STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAJERICK LOVELLE KNIGHT,

APPELLANT,

Appellate Case No. 2012-213529.

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II. Did the Circuit Court err when it excluded relevant evidence of Petitioner's state of mind which supported the lesser included offense of voluntary manslaughter?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in refusing to charge the jury as to voluntary manslaughter where either sudden heat of passion or sufficient legal provocation was absent under any possible interpretation of the evidence. (Appellant's Issue I).

II. Whether the trial court erred in denying Appellant's request to admit evidence of prior instances of violent conduct by Victim that were directed against another. (Appellant's Issue II).

III. Whether the trial court erred in finding Appellant's proffered expert testimony regarding Appellant's state of mind and whether Appellant's state of mind was reasonable to be inadmissible, where the expert's testimony was not based on scientific, technical, or other specialized knowledge and only served to bolster Appellant's own testimony. (Appellant's Issue II).

RESPONDENT'S STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant, Rajerick Lovelle Knight, in October 2011 for murder and for possession of a weapon during a violent crime. (Indictment Numbers 2011-GS-07-01673 & 2011-GS-07-01674). On November 26, 2012, Appellant's case was called to trial before the Honorable D. Craig Brown. (Tr. pp. 1, 13). Appellant was represented by Arie Bax and Naki Richardson-Bax during the four-day trial. (Tr. p. 1). Solicitor Duffie Stone and Assistant Solicitor Sean Thornton represented the State. (Tr. p. 1). On November 29, 2012, the jury returned a verdict of guilty. (Tr. p. 622, lines 12–23). Judge Brown sentenced Appellant to life imprisonment for murder and to imprisonment for five (5) years for the possession of a weapon during a violent crime, the sentences to run consecutively. (Tr. p. 636, lines 1–8).

Thereafter, Appellant served a timely notice of appeal, which he filed with the South Carolina Court of Appeals on December 5, 2012. (Notice of Appeal).

RESPONDENT'S STATEMENT OF THE FACTS

The State's Case

At Appellant's trial, the State presented evidence, including eyewitness testimony and surveillance video, that Appellant shot Travis Holmes (Victim) in the middle of a Subway restaurant in Beaufort, South Carolina on July 26, 2011.

Sierra Thomas, who worked at the Subway where Victim was killed, testified Appellant came into the restaurant with a female. (Tr. p. 174, line 1–p. 175, line 25). Thomas testified that she made Appellant's subs and then rang up his order. (Tr. p. 175, line 25–p. 177, line 9). Around that time, Victim walked into the Subway. (Tr. p. 177, lines 10–14). Appellant and the female then left the Subway. (Tr. p. 176, line 19–p. 177, line 14). According to Thomas, her co-worker, Demetria Green, started making a sub for Victim. (Tr. p. 177, line 10–p. 178, line 16). Thomas then noticed Appellant re-enter the restaurant and walk up to Victim. (Tr. p. 178, lines 17–24). Thomas heard a gunshot. (Tr. p. 178, line 24). According to Thomas, at that point Victim jumped on the counter, and Thomas ran away. (Tr. p. 178, line 24–p. 179, line 2).

Demetria Green also testified about what she witnessed on the day of the shooting. Green knew Victim—they had gone to elementary school together but had not seen each other since then. (Tr. p. 185, line 20–p. 186, line 6). Green and Victim caught up as she made him a sandwich. (Tr. p. 185, line 11–p. 186, line 22). Right as Victim was about to pay, Green saw Appellant come back up to Victim. (Tr. p. 186, line 21–p. 187, line 8). Green thought Appellant was going to greet Victim, but, instead, she heard a gunshot and saw part of a gun. (Tr. p. 187, lines 9–14). Green then ran to the back of Subway and hid. (Tr. p. 187, line 14–p. 189, line 11).

