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Aug 13 2026

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
The Honorable Marvin H. Dukes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JORDIN QUOLEAHA GLOVER,

APPELLANT.

Appellate Case No. 2025-000849

FINAL BRIEF OF RESPONDENT

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APPELLANT’S 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?

RESPONDENT’S COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Should this Court consider Appellant’s issues when they were clearly not preserved with a proper objection before the trial court, and Appellant asks this court instead to consider them under a 102-year-old decision that has never been cited to on issue preservation?
- II. Did the trial court abuse its discretion when it instructed jurors on factors to consider about witness credibility that did not create a specific inference or call undue attention to any facts in evidence?
- III. Did the trial court abuse its discretion with an instruction on inconsistent statements that, in light of what happened at trial, did not call particular attention to one witness’s testimony?

STATEMENT OF THE CASE

Jordin Glover was indicted for murder. (R. p. 469 - 470). Glover proceeded to trial in Colleton County in front of the Honorable Marvin H. Dukes, III, and a jury. (R. p. 1). The trial was conducted April 21, 2025, to April 24, 2025. (R. p. 1). Glover was represented by Matthew Walker, Esq., and the State was represented by Assistant Solicitor Tameaka A. Legette, Esq. (R. p. 1).

At the conclusion of the trial, after less than an hour of deliberation, the jury found Glover guilty of murder. (R. p. 454, l. 5–p. 455, l. 8). The court sentenced Glover to 30 years' imprisonment. (R. p. 465, ll. 18–25). This appeal follows.

STATEMENT OF THE FACTS

In the early morning hours of February 18, 2023, as LaMontre Green was walking out of a Waffle House in Walterboro, he was shot by Jordin Glover and, based on the evidence at trial, another individual. (State's Ex. 2, Dining Front Door Camera, 00:40:12–00:40:47). LaMontre Green was shot at about 1:40 a.m., according to the Waffle House security footage. *Id.* An ambulance took him to Colleton Medical Center while CPR was being performed, but Green died. (R. p. 167, l. 4–p. 169, l. 11; p. 171, l. 18–p. 172, l. 4).

Hours earlier, Sakasia Byrams and her sister Kya were among those attending a party at the Neyles Community Center. (R. p. 53, ll. 7–20). Jordin Glover was also at the party. (R. p. 53, l. 25–p. 54, l. 2). Kya had been in an off-and-on relationship with Glover. (R. p. 51, ll. 13–23; R. p. 102, ll. 19–24). Kya had also had an on-and-off relationship with LaMontre Green and shared a child with him, though she insisted at trial that she never dated Glover and LaMontre at the same time. (R. p. 52, l. 11–21; R. p. 101, l. 25–p. 102, l. 5; R. p. 102, ll. 19–24; R. p. 103, l. 22–p. 104, l. 2). At that point, Kya was in a relationship with LaMontre. (R. p. 102, ll. 12–14).

From the party, Sakasia and Kya went to a bar named Kay's Place. (R. p. 54, ll. 19–25). Glover would also arrive at Kay's. (R. p. 55, ll. 17–23). Sakasia, Kya, and another friend then went to a Waffle House in Walterboro. (R. p. 56, l. 19–p. 57, l. 20). Once again, they were soon joined by Glover. (R. p. 60, ll. 11–16).

LaMontre arrived. (R. p. 61, ll. 11–14). He forcefully pulled Kya from her seat in the restaurant. (R. p. 111, ll. 12–19; State's Ex. 2, Dining Front Door Camera, 00:39:42–00:39:48). He exited the restaurant at about 1:39 a.m. (State's Ex. 2, Dining Front Door Camera, 00:40:00). Green re-entered the Waffle House second later. (State's Ex. 2, Dining Front Door Camera, 00:40:00–00:40:07).

Green also got into an argument with a man known as “Chico.” (R. p. 61, ll. 15–21; R. p. 123, l. 25–p. 124, l. 3). As Green went to leave the restaurant again Sakasia heard gunfire. (R. p. 62, ll. 3–4). She saw Glover shoot Green. (R. p. 62, ll. 5–8). Kya also saw Glover shooting Green. (R. p. 113, ll. 14–16). Another person also started shooting. (R. p. 62, ll. 9–12).

