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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Colleton County

Honorable Marvin H Dukes, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JORDIN QUOLEAHA GLOVER,

APPELLANT

APPELLATE CASE NO. 2025-000849

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INITIAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUES ON APPEAL**

- I. Did the trial court unconstitutionally comment on the facts by directing the jury it "should" consider several specific factors when evaluating credibility?
  
- II. Did the trial court unconstitutionally comment on the facts by instructing the jury evidence of a witness's prior inconsistent statement might be reason to disbelieve all of that witness's testimony?

## STATEMENT OF THE CASE

Appellant Jordin Glover was indicted for murder by the Colleton County Grand Jury on August 17, 2023. R.\* She proceeded to trial before Judge Marvin Dukes, III, and a jury from April 21 to April 24, 2025. Tr. 1, 5. She was represented by Mathew Walker. Tr. 1. Tameaka Legette prosecuted the case. Tr. 1.

Appellant admitted in opening statements and on the stand to shooting LaMontre Green, and she testified she did so in self-defense. Tr. 49:6-13, 343:20-344:12. Ultimately, the jury found Appellant guilty as charged. Tr. 485:5-8. Judge Dukes issued a thirty-year sentence. Tr. 495:18-22.

This appeal follows.

## STATEMENT OF FACTS

Sakasia and Kya Byrams both testified at trial with similar versions of events. They are sisters, and they were with Appellant before and at the time of the shooting. Sakasia was eighteen at the time of the shooting, and Kya was nineteen. Tr. 79:3-5, 152:25-153:2. They both testified they were at a friend's party at Neyles Community Center in Colleton County on the evening of February 17, 2023. Tr. 83:8-24, 135:11-23. They left the party and went to Kay's Place, a nearby bar outside of Walterboro, where they were with several friends, including Appellant. Tr. 84:19, 85:14-86:2, 135:23-137:9. Both Byrams drank throughout the night and were drunk at the time of the shooting. Tr. 124:15-17, 165:24-166:3. Soon after midnight on February 18, the Byrams and Appellant agreed to leave Kay's Place for Waffle House, and they left the bar in separate cars. Tr. 86:16-24, 90:14-20, 137:13-138:14.

The Byrams, Appellant, and two friends all arrived at Waffle House at essentially the same time, around 1:30 in the morning. Tr. 90:9-20, 139:15-140:14; State's Ex. 2 (Dining Front Door) at 1:30:00.<sup>1</sup> The group sat down at a table, and Appellant stepped outside briefly before returning. Tr. 140:11-14, State's Ex. 2 (Dining Front Door) at 1:38:00. Also with the group (or soon after) were Charles Breland, a man named Chico,<sup>2</sup> and several others. Kya testified that when Appellant returned, Appellant told Kya, "your baby daddy is outside," referring to

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<sup>1</sup> State's Exhibit 2 is on file with this Court, and it is a collection of eight different security cameras at the Waffle House. Tr. 67:5-13. Each of the different cameras are named for the location they observe and are identified in the lower right-hand corner of the image. The times referred to reflect the timestamps in the upper right-hand corner of the image. The video has no sound.

<sup>2</sup> Kya did not know Chico's real name. Tr. 141:22-23. Sakasia testified his name was "Jamel or something like that." Tr. 108:3-4. Appellant testified Chico's name is Shamel and that they are cousins. Tr. 339:1-4.

LaMontre Green Tr. 141:12-13. No one expected Green at the Waffle House that night. Tr. 123:11-19, 166:23-167:3.

Kya had previously dated Green in middle school, but that ended until they resumed dating when she graduated high school; they had a child together when she was nineteen years old. Tr. 131:23-132:5, 152:20-153:13. Kya also previously dated Appellant, in between when she dated Green. Tr. 132:12-133:24. She testified Appellant and Green "didn't like each other" because of her history with both of them. Tr. 134:3-23.