Jeannie Salleme, a customer who was in line at Subway when the shooting occurred also testified. (Tr. p. 199, line 16–p. 203, line 15). Salleme worked at the Golden Corral in Beaufort,

and she recognized Appellant on the day of the shooting because she had seen him "a handful of times" at Golden Corral. (Tr. p. 199, line 25–p. 203, line 3). When Salleme was going into Subway, Appellant was leaving. (Tr. p. 202, lines 6–15). But Salleme saw Appellant again when he returned to the restaurant. (Tr. p. 203, lines 8–19). According to Salleme, Appellant "just goes up to the other gentleman and then I heard a bang and that was it." (Tr. p. 203, lines 20–22). Before the shooting, Salleme did not see any argument or words exchanged, nor did she see a fight. (Tr. p. 203, line 23–p. 204, line 2). Later, Salleme spoke to the police and told them what she had witnessed. (Tr. p. 205, lines 7–19). She also identified Appellant as the person she had seen in Subway at the time of the shooting. (Tr. p. 205, line 20–p. 208, line 25).

Shiecarra Smalls, the female who was with Appellant at Subway on July 26, 2011, also testified for the State. (Tr. p. 212, line 6–p. 215, line 7). According to Smalls, Appellant picked her up from work, and they went to pick up subs from Subway for Appellant and his girlfriend. (Tr. p. 213, line 15–p. 215, line 15). After Appellant and Smalls got their subs, Victim walked in the door. (Tr. p. 215, line 24–p. 216, line 8). As Appellant and Smalls were leaving Subway, Smalls spoke to Victim, and he responded, but Smalls did not hear any words exchanged between Appellant and Victim. (Tr. p. 216, lines 10–20). After Appellant and Smalls left Subway, Smalls got in the car, but Appellant went back in to the restaurant. (Tr. p. 216, line 25–p. 217, line 16). Smalls testified, "I asked him if he had—if it was something going on and he said that, yeah, he was going back in there." (Tr. p. 217, lines 13–14). A short time later, Appellant walked out of Subway and got in the car, and Appellant and Smalls left. (Tr. p. 217, line 16–p. 218, line 1). Before leaving Smalls saw Victim run out of Subway and fall to the ground. (Tr. p. 218, lines 2–8). In the car Smalls heard Appellant tell someone on the phone that he had shot Victim. (Tr. p. 218, lines 13–17).

In addition to the eyewitness testimony of Thomas, Green, Salleme, and Smalls, the State also introduced eyewitnesses who saw Victim come out of Subway and drop to the ground. For example, James Powell testified that he saw Victim collapse, and he called 911 and gave information about a car that was seen leaving the scene. (Tr. p. 232, line 13–p. 237, line 24). Tanya Terry was also standing outside of Subway at the time of the shooting, and she saw a man come out of Subway right before Victim and jump into a car. (Tr. p. 240, line 17–p. 242, line 15). Terry then relayed to Powell information about the license tag of the car the man got into. (Tr. p. 242, line 13–p. 243, line 11).

The State also presented a video recording of the shooting from Subway's surveillance cameras. (Tr. p. 159, line 10–p.165, line 20; State's Ex. 10).

The Defense's Case

Appellant testified that he believed that Victim had been involved in a shooting of his home that took place on May 30, 2011. (Tr. p. 487, line 24–p. 497, line 19). Appellant was across the street at a neighbor's home at the time of the May 30th shooting, but Appellant's girlfriend, who was pregnant at the time, and his adopted son were at his home when the shooting occurred. (Tr. p. 489, line 2–p. 491, line 24; Tr. p. 509, lines 1–9). According to Appellant, the shooting lasted for "two to three minutes" during which there were "too many [shots] to count." (Tr. p. 491, lines 10–15). Appellant's girlfriend miscarried as a result of the shooting. (Tr. p. 494, line 4–p. 495, line 5). Appellant testified that he learned that Victim and another person were involved in the May 30th shooting. (Tr. p. 497, lines 14–19).

