

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JULIAN DEANDRE BATTLE,

APPELLANT

Appellate Case No. 2011-203746

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 5222

PETITION FOR REHEARING

RECEIVED

MAY 07 2014

SC Court of Appeals

In abject terror of the legal maxim, "Pigs get fed and hogs get slaughtered," counsel for appellant respectfully asks this Court for rehearing on the second issue of the Court's opinion. With knowledge that the State petitions for certiorari on almost every reversal, appellant must reluctantly ask for rehearing on the second issue to preserve his arguments during the almost inevitable litigation at the Supreme Court. In the event the State does not petition for rehearing regarding the involuntary manslaughter charge, appellant intends to withdraw this petition.

This Court held that appellant's issue regarding the erroneous flight charge was unpreserved. The Court found that the State objected to the flight charge and appellant did not join in the objection. Respectfully, the Court erred in this determination. The context of appellant's objection is important. Judge Pyle omitted the flight charge from the first trial, so his use of this charge—that had been illegal for over thirty years—was a surprise to both parties. R. 444, l. 21 – 456, l. 22. State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

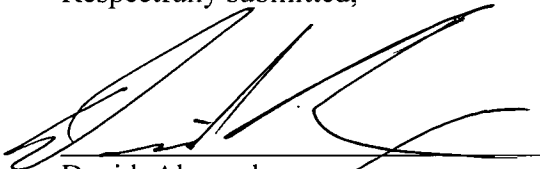
The State was the first to bring the error to the court's attention. R. 429, ll. 12 – 22. The solicitor stated, "I believe Your Honor's instructions are correct but the Supreme Court said that there can't be any mention of flight being evidence of guilt in a jury charge and I would ask you to please say something along the lines of any evidence of flight should be something that you can consider if you feel necessary." R. 429, ll. 12 – 22. Defense counsel then stated his three objections to the jury charges. R. 429, l. 23 – 430, l. 6. He numbered his objections for the court. R. 429, l. 23 – 430, l. 6. He first objected to the term "voluntary." R. 429, l. 23 – 430, l. 6. He then stated, "Secondly, I believe your charge **did** say they're not supposed to consider that as guilt **but it is something they can consider** as far as flight evidence." R. 429, l. 23 – 430, l. 6 (emphasis added). He then stated, "And third," renewing his objection to the refusal to charge involuntary manslaughter which was correctly found dispositive by this Court. R. 429, l. 23 – 430, l. 6.

Not only did defense counsel immediately join in the State's objection, he was correcting the State's suggestion that the trial judge recharge that flight can be considered if "necessary" because that was, in fact, what Judge Pyle had already said. R. 422, ll. 16 – 22. The trial judge then immediately ruled that he would not give any further charges. R. 430, ll. 7 – 9. As counsel

for appellant can attest from personal experience, Judge Pyle does not countenance further argument after he rules. See S.C.R. Crim. P. 18(a).

Judge Pyle knew the substance of the objection and ruled he would not correct the erroneous charge, which makes this issue preserved. At worst, the preservation issue is unclear. In such a case, the Court should find the issue preserved and reach the merits. Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part). This Court should find the issue preserved, conclude under Grant that the flight charge was error, and allow this issue to serve as an alternate sustaining ground for this Court's well-reasoned and sound opinion on the failure to give an involuntary manslaughter charge. Alternatively, this Court could simply delete this portion of the opinion as it is not dispositive, the error is clear, and the preservation of the issue is irrelevant at the trial level. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Respectfully submitted,



David Alexander
Appellate Defender

This 7th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, this 7th day of May, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of May, 2014.

Rhonda Demetrius Zawath (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.