Kya explained that after Appellant returned, Green came inside the restaurant and "pulled [her] up out of the booth," trying to make her leave. Tr. 141:12-17; State's Ex. 2 (Dining Front Door) at 1:38:45. Kya refused, and she and Green argued about it. Tr. 141:14-17. Sakasia testified she tried to make Kya leave. Tr. 106:15-21. Green then briefly left the restaurant before returning. Tr. 153:15-21. He then got in an argument with Chico, who told LaMontre not to grab Kya again. Tr. 153:25-154:9, 168:19-22. The Byrams testified they did not hear LaMontre threaten anyone, nor did they see him with a weapon that night, although Kya testified she did know Green to carry weapons in general. Tr. 113:5-9, 158:5-8, 142:22-25. Appellant and Breland then shot LaMontre. Tr. 94:21-23, 157:2-12; State's Ex. 2 (Dining Front Door) at 1:39:50. Sakasia testified Appellant shot LaMontre initially, perhaps two times, then Charles Breland kept shooting him. Tr. 94:23-95:8, 117:2-10.

Kya was so drunk that night, that when the police arrived, she was "still out of it" and did not talk to them. Tr. 159:2-5. Sakasia was also drunk and could not recall details of the night after they left the bar, except essentially what she could see on the Waffle House recordings. Tr. 124:15-17.

Deputy Jackson Riley, then of the Walterboro Police Department, was one of the first to respond to the scene after the shooting. Tr. 172:6-173:3. When he arrived he found Green deceased and with a gun in his waistband. Tr. 175:20-176:13. He collected the firearm, which was admitted at trial as Defense Exhibit 1A. Tr. 177:6-11, 184:17-185:7, 4.

SLED special agent Olivia Nobles collected eight cartridge casings from the scene, four .357 and four .45 caliber. Tr. 229:18-25. The firearm found in Green's waistband was .40 caliber. Tr. 232:19-233:5. A firearms expert, SLED agent Suzanne Cromer, testified she received the eight casings and eleven bullets/bullet fragments. Tr. 272:14-273:2. Of the bullets and fragments, four were consistent with a .357, two were fired by a .45-caliber gun, and five others could not be identified. Tr. 273:13-274:4. All of the .357 casings and the .45-caliber casings were fired by the same gun of their respective caliber. Tr. 279:19-25.

Dr. Daniel Butler performed Green's autopsy. Tr. 292:1-19. He testified the gunshot wounds killed Green, that he had smoked marijuana recently before his death, and that he was five-foot-nine and weighed 190 pounds. Tr. 299:23-300:10, 305:1-22.

Appellant testified in her own defense. Tr. 320:19. She explained the events earlier in the evening in much the same way as Sakasia and Kya Byrams had: she got ready for the night (separately from the Byrams), went to the party at the community center, and then went to Kay's Place. Tr. 324:13-327:24. At no point earlier that day prior to Waffle House did she speak with either Green or Breland. Tr. 322:1-10, 323:17-324:4, 325:10-12. Appellant testified that she, Sakasia, Kya, and De'ja Lingard decided to leave the party for Waffle House, although Appellant went separately with another friend, Tyreece.<sup>3</sup> Tr. 330:20-331:9. She testified that at the Waffle

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<sup>3</sup> Tyreece's last name is Green. Tr. 369:25. He is not related to the deceased, LaMontre Green. Tr.373:12-25. For clarity in writing, the deceased is referred to as Green, and Tyreece will be referred to only as Tyreece.

House she saw Green's car outside, so she went inside to tell Kya to leave because she knew Green would be angry they were together. Tr. 339:7-14.

Appellant shot Green because she thought he would hurt her or her cousin Chico. Tr. 344:11-12. She explained that when Green re-entered the Waffle House after pulling Kya out of the booth, he argued with Chico. Tr. 344:13-21. Chico told him, "he's not putting his hand on no more females." Tr. 344:21-24. She heard Green respond very aggressively with threats: "[M]aybe I'm not the only one with guns. I'm not scared of you. I'll shoot this bitch up." Tr. 345:1-2. Appellant could see that he was carrying a gun, and she saw him move his hand toward the front of his pants where he carried the gun. Tr. 345:7-21. When he turned toward Chico, she shot him. Tr. 345:20-23, 348:8-349:2, 361:9-14. She also explained that she carried a weapon for her protection because her friend had previously been killed. Tr. 346:21-24, 349:12-23. She voluntarily turned herself in to the sheriff's department the next day. Tr. 347:18-23.