Appellant also testified that he knew Victim was a dangerous person and that Victim was known to "tote a gun and is a shooter." (Tr. p. 497, line 20–p. 498, line 3). Appellant further testified that the shooting scared him and took away his sense of security. (Tr. p. 498, lines 4–

11). He did not feel safe at home and moved to another residence. (Tr. p. 498, lines 8–11; Tr. p. 499, line 25–p. 500, line 10).

Appellant also testified about the shooting on July 26, 2011. According to Appellant, he first noticed Victim after he got his subs and turned to leave. (Tr. p. 501, lines 8–16). Appellant testified that, as he and Smalls tried to rush out of the store, Victim was staring him down. (Tr. p. 501, lines 17–21). Smalls said hello to Victim, but, according to Appellant, "he barely acknowledge her. He walk pass me and just was like, [']Man, I'm gone kill you boy.[']" (Tr. p. 501, line 21–p. 502, line 4). Appellant and Smalls exited the Subway, and, as they were walking to the car, Appellant talked to Smalls about Victim. (Tr. p. 502, lines 8–18). He testified to the following:

> And I was just explaining to her like did you hear what he said just now. Like, man, he just gone keep trying to kill me. You know, Travy, you know what type of guy he is. And I was just keep telling her that. I told her he just shoot up the house. He just took a son from me.

(Tr. p. 502, lines 11–16). By the time Appellant and Smalls reached the car, Appellant had decided he "couldn't live like that any more, hiding, running and from Mr. Holmes and just always being a victim to Mr. Holmes." (Tr. p. 502, lines 20–23). Appellant then went back into Subway, put a gun right up against Victim, and shot him. (Tr. p. 503, line 18–p. 504, line 17). Appellant then left Subway and got back into his car. (Tr. p. 504, lines 18–20). He then dropped Smalls off at her home. (Tr. p. 505, lines 1–6).

After the shooting, Appellant and his girlfriend fled to Jacksonville, Florida, and Appellant cut his shoulder-length dreadlocks so as "not to be noticed." (Tr. p. 505, line 7–p. 506, line 9). In early August of 2011, two officers from the Beaufort City Police Department picked Appellant up from Florida. (Tr. p. 266, line 9–p. 268, line 18).

ARGUMENT

I.

The trial court did not err by refusing to charge the jury as to voluntary manslaughter where the evidence did not support such a charge.

Introduction

The evidence presented at Appellant's trial did not support a voluntary manslaughter charge. Thus, the trial court correctly denied Appellant's request to charge the same.

How the Issue Was Raised at Trial

At trial Judge Brown indicated that he was inclined not to charge manslaughter or self-defense,[1] but he allowed both sides to argue that point before he made a decision. (Tr. p. 563, line 2–p. 572, line 3).

Defense counsel first argued that both self-defense and manslaughter should be charged "and let the jury decide based on what they perceived the state of mind of the defendant to be based on what they thought was reasonable and not reasonable, what charge to come back with." (Tr. p. 564, lines 2–25). Defense counsel cited *State v. Brown*, 79 S.C. 390, 60 S.E. 945 (1908); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981); and *State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596 (1988) in support of his point. (Tr. p. 564, lines 2–25).

In response, counsel for the State referenced *State v. Hernandez*, 386 S.C. 655, 690 S.E.2d 582 (Ct. App. 2010), and argued that voluntary manslaughter should not be charged. (Tr. p. 566, lines 1–23). Counsel for the State argued that either there was not sufficient provocation

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[1] Appellant is not challenging the trial court's decision not to charge self-defense. However, counsel's arguments and the trial court's analysis are sometimes intertwined in the record. The trial court ultimately did not charge either voluntary manslaughter or self-defense. (Tr. p. 598, line 22–p. 613, line 16).

for the shooting as words alone are never sufficient or there was a sufficient cooling off period (of two months) if the May 30th shooting was considered the provocation. (Tr. p. 566, line 13–p. 567, line 20). Under either scenario, Appellant could not meet the voluntary manslaughter standard. (Tr. p. 566, lines 21–25).