According to Sakasia and Kya, LaMontre did not display a weapon at Waffle House or make threats. (R. p. 64, ll. 2–10; p. 83, ll. 5–9; p. 112, ll. 3–4, p. 112, ll. 20–23). However, law enforcement did find a firearm “down in his pants” that had apparently been tucked in his waistband. (R. p. 146, ll. 11–13; p. 146, l. 14–p. 147, l. 4).

LaMontre had been shot six times. (R. p. 269, l. 23–p. 270, l. 1). While one bullet did the most structural damage, according to the forensic pathologist who performed LaMontre’s autopsy, he died from the effects of all of the wounds. (R. p. 259, ll. 11–15; p. 262, ll. 15–19; p. 270, ll. 11–23; p. 275, ll. 9–10). Investigators found that at least two guns were involved in the shooting. (R. p. 249, ll. 18–25).

Glover testified in her own defense. She said that a friend, Tyreece Green, had taken her to her cousin’s house on February 17 to get ready for the party. (R. p. 294, l. 23–p. 295, l. 3). Tyreece also took Glover to the party. (R. p. 295, l. 22–p. 296, l. 12). Glover said she shot LaMontre because she thought he might hurt her or Chico. (R. p. 314, ll. 11–12). She also testified that LaMontre said that he would “shoot this bitch up,” and that Glover saw his gun and saw him move his hand toward it. (R. p. 314, l. 25–p. 315, l. 4; p. 315, ll. 7–10, 17–21).

Tyreece also testified, even though he said that he did not see the actual shooting because he blacked out. (R. p. 342, ll. 21–25). Tyreece said he could remember what happened before and after the shooting. (R. p. 343, ll. 1–6). He said he saw a magazine in LaMontre’s waistband when LaMontre returned to the restaurant after walking out the first time. (R. p. 347, ll. 6–18). He also

recalled hearing LaMontre say “y’all ain’t got no guns.” (R. p. 345, ll. 2–7). On direct examination, Tyreece also said he was not related to Glover. (R. p. 343, ll. 12–15).

However, on cross-examination, Tyreece conceded that he had earlier told prosecutors that Glover was a distant relative. (R. p. 351, l. 24–p. 352, l. 6). “I call everybody my cousin friends,” he explained (as transcribed). (R. p. 352, ll. 7–8). He said he did not tell prosecutors he saw a gun on LaMontre because “y’all didn’t ask me no further questions after y’all ---” before he was cut off. (R. p. 352, ll. 17–21).

After closing statements, the trial court instructed the jury on the case. During his jury charge, the trial court gave the following instruction regarding witness credibility:

In determining what the facts in this case are, you must judge the credibility, which simply means the 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 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. In exercising your mental processes and attempting to decide the verdict, the law simply requires that you exercise your good judgment, your common sense, your sense of logic and reason, and your experiences in life. You then apply these attributes to the evidence and apply the law as I state it to you and, thus, arrive at a verdict.

(R. p. 432, l. 22–p. 433, l. 25). The judge also charged the jury:

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.

(R. p. 435, ll. 8–20). Neither party objected to the charge. (R. p. 451, ll. 11–14). A minor pronoun issue the judge recognized did not draw an objection. (R. p. 453, ll. 2–12).

After less than an hour of deliberation, the jury found Glover guilty of murder. (R. p. 454, l. 5–p. 455, l. 8). The court sentenced Glover to 30 years' imprisonment. (R. p. 465, ll. 18–25). This appeal follows.

STANDARD OF REVIEW

“In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous.” *State v. McBride*, 416 S.C. 379, 385, 786 S.E.2d 435, 438 (Ct. App. 2016). This Court considers “whether the trial court abused its discretion.” *Id.*

“When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial.” *State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016).

ARGUMENT

I. As Glover concedes, her argument on the jury charge is not preserved for this court’s appellate review, and her attempt to invoke *Orr* does not allow her to proceed with an unpreserved claim.