Tyreece also testified on Appellant's behalf. Tr. 371:16-20. He testified he does not remember the shooting itself, but he did recall the events around it. Tr. 372:15-373:6. He remembered Green entering the Waffle House "aggressive[ly], trying to snatch them out of the booth." Tr. 375:2-4. Tyreece and Chico told Green he would not be touching Appellant or Kya, and Green then said "y'all ain't got no guns." Tr. 375:5-7. Green was acting aggressively, and then Tyreece saw a gun magazine in his waistband before the shooting. Tr. 376:23-377:20.

In its reply case, the state recalled Kya Byrams. She testified that she did not hear Green threaten to "shoot up" the Waffle House or see him reach for his waistband. Tr. 387:8-388:6. The trial court's jury charge and relevant portions of closing argument are discussed below. Ultimately, the jury found Appellant guilty as charged. Tr. 485:5-8.

## STANDARD OF REVIEW

Whether a given jury charge is an unconstitutional comment on the facts should be reviewed on appeal de novo as a question of law. The question is whether the charge given violates Article V, section 21 of the South Carolina Constitution. That section is a limitation on the judicial authority of this state, and as such its application raises a question of law this Court reviews de novo. See *State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (holding constitutional criminal procedure questions of law are reviewed de novo); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (extending *Frasier* to voluntariness of a confession); cf. *Powell v. Keel*, 433 S.C. 457, 462, 860 S.E.2d 344, 346 (2021) (interpretation of a statute is reviewed de novo).

## ARGUMENT

### **I. The trial court unconstitutionally commented on the facts by instructing the jury as to how it "should" evaluate credibility.**

In relevant part, the trial court provided the following instruction on witness credibility:

In determining what the facts in this case are, you must judge the credibility, which simply means believability, of the witnesses and the value or weight to be given to their testimony. You alone must decide the force and effect of the testimony. In making this decision, there are many things you may, *and should*, take into consideration, such as: the appearance and manner of the witness on the stand, a characteristic often referred to as the demeanor of the witness; was the witness forthright or hesitant; was the witness' testimony consistent or did it contain discrepancies; what was the ability of the witness to know the facts about which he or she testified; did the witness have a cause or reason to be biased and prejudiced in favor of the testimony he or she gave; was the testimony of the witness corroborated or made stronger by the other testimony and evidence, or was it made weaker or impeached by such other testimony and evidence.

As jurors, please understand, you have the right to believe a small portion of a witness' testimony and discard the larger portion or vice versa. You may believe all of a witness' testimony or none. You may believe the testimony of a single witness against that of many witnesses or the other way around.

Tr. 462:22-463:19. Giving this charge was error because it told the jury what factors to consider in evaluating credibility and determining the facts of the case.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21; *see State v. Brown*, 443 S.C. 196, 198-199, 904 S.E.2d 448, 449-50 (2024) (collecting cases). It is not proper for courts to give charges "instructing juries on how to interpret and use evidence." *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019). The trial court erred by instructing the jury that in evaluating credibility it "may, *and should*, take into consideration" the identified factors. That is not the court's role. "It is the exclusive province of the jury to weigh the testimony and determine its force and effect, and when the

circuit judge invaded that province, and undertook to advise the jury how they might weigh the testimony . . . it undoubtedly was a violation of both of the letter and spirit of the constitution." *State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900).

Long ago our Supreme Court affirmed the trial court's refusal to instruct the jury that they "are not bound to take everything [the witness] may say as true, unless they do believe with good reason that he is telling the truth." *State v. Anderson*, 24 S.C. 109, 114 (1886). It reasoned this charge would have been an unconstitutional comment on the facts:

In view of the very stringent provisions of our constitution, which forbids the judges from charging juries 'in respect to matters of fact,' we cannot say there was any error in refusing to charge in the language of the request. The jury were properly told that they were 'the sole judges of the credibility of the witnesses,' and it would have been an invasion of their exclusive province if the Circuit Judge had gone further and undertaken to instruct them as to the kind of reasons which ought to influence them in reaching a conclusion as to a question of which they were the sole judges.

*Anderson*, 24 S.C. at 115. The charge given here did precisely what *Anderson* sought to avoid: it charged the jury with "the kind of reasons which ought to influence them" in determining credibility. The trial court went further than is permitted or necessary, and in doing so it was likely to influence the jury on a question of which it was the sole judge.