Defense counsel argued that there was evidence of both a threat and a shooting in the record and encouraged the trial court to allow the jury to decide whether Appellant had sufficient time to cool off. (Tr. p. 568, line 8–p. 569, line 15).

Counsel for the State again referred the trial court to *Hernandez* and noted that it was appropriate for the court to decide the issue as a legal matter because "[i]f there has been a cooling off, then there would not be a reason to do voluntary manslaughter." (Tr. p. 569, line 19–p. 570, line 17).

The trial court ultimately decided not to charge either self-defense or voluntary manslaughter. (Tr. p. 572, line 5–p. 577, line 11). The trial court noted that "words alone under the law is not sufficient legal provocation." (Tr. p. 577, lines 8–9). The trial court also noted that there was no evidence of contact between Appellant and Victim between the May 30th shooting (allegedly committed by Victim) and the July 26th shooting by Appellant. (Tr. p. 576, lines 1–18).

Standard of Review

"The trial court is required to charge the correct law applicable to the case. When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle." *State v. Marin*, 404 S.C. 615, 619–20, 745 S.E.2d 148, 151 (Ct. App. 2013) (citations omitted). "'In reviewing jury charges for error, [appellate courts] must consider the [trial] court's jury

charge as a whole in light of the evidence and issues presented at trial.'" *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "'To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)).

Analysis

Because the evidence in the record did not support a charge of voluntary manslaughter, Respondent submits that the trial court properly refused to charge voluntary manslaughter. As this Court has stated,

> The evidence presented at trial determines the law to be charged to the jury. *State v. Brown*, 362 S.C. 258, 261–62, 607 S.E.2d 93, 95 (Ct. App. 2004). "A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). In determining whether the evidence requires a charge of voluntary manslaughter, the trial court views the facts in a light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). However, "[a]n instruction should not be given unless justified by the evidence." *State v. Moultrie*, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002).

Hernandez, 386 S.C. at 660, 690 S.E.2d at 585.

Under South Carolina law, "'[m]urder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. On the other hand,

> [v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out

> knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

State v. Cole, 338 S.C. 97, 101–02, 525 S.E.2d 511, 513 (2000) (internal quotations and citations omitted).

> [E]ven when a person's passion is "sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter."

Hernandez, 386 S.C. at 661, 690 S.E.2d at 585 (quoting *State v. Knoten*, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001)). While "[a]n overt, threatening act or a physical encounter may constitute sufficient legal provocation[,]" *id.*, "[w]here death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation[,]" *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (citing *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951)).

Respondent submits that the trial did not err in refusing to charge voluntary manslaughter as the evidence presented at trial did not support that charge. This Court's decision in *Hernandez* is both on point and dispositive of this issue. In *Hernandez*, this Court affirmed a trial court's decision not to charge voluntary manslaughter because the evidence demonstrated that Hernandez cooled off between the only physical altercation between himself and the victim and the time when Hernandez shot and killed the victim. 386 S.C. at 661, 690 S.E.2d at 585–86. Specifically, Hernandez and the victim had a physical altercation when the victim kicked Hernandez out of a party at the victim's home. *Id.* at 658, 690 S.E.2d at 584. Hernandez then went to his home and grabbed a gun. *Id.* Hernandez returned to the party and enjoyed the party without incident until later than night when he encountered the victim again, and the victim

insulted him. *Id.* at 658–59, 690 S.E.2d at 584. Hernandez took out his gun and shot the victim. *Id.* at 659, 690 S.E.2d at 584. This Court noted that "'whether the defendant's actions during the intervening time between the provocation and the killing indicates the absence of sudden heat of passion is an appropriate question for the court.'" *Id.* at 662, 690 S.E.2d at 586 (quoting *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007)). This Court further explained:

> [E]vidence indicates Hernandez left the party, drove home, and retrieved his gun, thereby removing himself from any influence the ongoing party might have exerted. Moreover, when Hernandez returned to the party, he calmly resumed drinking and enjoying himself. Hernandez's intervening actions and demeanor upon returning to the party support a finding that he cooled off after being ejected. No evidence indicates a second physical confrontation between him and Garcia after his return. Consequently, the trial court did not err in declining to charge the jury on voluntary manslaughter.