Glover frankly concedes in her brief that her argument about the jury charge is unpreserved. Instead, she proposes that this Court hold that she did not need to preserve the argument based on a 102-year-old case that even she acknowledges has never been used before and would create a so-far-unrecognized exception to our state’s law in this area. This Court should decline her invitation.

South Carolina’s appellate courts have long required even mistakes of a constitutional dimension to be raised before the trial court in order to be preserved for review. *See State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (“The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal.”); *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A plethora of cases from the appellate entities of this state recognize that constitutional rights may be waived.”). The rule is not “some sort of game of ‘gotcha’ elevating form over substance,” *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023), but helps prepare the ground for appeal. “A trial court’s opportunity to rule necessarily includes both parties being aware of the nature of the objection such that they may present their best arguments addressing *that* objection. This then serves another purpose of our rules—‘meaningful appellate review.’” *Id.* at 609, 889 S.E.2d at 556 (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).

Nothing less is required when the issue is a jury charge. “The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the

opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge.” *State v. Williams*, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976).¹

In writing for a majority abolishing an exception to the issue preservation rules for capital cases, Justice Toal explained why issue preservation should apply even in criminal cases. She highlighted the “danger” that could come from the exception—“sandbagging.” *State v. Torrence*, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result and writing for the majority). “Of course, a contemporaneous objection requirement to preserve legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal.” *Id.*

Glover cannot argue that her alleged error is preserved here, because it clearly is not. The charge conference was held in chambers. (R. p. 338, ll. 5–18). After that conference, Glover did not raise any issue on the record. (R. p. 339, ll. 1–6). The court later said that the two sides “have the charge that I think we’ve all agreed to,” and said that it could be fixed the next day if necessary. (R. p. 359, ll. 20–24). The next morning, Glover still did not raise an objection on the record. (R. p. 360, ll. 8–16).

Instead, Glover reaches back more than a century and asks this court to rely on the sparse opinion of our supreme court in *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924). This is the entirety of the court’s reasoning in the case:

The defendant was forced to trial under the state’s admission that if his two absent witnesses had been present they would have testified that the defendant did not kill the deceased. 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

¹ The *Williams* Court noted that “[t]his rule is relaxed in capital cases,” an apparent reference to the *in favorem vitae* exception that our supreme court abolished in 1991. See *State v. Torrence*, 305 S.C. 45, 60–61, 406 S.E.2d 315, 324 (1991) (Toal, J., concurring in result and writing for the majority).

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. at —, 122 S.E. at 771. It's worth noting here that the trial court's error was not simply charging on the facts, but charging on the wrong facts. The court told jurors that the defendant had essentially confessed to killing the victim in self-defense. *Id.* But that wasn't the case; the defendant had merely testified that if he killed the victim, "it was in self-defense." *Id.*

The other issue is that, to the State's knowledge, no court has ever cited *Orr* for this proposition—or, with one exception, ever. In what appears to be an appeal in a related case—perhaps the retrial from the first case—the first *Orr* is briefly cited in another *State v. Orr*, 131 S.C. 276, —, 126 S.E. 766, 767 (1925). Glover attempts to argue that this is because the previous cases about factual charging did not require the use of the previously unknown *Orr* exception; that the provision of the Constitution prohibiting a charge on the facts is somehow of special importance or dimension; or that our courts have sometimes gone beyond the narrow confines of the arguments of the parties to deal with related issues.

Glover asks this court not to discard *Orr*, but recognizing any exception created in *Orr* would require overturning decades of issue preservation rulings from our supreme court and this Court. That, of course, could also be unconstitutional. *See* S.C. CONST. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

Glover did not preserve her error in the trial court and does not offer this Court a good reason to depart from the state's well-developed law on issue preservation. Her conviction should be affirmed.

II. The trial court did not abuse its discretion by telling jurors that they “may, and should” take certain factors into account when considering the credibility of witnesses, or by addressing inconsistent statements, as neither charge relieved the State of its burden and neither charge highlighted specific evidence to the jury.

Assuming the error is preserved—and the State maintains that it is not—Glover still cannot show that the trial court abused its discretion with its jury instructions. Our constitutional prohibition on judges charging matters of fact is meant to prevent trial courts from shaping jury verdicts by drawing attention to inferences or evidence that benefits one party in a proceeding. That is not what happened here, and in event, any error that did occur was harmless.