Telling the jury it *should* consider certain factors when evaluating the credibility of the witnesses is not materially different from instructing it a sex crime victim's testimony does not need to be corroborated, an instruction more recently invalidated. See *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). In both cases the court has instructed that certain factors have weight when evaluating credibility. Even by merely drawing attention to these factors in this way, the court has commented on the facts. See *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483 ("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."). By expressly telling the jury it "should"

consider those factors, the court has gone too far. Furthermore, as will be address further *infra*, this instruction dovetailed the solicitor's argument to the jury for disbelieving Tyreece's testimony about seeing Green with a gun. In that context, instructing the jury it *should* consider, for example, whether a witness's testimony was corroborated, is a comment on the facts in just the same way as in *Stukes*. Such suggestions from the court concerning credibility are unconstitutional:

If there could have been any doubt upon this subject prior to the adoption of the present constitution, such doubt is effectually dispelled by the emphatic and mandatory language used in the present constitution, "Judges shall not charge juries in respect to matters of fact, but shall declare the law,"—omitting the permission previously given in the constitution of 1868 to "state the testimony," which omission clearly shows that the purpose was to forbid the judge, *unqualifiedly*, from charging the jury in respect to matters of fact, and thus *leaving such matters exclusively to the jury, unaided by any suggestions from the judge*.

*State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900) (emphasis added).

It should also be noted that the history of this charge, in and of itself, does not protect it from challenge. Even "longstanding" charges can be unconstitutional comments on the facts. *Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 (citing *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009)). "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . ." *Williams v. Illinois*, 399 U.S. 235, 239 (1970). The question is "simply whether the circuit judge erred in giving any advice or suggestion to the jury as to how they might deal with the facts." *Mitchell*, 56 S.C. 524, 35 S.E. at 214. It did.

As a final point, this instruction is simply unnecessary. See 16 *Corpus Juris* § 2438, at 1012 (1918) ("[I]t is not necessary to instruct the jury that they are the judges of the credibility of witnesses and as to the weight to be given their testimony, and that they have a right to credit or

to discredit the testimony of any witness."). In every person's life, in virtually all interactions with others, people inherently and automatically recognize their obligation to evaluate credibility, and they need no guidance on how to do so. *Cf. Burdette*, 427 S.C. at 503, 832 S.E.2d at 583 ("It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" (quoting *Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9)).

**II. The trial court unconstitutionally commented on the facts by instructing the jury that a prior inconsistent statement might be "consider[ed] . . . in determining whether to trust the witness' testimony as to other matters."**

The trial court also provided the following instruction about prior inconsistent statements by witnesses:

*There has been evidence presented that witnesses have made prior statements which are not consistent with the witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial. If a witness is shown to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness' testimony as to other matters. You may reject all testimony of that witness or give all or part of the testimony the weight you think it deserves.*

Tr. 465:8-20.

As broadly addressed above, the trial court is forbidden from instructing the jury on how to determine factual matters. Appellant contends the entire instruction just quoted is an unconstitutional comment on the fact, even if the majority of it is largely neutral and unimpactful. However, the critical portions of the instructions are these: (1) "There has been evidence presented that witnesses have made prior statements which are not consistent with the witnesses' present testimony" and (2) "If a witness is shown to have knowingly testified

untruthfully concerning any material matter, you may consider this in determining whether to trust the witness' testimony as to other matters." In the context of Tyreece's testimony and the solicitor's clear attack on his credibility, as explained *infra*, these portions of the instruction could have had a meaningful impact on the jury and never should have been given.

The instruction is similar in essence to the instruction invalidated by the implied malice cases. In *State v. Burdette*, the trial court instructed the jury that "malice may also arise when the deed is done with a deadly weapon." 427 S.C. at 494, 832 S.E.2d at 577. That instruction is impermissible because "the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." 427 S.C. at 502, 832 S.E.2d at 582. In precisely the same way here, the trial court emphasized the fact of the prior inconsistent statement, and then suggested to the jury what it might do with that evidence.