Id. at 662–63, 690 S.E.2d at 586.

Appellant now argues that "the 2011 shooting incident at [his] trailer combined with [Victim's] verbal threat at Subway constituted sufficient legal provocation. . . ." Initial Br. of Appellant, pp. 14–15. However, this is the same type of evidence—a physical altercation, followed by a cooling down period, followed by a verbal exchange that triggered a shooting—that this Court found did not support a charge of voluntary manslaughter in *Hernandez*. Appellant apparently seeks to combine the physical confrontation and the threat as evidence of sufficient legal provocation. However, for purposes of determining whether sufficient legal provocation exists, if this Court did not combine the physical altercation and the insult in *Hernandez*, where both occurrences took place in the same night, there is no support for combining the May 30th shooting and the July 26th threat in this case, where almost two months separates the occurrences. Appellant has failed to point to any authority that a verbal threat can revive an earlier provocation, and none is readily apparent, and *Hernandez* seems to indicate the contrary.

The alleged threat made by Victim on the day Appellant shot him was not sufficient to warrant a voluntary manslaughter charge. *See State v. Rogers*, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996) ("[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon."). Moreover, the May 30th shooting that Victim was allegedly involved in occurred well before Appellant shot Victim, and there was a sufficient time for Appellant to cool down between the two events. Thus, the trial court did not err in denying Appellant's request to charge voluntary manslaughter where the evidence, viewed in a light most favorable to Appellant, did not support such a charge.

II.

The trial court did not err in denying Appellant's request to admit evidence of specific instances of violent conduct by Victim directed against others.

Introduction

The trial court did not err in denying Appellant's request to present evidence of prior acts of violence by Victim where those acts were not directed against Appellant and were not so closely connected in time or occasion with Victim's homicide so as to indicate the state of mind of Victim or to produce a reasonable apprehension of great bodily harm by Appellant. Additionally, had the evidence been presented to the jury, the evidence would not support a voluntary manslaughter charge.

How the Issue Was Raised at Trial

After jury selection, counsel for the State raised the issue of what Rule 404(b) evidence defense counsel planned to discuss during his opening statement. (Tr. p. 52, line 25–p. 53, line 15). The State took the position that some of the 404(b) evidence regarding Victim would not be admissible, but the State needed to know what particular instances of conduct defense counsel wanted to introduce. (Tr. p. 52, line 25–p. 58, line 17). Defense counsel indicated that he did intend to go into things about Victim's past, but he did not want to be specific about exactly what those were. (Tr. p. 53, line 17–p. 63, line 21). At that time, Judge Brown informed defense counsel ". . . it's your decision however you see fit to defend the case for the defendant. If you open the door, then that may result in some other issues or matters coming out." (Tr. p. 63, lines 12–13). However, Judge Brown deferred ruling on the 404(b) matters until he heard the particulars of the evidence. (Tr. p. 63, lines 8–21). Before breaking for the day, the trial court

instructed defense counsel to review the law regarding 404(b) evidence. (Tr. p. 108, line 24–p. 109, line 19).