A. Under modern South Carolina law, a jury instruction impermissibly comments on the facts when it provides an inference that benefits one party or calls attention to specific evidence to benefit one party.

“Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. CONST. art. V, § 21 (West). As our supreme court noted in interpreting this section for the first time in 1896, the single sentence was already on its second draft. *See Norris v. Clinkscales*, 47 S.C. 488, —, 25 S.E. 797, 803–04 (1896). The provision in the 1868 Constitution, while barring the judge from “charg[ing] juries in respect to matters of fact,” still gave judges permission to “state the testimony and declare the law.” *Id.* at —, 25 S.E. at 804. The 1895 version of the Constitution introduced the current wording. *Id.* Judges were no longer allowed to state testimony and were required to declare the law. *Id.*

But the court considered a problem caused by the new clause: How could the judge frame a charge on the law that would not overwhelm the jury but would give them all the law they needed? *Id.* at —, 25 S.E. at 807–10. “The constitutional mandate is, they ‘shall declare the law.’ To require that they shall do so, and to forbid them to establish the law they must declare upon any foundation, is to require the impossible.” *Id.* at —, 25 S.E. at 809. The court found a solution in hypothetical statements.

We therefore conclude and hold that as it would be impossible to declare the legal principles involved without some state of facts, actual or hypothetical, it was the intention of the framers of the new constitution, in amending [the section], that the trial judge, in charging the law of the case, *should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony either in whole or in part.* We are clearly of the opinion that under [that section], as it now reads, a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, *and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the legal result.*

Id. at —, 25 S.E. at 809–10 (emphases added). Our supreme court more or less read the law the same way for several decades. *See State v. Clamp*, 225 S.C. 89, 98, 80 S.E.2d 918, 922 (1954) (“Stating a legal conclusion which would result if the jury found certain facts is not a charge on the facts.”).²

Beginning with *Belcher*, our supreme court has tightened the restrictions on permissive inferences, sometimes discussing those inferences in terms of instructions on the facts. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). In what the *Belcher* Court conceded was “a clear break from our modern precedent,” *id.* at 612, 685 S.E.2d at 810, the court held that “where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill)

² In *Clamp*, a burglary and armed robbery case, the victim had testified that the burglars had entered her home by tearing through a screen door to access the latch. *Id.* at 97, 80 S.E.2d at 921–22. The court upheld a jury instruction stating that “the mere opening of an unlatched door, or the mere opening of an unlatched screen door is a sufficient breaking under the law.” *Id.* at 97, 80 S.E.2d at 922. Our supreme court found that the instruction “was nothing more than a statement or definition of ‘breaking’, which is one of the essential elements of the crime of burglary.” *Id.* at 98, 80 S.E.2d at 922. The court also noted that judge did not “express[] or even intimate[] any opinion which he may have had as to who, if anyone, broke and entered the dwelling” of the victim. *Id.* at 99, 80 S.E.2d at 922–23. Identity was a disputed issue.

caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon,” *id.*

The court dealt directly with the ban on factual instructions in *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013).³ There, the court ruled it was no longer proper to instruct a jury that constructive possession could be inferred from a defendant’s knowledge of the presence of drugs. *See id.* at 327–29, 737 S.E.2d at 483–84. That charge “unduly emphasizes that evidence,” *id.* at 328, 737 S.E.2d at 484, and “erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law,” *id.* at 329, 737 S.E.2d at 484. The court also found that because the instruction characterized knowledge as “strong evidence,” it was “necessarily a comment on the weight of the evidence[.]” *Id.*

In *Stukes*, our supreme court held that the prohibition on factual instructions also applied to judges mentioning a law allowing for a criminal sexual conduct case to be supported by the uncorroborated statements of a victim. *See State v. Stukes*, 416 S.C. 493, 499–500, 787 S.E.2d 480, 483 (2016). The charge was problematic in part, the court found, because “[s]pecifying this qualification applies to one witness creates the inference the same is not true for the others.” *Id.* at 500, 787 S.E.2d at 483.