The instruction was effectively a permissive inference to the jury: if the jury finds certain facts to exist, certain conclusions should follow. However, such inferences—where they have been challenged recently—have been consistently invalidated as unconstitutional comments on the facts. *Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 ("The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); *see, e.g., State v. Brown*, 443 S.C. 196, 199, 904 S.E.2d 448, 450 (2024) (collecting cases); *State v. Stewart*, 433 S.C. 382, 391, 858 S.E.2d 808, 812 (2021) (inference of knowledge from possession of contraband); *State v. Cheeks*, 401 S.C. 322, 327-29, 737 S.E.2d 480, 483-84 (2013) (inference of control from knowledge of contraband). The instruction "elevate[d] the specific facts of the case" to matters expressly bearing on credibility. *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled in unrelated part by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). This it cannot do because "[i]t is always for the jury to determine the facts,

and the inferences that are to be drawn from these facts." *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582 (quoting *Cheeks*, 401 S.C. at 328, 737 S.E.2d at 484).

**III. The instructions were not harmless beyond a reasonable doubt because they particularly undermined Tyreece's testimony in the way argued by the solicitor.**

"Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, [the Court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). Thus, the question "is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

This Court cannot be confident the instructions did not contribute to the verdict because they could have led to the jury finding the Byrams' testimony was credible and that Tyreece lacked credibility.

The instructions could have affected the jury's evaluation of the Byrams' credibility because they presented essentially the same testimony, which was most importantly that they did not hear Green make any threats nor did either see his gun. Tr. 94:2-10, 142:3-5. By instructing the jury to consider if witnesses' testimony was corroborated, the jury could have concluded each of their testimony was "corroborated or made stronger by the other testimony and evidence" and therefore more credible. The solicitor also expressly told the jury it should believe Sakasia in part based on the security footage:

She also said she never saw LaMontre pull a gun. She also said LaMontre was leaving. You can use corroboration to see what she

is saying. What she is saying is LaMontre was leaving. She never saw him pull a gun. That can be corroborated based on what you saw in the Waffle House video. She is credible. She is believable. But, ultimately, you get to decide.

397:10-16. The solicitor immediately continued said nearly the same thing in support of Kya's testimony, directly contrasting it with Appellant's. Tr. 397:17-398:10. This commentary almost perfectly matched the direction given by the trial court, and that made it all the more likely to influence the jury into doing as instructed, leading it to disbelieve Appellant's testimony.

The solicitor also extensively challenged Tyreece's credibility, and she did so in ways directly connected to the improper charges. Thus, the trial court's instructions could have pushed the jury into accepting the solicitor's argument. If the jury disbelieved Tyreece, it was likely to conclude Green had not, in fact, made aggressive movements toward his gun at the time of the shooting, or that Appellant could not have seen or known that Green had a gun. Tyreece testified he saw a gun magazine in Green's waistband after Green entered the Waffle House a second time immediately prior to the shooting. Tr. 377:4-13. This was the only evidence—other than the fact Green did have a gun on his person—corroborating Appellant's testimony she saw Green reach for his weapon at his waistband,<sup>4</sup> Tr. 345:1-23. In this way then, if the jury concluded Green was a liar, it might have also been more likely to conclude Appellant was lying as well because she gave similar testimony. It is "entirely conceivable" the jury found self-defense did not apply because of this charge. *Belcher*, 385 S.C. at 612, 685 S.E.2d at 810.

In closing the solicitor repeatedly pointed to some of Tyreece's purported prior statements and called him a liar the jury should not believe. Tr. 396:5-21, 401:5-7, 401:21-23, 412:19-22.

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<sup>4</sup> Although both Byrams testified they did not see Green with a weapon, Appellant was positioned in the seat closest to Green at the time of the shooting, Tr. 345:7-16, and thus had a better view than either of them.

The solicitor called him a liar based on these claimed prior inconsistent statements, even though Tyreece attempted to explain the matter and this evidence should have been relatively unimportant. Specifically, first, while cross-examining Tyreece, the solicitor challenged his earlier testimony he was not related to Appellant:

Q: Mr. Green, do you remember meeting with me and Ms. Pinckney.

A: Yes, ma'am.

Q: Do you remember telling us that Jordin was your cousin, a distant relative?

A: I told you -- I told yall she was my friend.

Q: You told us that she was your distant relative.

A: Yes, ma'am.

Q: Well, then why did you lie to us if she ain't?

A: Because she's just a friend. I call everybody my cousin friends.

Q: Okay. But you didn't tell us that you call everybody your cousin friends. So you lied to me?

A: I didn't lie. If you would've asked me, I would've told you.

