.

Lewis argues that because he was seen sleeping several times during the trial, that Judge Coble should have declared a mistrial or a continuance. Lewis is wrong. Both Lewis and his counsel informed the Court that Lewis was sleepy because he did not get much sleep 2 days before trial and then for 2 days during the trial. Counsel also claimed Lewis was sleeping during the playing of his interview with police at the Sheriff's Office; however, Lewis denied this under oath and had previously told the court he had seen the video 3 times. Regardless, a sleeping defendant does not equate with incompetence as other jurisdictions have universally concluded. Greene v. State, 2017 WL 993213 (Md. Ct. Spec. App. Mar. 15, 2017); *See, e.g.*, Watts v. Singleton, 87 F.3d

1282, 1287 (11th Cir. 1996)(holding there was no doubt a defendant who "conspicuously" slept through 70% of his murder trial was competent to stand trial); Bisnett v. Kelly, 221 F. Supp. 2d 373, 385 (E.D.N.Y. 2002)(holding a physical problem, "such as sleep apnea," does not pertain to the "inability to understand the proceedings or assist in [a] defense."); State v. Seldon, 172 N.C. App. 174, 616 S.E.2d 28, 2005 W.L. 1804899 (N.C. App. 2005) (Table, Unpublished Decision) (While it is uncontradicted defendant had trouble staying awake during the trial, the trial court inquired about the nature of defendant's disorder and made various inquiries of defendant to discern his mental capacity. There is no showing that defendant's sleeping during trial rendered him unable to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. Accordingly, the trial court properly proceeded with the trial, and this assignment of error is overruled.); Nasser v. State, 975 N.E.2d 854 (Ind. Ct. App. 2012)(Unpublished Memorandum Opinion)(there is nothing in the record before us to indicate that the trial court had reasonable grounds to order a competency evaluation of Nasser. Despite the trial court's comment during sentencing regarding Nasser's act of sleeping during portions of voir dire and during "some" testimony, Nasser was presumably awake during most of the witness testimony and was able to take the stand during trial and to maintain his defense that he was a victim rather than an aggressor during his encounter. Neither Nasser nor his attorney asserted during sentencing, in response to the trial court's comments regarding his sleeping, that Nasser's act of sleeping was anything but a voluntary act or that it impeded Nasser's ability to understand the proceedings and assist in the preparation of a defense. The trial judge had the opportunity to observe Nasser's conduct during the course of the trial and was in the best position to determine whether reasonable grounds existed to question Nasser's competency. Such grounds

did not exist. We cannot say that the trial court's decision to proceed with trial rather than order a competency evaluation was against the logic and effect of the facts and circumstances before the court. Nasser has not shown that the trial court abused its discretion.).

Furthermore, the fact that Lewis, a 76-year-old man, could not remember certain specific things about an incident that occurred 3 ½ years earlier, does not render the defendant incompetent to stand trial or continue with trial. State v. Proctor, 348 S.C. 322, 559 S.E.2d 318, 326 (Ct. App. 2001). In Proctor, the defendant claimed he did not remember the incident on trial. The Court found this did not prevent Proctor from being competent to stand trial:

> Proctor concedes he has a factual understanding of the proceedings against him. He contends the trial court erred in finding him competent to stand trial because his memory deficits render him unable to rationally assist his attorneys with the defense. Although there was evidence that Proctor was unable to recall some information unless it was constantly repeated, Proctor did not meet his burden of proving he was unable to assist his attorneys. Proctor understood the nature of the charges against him, the seriousness of the charges, and the adversarial nature of the proceedings. He consulted his attorneys when he had questions. Despite Proctor's amnesia regarding the events surrounding the crime, he was able to rationally discuss the trial proceedings with counsel and comprehend them.

Proctor, 348 S.C. 322, 559 S.E.2d at 326, *reversed on other grounds*, 358 S.C. 417, 595 S.E.2d 476 (2004). Lewis' memory problems, whether feigned or not, did not prevent him from being competent to stand trial. Proctor, *supra*. Lewis knew he was on trial for Kyle's murder and had the ability to assist his attorneys during the trial of the case as shown by his testimony during the immunity hearing, his colloquies with Judge Coble, and his testimony before the jury. As the Court stated in McLaughlin v. State, 352 S.C. at 480, 575 S.E.2d at 843:

> From our review of respondent's trial testimony, respondent clearly understood the questions he was asked and responded to the questions in an appropriate manner. At no time did respondent indicate he did not understand what counsel was asking him.

The evidence does not suggest Lewis was incompetent before or during his trial. Lewis offered no medical records or medical testimony whether during the trial or after the trial, relevant to his ability to consult with his counsel or to understand the proceedings against him. (Tr. 1-556; Post-Trial Written Motion for a New Trial; Order Denying Motion for a New Trial).[3] Lewis informed Judge Coble several times he had the capacity to understand counsel and the trial proceedings. From a review of Lewis' pretrial and trial testimony, and his colloquies with the court, it is clear Lewis had the ability to "consult with his lawyer with a reasonable degree of rational understanding" and he clearly understood the nature of the proceedings against him. *See* Kelly, *supra.* During his trial testimony, Lewis answered his counsel's questions, and those of the prosecution. McLaughlin v. State, 352 S.C. at 481–82, 575 S.E.2d 843.

Judge Coble's findings of competence were based on Lewis' testimony, the court's conversations with Lewis and his family, and the trial judge's own observations of Lewis' behavior. Judge Coble's determinations of competency to stand trial and continue with trial have evidentiary support and are not against the preponderance of the evidence. Bell, 293 S.C. 395–96, 360 S.E.2d 708–09. Therefore, Judge Coble must be affirmed. Judge Coble did not abuse his discretion in denying the motion for a continuance or a mistrial because Lewis was competent to stand trial and continue with trial. Drayton, *supra* (the test for competency to stand trial or continue with trial is whether the defendant had a rational as well as a factual understanding of the proceedings against

[3] Lewis filed a short generic Motion for a New Trial based on his prior motions for a mistrial [including an alleged discovery violation] and based on all objections raised during the trial. (See Post-Trial Written Motion for a New Trial). He did not attach or provide Judge Coble with any medical records, scans, or reports of Lewis treatment and release from Spartanburg Regional Hospital during the trial or any sworn affidavits of any hospital personnel or doctor who treated Lewis and released him during the trial. (Motion for a New Trial). Judge Coble denied the motion for a new trial. (Order Denying Motion for a New Trial).

him and whether he had sufficient present ability to consult with his counsel with a reasonable degree of rational understanding).

CONCLUSION

For the above stated reasons, Lewis' convictions and sentences for murder and possession of a weapon during a violent crime must be affirmed.

Respectfully submitted,

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