The court revisited *Belcher* in *Burdette*. *See State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). In *Burdette*, the court discarded its caveat that instructing the jury on the deadly weapon-malice inference was improper when there was offsetting evidence in the record; instead, instructing the jury on the inference was always inappropriate. The reason?

³ *Cheeks*, in turn, referenced our supreme court’s decision in *Grant*, where the court held that a jury should not be instructed that a defendant’s attempt to flee from law enforcement is evidence of guilt. *See State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (“[W]e believe that the ‘law of flight’ in a judge’s charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter.”).

When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury.

Id. at 502, 832 S.E.2d at 582.

Most recently, our supreme court ruled that judges should not instruct juries that they can infer the malice needed for a murder conviction from the fact that the victim was killed by the defendant “during the commission of a felony.” *State v. Brown*, 443 S.C. 196, 198, 904 S.E.2d 448, 449 (2024) (per curiam). The *Brown* Court found that the inferred malice instruction was impermissible in that case because giving it meant that “the trial court improperly elevated and commented to the jury upon a particular fact—the commission of a felony.” 443 S.C. at 199, 904 S.E.2d at 449.

“The modern trend, however, has cast doubt upon the validity of 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). Our modern case law suggests there are two (often interlocking) ways that a trial court’s instructions can violate that rule. Generally, a trial court impermissibly charges the jury on the facts when (1) it underscores certain permissive inferences to the benefit of one side of the litigation; or (2) it highlights a piece of evidence to the benefit of one side.

The first way an instruction can violate the constitutional ban on charging facts is where the court specifically instructs a jury on what inferences can lead to what legal findings—if x, then y—usually in way that helps one party (and usually the State) prevail. If a deadly weapon is used, then you can infer malice, which shows one of the elements of murder. *Belcher, supra*; *Burdette, supra*. If a defendant has knowledge of the presence of drugs, then they can be found to be in possession of the drugs, one of the key elements of a drug-possession charge. *Cheeks, supra*. If the

defendant was committing a felony, then a jury can infer malice, again boosting the State's chances of getting a murder conviction. *Brown, supra*.

The other defect our supreme court has identified is instructions that single out specific evidence, whether it is evidence of the knowledge of the presence of drugs, *Cheeks, supra*; the provision of state law that a CSC victim's testimony does not have to be corroborated, *Stukes, supra*; the use of a deadly weapon, *Burdette, supra*; and the commission of a felony. *Brown, supra*. Again, highlighting that evidence—drawing the jury's attention to a specific fact, often one that cuts against one of the parties—right before the jury undertakes its deliberations might subtly shape their perceptions.

That explains *Hughey*, where the court found a limit to hypothetical evidence. *See State v. Hughey*, 339 S.C. 439, 450–52, 529 S.E.2d 721, 727–28 (2000), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).⁴ In *Hughey*, the defendant wanted the court to illustrate the concept of legal provocation with several examples, some of which just so happened to resemble facts in the case.

Specifically, Hughey requested the following examples of legal provocation: *pulling a knife on a defendant, pointing a gun at a defendant, spitting in a defendant's face*, assault of a family member, *sudden mutual combat* where one of the participants is killed by the other without a previously informed intention to do so, finding one's spouse in the act of adultery, or the deceased having molested a defendant's minor child. The requested examples constitute a direct charge on the facts because Hughey alleges that *a knife was pulled on him, [a victim] spit in his face, and there was sudden mutual combat*.

Id. at 452, 529 S.E.2d at 728 (emphases added). As a result, our supreme court found, the trial court was right not to give the charge, because it would have been a charge on the facts of that

⁴ Ironically enough, based on an instruction in the penalty phase of a capital matter.

case. *Id.* In other words, it would have told the jurors how to evaluate *specific* evidence in their deliberations. The same with *State v. Cartwright*—when evidence of a suicide attempt is admitted, the trial court should not tell jurors how to evaluate that particular evidence. 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018).

B. In this case, neither the isolated phrase “and should” nor any other part of the trial court’s instructions created a specific inference or called undue attention to particular facts; as a result, the trial court did not abuse its discretion in giving the instruction, and any error was in any event harmless.