Q: No. I asked you, and you told me that she was your cousin. But today you're telling us that she ain't your cousin. So you done lied?

A: No, ma'am.

Q: Okay. Now, the other part that you said that you told us about is you seeing this gun. You didn't tell us you saw no gun on LaMontre Green.

A: Because y'all didn't ask me no further questions after y'all ---

Q: I asked you all kinds of questions. You never told me you saw no gun on LaMontre Green. You told me you blacked out and didn't see nothing. You don't remember that?

A: That was after the shooting.

Q: That was during the shooting. You never told us that you saw a gun on LaMontre Green. Now you're telling the Court that you saw LaMontre Green and Jaheim whispering outside. You got a lot to tell today, Mr. Green, that you didn't tell us when you saw us. Why didn't you tell us, Mr. Green?

A: Because you were going against us?

...

Q: ... Now, Mr. green, this part about you said that LaMontre Green said he wasn't putting his hands on no more females. Mr. Green, you didn't tell us that. All the stuff that you're telling this Court here today, Mr. Walker, you didn't tell us any of that, Mr. Green. And you lied and said that Jordin was your cousin and now you're telling us that she ain't your cousin. You got something you want to say? Or that's the end of it?

A: No.

Tr. 381:21-384:3. In this exchange, the solicitor has expressly attempted to call Tyreece's credibility into question because of prior statements and omissions, a theory emphasized by the court in the charge. She expressly attacked his testimony *about Green's gun* based on his prior omission.

The solicitor also told the jury, "The judge is going to tell you about credibility of witnesses." Tr. 394:19-20. She then argued the jury should not believe Tyreece because she believed he lied about his relation to Appellant:

Now, I'll be honest, Tyreece Green may be a little bit agitated because Tyreece Green lied. He lied. And he sat on the witness stand and he admitted that he lied for no good reason. I asked him, "Why did you lie to us?" He had no reason to lie to us about a small thing, a small thing like Jordin Glover is my cousin. And then he tried to roll it back: Oh, I call all kinds of people my cousin. I'm not your cousin. But he lied about that. *My thing is if you lie about the small things, what else would you lie about?*

Tr. 395:9-18. As it relates to the cross-examination as well, this is the primary problem with the trial court's instruction: it directly matches the solicitor's theory and argument. The trial court

instructed the jury it might consider the witness's prior inconsistent statements "in determining whether to trust the witness' testimony as to other matters." In so doing the court placed its thumb on the scales, and the jury might have done precisely as instructed.

Finally, again in closing, the solicitor argued:

When Mr. Walker began questioning [Tyreece], he started off talking about the gun. No question was even asked yet. But he began talking about this gun. Now, when I pressed him about the gun that he didn't tell us that he saw, then it was like, oh, you didn't ask me. But you sat on the witness stand and told the jury that you told us. Why are you lying, Tyreece Green? My mama used to say -- she's passed on now, God rest her soul -- but she used to say she despised a liar. And that's what Tyreece Green is. But now, of course, you have the ability to judge that. Because you judge the credibility of the witnesses. He also said he told LaMontre Green that he wouldn't be putting his hands on anymore females. But now he's standing there saying he saw nothing, but he said he told us that. But then he said I didn't ask him about it. So he didn't tell us. Ladies and gentlemen, Tyreece Green is not credible. He cannot be believed.

Tr. 396:5-21. Throughout her closing argument and his testimony, the solicitor attempted to impugn and attack Tyreece's credibility for the reasons and in the ways contemplated by the charge. The charge was both improper and impactful.

As a final note, that the jury was told it is to determine the facts and credibility of witnesses does not automatically cure the prejudice of an improper comment on the facts. 16 Corpus Juris, *Criminal Law* § 2313, at 943 (1918) ("It has been held that, where the trial judge, in charging, intimates an opinion as to the weight of the evidence, or as to the credibility of the witnesses, the error is not cured by subsequently instructing that the jury are the sole judges of such matters . . . or that the court has no right to trench upon such matters."). This was a pure self-defense case where Appellant admitted to shooting Green in opening argument. Tr. 49:6-13. She and Tyreece saw Green's weapon. Appellant and Breland both shot him with no evidence at all of prior coordination, which could indicate they both saw the same threat. This was a close

case, and it was always going to boil down to a credibility contest—one that should have been uninfluenced by the trial court. "[G]iven the centrality of the issue of credibility in this case," this Court should not find the error harmless beyond a reasonable doubt. *State v. Witherspoon*, 418 S.C. 641, 643, 795 S.E.2d 685, 686 (2016).