It would appear, based on the emphasis in Glover’s first argument, that her first objection to the jury instructions rests heavily on the inclusion of the phrase “and should.” Init. Br. App. 8–10. But she’s wrong, both because the credibility instruction was not an impermissible comment on the facts of the case and because the inclusion of an isolated phrase cannot render a jury instruction improper.

First, the instruction here is not an instruction on the facts. It does not elevate a particular piece of evidence to the jury. The jury in this case heard the testimony of fifteen witnesses—most of whom testified for the State. Nothing in the trial court’s instructions could reasonably be read to apply to only one of those witnesses. *See Stukes*, 416 S.C. at 500, 787 S.E.2d at 483 (“Specifying this qualification applies to one witness creates the inference the same is not true for the others.”); *see also Cheeks, supra; Stukes, supra; Burdette, supra; Brown, supra.*

Glover’s argument here is also missing another one of the implied ingredients of a charge on the facts: That the benefit of the instruction creates an uneven playing field, by making it easier for the State to meet its burden on the element of a crime, or by suggesting that the law views some evidence differently than other evidence. *Cf. State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) (holding, in a case about a trial court’s comments during the trial about a witness’

testimony, that “[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”).

That’s why Glover’s attempt to make this case a repeat of *Stukes* is misguided. Glover’s argument that the instruction here “is not materially different from instructing it [that] a sex crime victim’s testimony does not need to be corroborated,” (Init. Br. App. 9), overlooks precisely what the *Stukes* Court found problematic.

By *addressing the veracity of a victim’s testimony* in its instructions, the trial court *emphasizes the weight of that evidence* in the eyes of the jury. The charge *invites the jury to believe the victim*, explaining that to confirm the authenticity of her statement, the jury need only hear her speak.

Stukes, 416 S.C. at 499, 787 S.E.2d at 483 (emphases added). In Glover’s case, the instructions did not invite the jury to take any witness’ word for it. The instructions provided some guidelines for jurors to consider when assessing any of the testimony. Most of which, again, was presented by the State.⁵

Further, because the instructions applied the same to all of the witnesses—the State will address the testimony of an individual witness below—there is no prejudice in this case. And even if the word “should” somehow made an otherwise permissible jury instruction wrong, that’s not enough to warrant reversal. *See Burdette*, 427 S.C. at 498, 832 S.E.2d at 580 (“When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court's charge to the jury in its entirety.”).

⁵ *State v. Bamberg* is not to the contrary. 270 S.C. 77, 82, 240 S.E.2d 639, 641 (1977). Our supreme court concluded in that case that the trial court did not err when it refused to instruct jurors to consider “the interest or bias of the witness and to observe his demeanor.” *Id.* But the supreme court simply found that the trial court had not abused its discretion in declining to give the instruction, not that it would have been error to give it. *Id.*

That is not contradicted by *Smith*, a case not cited by Glover. *See State v. Smith*, 227 S.C. 400, 88 S.E.2d 345 (1955). There, our supreme court found error in a charge on witness credibility when the trial court instructed the jury that it “may take into consideration whether or not there has been any contradiction of the testimony of one witness by that of another witness as to any known or proven fact in the case” and “shall take into consideration whether or not there has been any corroboration of any testimony of any witness by the testimony of any other witness or witnesses who have testified in the case as to any known or proven fact, or admitted fact, in the case.” *Id.* at 406, 88 S.E.2d at 348. But the court pointed out the imbalance in terms “may” and “shall.” *See id.* at 407, 88 S.E.2d at 348 (“It therefore was *permissive* for the jury to consider whether or not there had been any *contradiction*, but *mandatory* that they take into consideration whether or not there had been any *corroboration*.”). The court then considered the intersection of the instruction and what happened at the trial court.

In the instant case, the defendant (appellant here) did testify in his own behalf but *having no other witness was without corroboration*, while the State presented sixteen witnesses with these being recalled to the stand a total of twenty-two times for the purpose of corroboration or contradiction of various portions of the evidence.

Id. at 407, 88 S.E.2d at 349 (emphasis added). Implicit in the *Smith* Court’s decision was an acknowledgment that the thing that the jury “shall” consider—corroboration—was present in the State’s case and missing in the defendant’s.

Even under our supreme court’s tightened view of what constitutes an instruction on the facts, the instruction the court gave here on witness credibility did not constitute an abuse of discretion. And even if it did, Glover has been unable to show how that instruction resulted in any prejudice. Her conviction should be affirmed.

C. The trial court did not abuse its discretion with its instruction on inconsistent statements, because in light of what happened at trial, the instruction did not call particular attention to any specific evidence; furthermore, even if the instruction did constitute error, it was harmless.

Glover next contends that the portion of the jury instructions dealing with inconsistent statements was an instruction on the facts of the case because it singled out the testimony of Tyreece Green. But it was not targeted at Green, and it was not prejudicial, because the instruction once again provided a broad instruction that applied both the State's witnesses and Glover's.

Again, the idea that Tyreece Green's testimony was singled out is a key element to finding any error here. *See Stukes*, 416 S.C. at 500, 787 S.E.2d at 483 ("Specifying this qualification applies to one witness creates the inference the same is not true for the others."); *see also Cheeks*, *supra*; *Stukes*, *supra*; *Burdette*, *supra*; *Brown*, *supra*. Even if the instruction would have been erroneous if only Tyreece Green had been confronted with prior inconsistent statements—and the State does not concede that it would be—that is not the situation that the trial court faced. And the situation matters in reviewing the instruction. *See Smith*, 227 S.C. at 410, 88 S.E.2d at 350 ("Proper evaluation of the portion of the charge to which exception is taken requires also that we view it in the light of the circumstances of the trial (with regard to corroboration or contradiction of witnesses) in which it was received, and presumably considered, by the jury." (quoting *State v. Fuller*, 227 S.C. 138, 152, 87 S.E.2d 287, 294 (1955), *abrogation on other grounds recognized by State v. Salisbury*, 343 S.C. 520, 523, 541 S.E.2d 247, 248 (2001))).

Glover's trial counsel questioned Sakasia Byrams, one of the State's witnesses, about her first statements to law enforcement, when she did not mention the other person alleged to have shot the victim that night, and discrepancies in her statement about who was in a vehicle that left the scene. (R. p. 94, l. 12–p. 96, l. 15). And just like the State argued to the jury that Tyreece

Green's testimony should not be believed, Glover argued the Byrams sisters' testimony should not be taken at face value.

And so I submit to you that they -- again, you can believe part or none or all -- but, you know, that they are not reliable witnesses in which to base a decision. And they're unreliable because they're clearly biased as to the outcome that wish for you to achieve or you to reach. They want you to find my client guilty. And they're gonna continue their testimony to achieve that end.

I also submit to you that they were quite both drunk that night. And so their recollection of events were spotty. I don't remember what else was said. I was drunk. They both said that. Mainly when what was said -- but, again, their memories are spotty. And, again, it's a traumatic event. You get focused in, you get tunnel vision. *Kya is -- you know, neither one at the time is saying that they saw anybody but Jordin shoot and never saw [the other person] shoot.* But, you know, now later on they're saying that once they've been told it happened. But at the time, they had no idea that [the other person] had shot. So their memories are not as useful to you in deciding what was really said during those events we're talking about today. *We can compare their testimony to what we actually see happening in video and note the discrepancies.*

(R. p. 401, l. 14–p. 402, l. 10) (emphases added). Just as Glover asserts that the State's closing statement touched at times on what the trial court's instructions would be—hardly a novel tool of advocacy—Glover's counsel tried to connect his arguments to the charge.

The trial court's instruction could be applied to all witnesses and was not meant to elevate the testimony of one witness or any other aspect of the evidence. It did not highlight permissive inferences or evidence to the advantage of either the state or Glover. The instruction was not error, and even if it was error, it was harmless.

Glover's conviction should be affirmed.

CONCLUSION

Glover did not preserve her issue for appeal before the trial court. Even if she did, the instructions here were not the kind that our courts look for when enforcing the constitutional prohibition on factual instructions. Glover's conviction should be affirmed.

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August 13, 2026.