**IV. Pursuant to *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), an unconstitutional comment on the facts can be raised on appeal for the first time because it is a limitation on the judicial power itself.**

Admittedly, Appellant's trial counsel did not object to the given charges.<sup>5</sup> However, Appellant asserts the general issue preservation requirement does not and should not apply to a trial court's unconstitutional comment on the facts. This is in part because article V, section 21 of the South Carolina Constitution is clear such comments are outside of the judicial power to make: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision "prohibit[s] courts from commenting to the jury on the facts of a case." *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. "Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts." *Id.*; see generally *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797 (1896) (providing a detailed analysis and history of the then-newly adopted strict prohibition on charging the facts in any way and explaining the effect of its amendment from a prior version in which trial courts could "state the testimony").

In *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), the Supreme Court recognized the importance of this rule and its place in the constitution of our state. 128 S.C. at 280, 122 S.E. at 771. Thus, the Court held a challenge concerning the "constitutional prohibition as to a charge on the facts" need not be raised below to be challenged on appeal. 128 S.C. at 280, 122 S.E. at

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<sup>5</sup> There was no charge conference on the record. Tr. 368:5-369:7.

771. In *Orr* the Court considered an appeal challenging the trial court's instruction on the facts without objection. *Id.* It reversed, holding:

It is said, however, that, if his honor misstated the issues, it was the duty of the defendant to call the attention of the court to it, and, not having done so, he cannot now complain. That is a rule of court and must give way to the constitutional prohibition as to a charge on the facts. This assignment of error must be sustained.

*Id.* Therefore, objections to a charge on the facts need not be raised below to be argued on appeal because the constitutional rule outweighs the general issue preservation requirement.

Appellant recognizes this rule has not been used since *Orr*. However, in virtually all recent comment-on-the-facts cases the jury instruction issue was preserved so the *Orr* rule was unnecessary to consider. See *State v. Brown*, 443 S.C. 196, 198, 904 S.E.2d 448, 449 (2024); *State v. Stewart*, 433 S.C. 382, 386, 858 S.E.2d 808, 810 (2021); *State v. Smith*, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020); *State v. Burdette*, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019); *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019); *State v. Stukes*, 416 S.C. 493, 497, 787 S.E.2d 480, 482 (2016); *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016); *State v. Cheeks*, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013); *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled in unrelated part by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Roof*, 298 S.C. 351, 353, 380 S.E.2d 828, 829 (1989); *State v. Grant*, 275 S.C. 404, 406, 272 S.E.2d 169, 170 (1980); *State v. Franks*, 432 S.C. 58, 80, 849 S.E.2d 580, 592 (Ct. App. 2020); *State v. Owens*, 427 S.C. 325, 329, 831 S.E.2d 126, 128 (Ct. App. 2019), *aff'd*, 433 S.C. 482, 860 S.E.2d 357 (2021); *State v. Brooks*, 428 S.C. 618, 626, 837 S.E.2d 236, 240 (Ct. App. 2019); *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010).

Although not expressly used in modern times, the *Orr* rule is a logical exception to the typical preservation requirement because it is a constitutional restriction directly on the judicial

power of the trial courts. Article V establishes the judicial branch, and it empowers and limits the courts in specific ways, such as the prohibition in section 21 on factual commentary by the court. As a restriction on the actual judicial power itself, this constitutional rule must be more closely guarded than any other. *See Orr*, 128 S.C. at 280, 122 S.E. at 771. This is for good reason: "the real object of this clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge, whose position would very naturally add great weight to any opinion he might express upon any question of fact arising in a case." *State v. White*, 15 S.C. 381, 392 (1881). The separation of roles between judge and jury is the foundation of our justice system. *See Sumter Tr. Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 817 (1926) ("The people of South Carolina have said that it is the province of the courts to state the law and of juries to determine the facts."); 64 Corpus Juris, *Trial* § 313, at 299 (1933) ("[I]t is the office of the judge to instruct the jury in points of law and of the jury to decide matters of fact."). Therefore, "the strict prohibition of the constitution" must be enforced because it is that important. *Norris*, 47 S.C. 488, 25 S.E. at 810. "This imperative mandate found in the organic law of the land, this court, even if disposed to do so, cannot and will not evade the responsibility of enforcing whenever such mandate is violated." *State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900) (reversing conviction where trial court improperly commented on credibility of witnesses); *see State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) (applying provision and stating, "A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and impartial trial").

The rule also fairly represents modern practice in this area because on multiple occasions the Supreme Court has held a jury charge was or would be a comment on the facts despite the

issue not being squarely presented on appeal. For example, in *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the Court established a three-part test to determine when evidence of a defendant's attempted suicide is admissible as evidence of guilt, affirming the trial court's admission of the evidence in that case. 425 S.C. at 92-93, 819 S.E.2d at 762. It then went further and held that trial courts should not instruct the jury on evidence of a suicide, even though on appeal the defendant challenged solely the admission of the evidence. 425 S.C. at 90, 93, 819 S.E.2d at 760, 762.

Similarly, in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the defendant had asserted only that his case fell within the narrower proscription against inferred malice instructions where "there was evidence presented that could reduce, excuse, justify, or mitigate the homicide," which was first established in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). *Burdette*, 427 S.C. at 493-94, 832 S.E.2d at 577. He did not challenge the wholesale impropriety of an inferred malice charge in every case; nonetheless the Court addressed the issue *after* holding there was evidence to reduce or mitigate the homicide and thus the charge was improper under *Belcher*. 427 S.C. at 495, 501-02, 832 S.E.2d at 578, 582. The Court then forbid the implied malice charge in all cases, even though that was not necessary to decide the case *or* raised by the defendant. 427 S.C. at 495, 501-04, 832 S.E.2d at 578, 582-83.

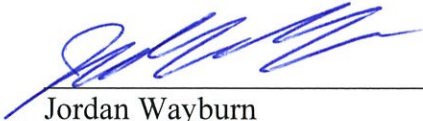
*Orr* should also be upheld precisely because the typical issue preservation requirement is not new. The Court at the time of *Orr* regularly refused to address exceptions to jury charges—for issues other than comments on the facts—unless raised to the circuit court. *E.g.*, *Stanford v. Cudd*, 93 S.C. 367, 76 S.E. 986, 986 (1913) ("[W]e have frequently held that we can consider no question which was not presented to or decided by the circuit court."); *see Morrison v. Mut. Benev. Ass'n of Chesterfield Cnty.*, 78 S.C. 398, 59 S.E. 27, 28 (1907)); *Smith v. S.C. & Ga. R.R.*,

62 S.C. 322, 324, 40 S.E. 665, 665 (1902); *State v. Chiles*, 58 S.C. 47, 49, 36 S.E. 496, 497 (1900); *Youngblood v. S.C. & Ga. R.R.*, 60 S.C. 9, 22, 38 S.E. 232, 236 (1901). Nonetheless, the *Orr* Court recognized the general preservation requirement as "a rule of court" that "must give way to the constitutional prohibition" in article V, section 21. 128 S.C. at 280, 122 S.E. at 771. It appears that by "rule of court," the Court was referring to Rule 11 of the Circuit Court Rules (1922), which required parties to submit requests to charge prior to argument. That Rule eventually became Rule 20, SCRCrimP. If the constitutional prohibition prevailed over the old court rule, it prevails over the new one as well. The constitution must be the supreme law; it cannot be altered nor its protections weakened by a mere rule of court. *Cf. Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750, 751 (1997); *see* 12 Corpus Juris, *Constitutional Law* § 41, at 699 (1917) ("A written constitution is to be interpreted and effect given to it as a paramount law to which all other laws must yield, and it is equally obligatory on individual citizens and on all departments of the government.").

The Court's decision in *Orr* should not be easily discarded now, and thus appellant can challenge the unconstitutional instruction. *See State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (citing the principle of stare decisis and stating, "we see no reason to revisit [the prior decision] today").

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests this Court reverse her conviction and remand the case for a new trial.



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Jordan Wayburn  
Appellate Defender

ATTORNEY FOR APPELLANT

This 2<sup>nd</sup> day of January, 2026.