Prior to the start of trial the next day, the trial court obtained a copy of Victim's criminal record. (Tr. p. 114, line 21–p. 115, line 12). The trial court then ruled that it would not allow defense counsel to go into Victim's charges or convictions from 2002, 2006,[2] 2008, or 2009. (Tr. p. 115, line 1–p. 118, line 3). The trial court noted that the earlier incidents were not directed toward Appellant, and "they were so far removed in time that the Court does not believe that they would be relevant to the matter that we have before us here today." (Tr. p. 117, lines 18–24). Defense counsel then argued that he should be able to go into the incident from 2011 when Victim allegedly shot at Appellant's home. (Tr. p. 118, line 4–p. 121, line 20). Defense counsel additionally requested that the trial court reconsider its ruling regarding the incidents from 2008 and 2009, both of which were directed against James Odom. (Tr. p. 122, lines 1–4). Judge Brown then stated that he had ruled as to the 2002 and 2005 incidents. (Tr. p. 123, lines 3–16).

After the State rested its case, the trial court took up various matters before the defense began its presentation of evidence. (Tr. p. 349, line 7–p. 363, line 3). At that time, defense counsel argued he should be able to present evidence regarding instances of violence in 2008 and 2009 by Victim against James Odom. (Tr. p. 350, lines 10–23). Defense counsel had a law enforcement witness[3] in the courtroom who defense counsel said was prepared to testify to the following:

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[2] It appears that this incident is also sometimes attributed to 2005 in the record.

[3] Defense counsel had Investigator Kelleher present in the courtroom at that time. (Tr. p. 350, lines 10–23). However, rather than called Investigator Kelleher to the stand to proffer his testimony about the 2008 and 2009 incident, defense counsel merely recited his understanding of

> [T]here was one incident in 2008, Your Honor, where based on the investigation . . . Mr. Holmes was charged in relation to a shooting into a house that Mr. Odom was in or residence. As a result of that, he received the charges—I think it was assault and battery with intent to kill, discharging a firearm into a dwelling and possession of a weapon charge. From our investigation possibly, the possession of a weapon charge might have gone away at prelim, but the rest of them were still existing.
>
> Those charges were pending and Mr. Holmes made bond and was released from pretrial detention. He was currently out on that pretrial release in February Your Honor of 2009 . . . . The allegations that were made that Mr. Holmes saw James Odom in February of 2009, at a gas station . . . .
>
> And that he then followed Mr. Odom who was being driven [by] Cassandra Simmons, who was I believe according the information I been provided, Mr. Holmes' cousin. He followed them down the road until he was closer to where Mr. Odom was living. And he opened fire out the driver's side window of his car and he struck the white SUV being driven by Cassandra Simmons with James Odom as a passenger several times . . . .

(Tr. p. 351, line 11–p. 352, line 16). Defense counsel then offered that Appellant knew James Odom. (Tr. p. 353, lines 4–5). Thus, defense counsel indicated that Appellant

> had knowledge . . . that Mr. Holmes in prior instances where he had been alleged to have shot at someone in their house, then sees them in a public place, waits until they have left that public place, follows them after they have left that public place and fires on them again.
>
> . . . So the idea that that is the evidence that we intend to present, we would argue that needs to be presented in this case is that my client had that in his mind when he sees Mr. Holmes in a public place.

(Tr. p. 355, lines 3–19). Defense counsel argued that the evidence was relevant to Appellant's state of mind at the time of the shooting. (Tr. p. 355, line 21–p. 356, line 2).

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the investigation. (Tr. p. 350, lines 10–17). Both the State and the defense directed Investigator Kelleher to speak up if defense counsel misrepresented anything in his recitation of the investigation. (Tr. p. 350, lines 10–17; Tr. p. 361, line 21–p. 362, line 18). The trial court found that presentation to be an acceptable replacement for the proffer of Investigator Kelleher's testimony. (Tr. p. 362, line 20–p. 363, line 3).

In response, the State argued that, based on state case law, the situations were not analogous and were too far removed in time from the July 26th shooting. (Tr. p. 356, lines 4–25). Defense counsel then stated that he would defer to the trial court's interpretation of the cases but pointed out that those cases did not set a bright-line rule. (Tr. p. 357, lines 1–25).

Though the trial court agreed with defense counsel that there was no bright-line rule, the trial court ruled that the 2008 and 2009 incidents were not so closely connected in point of time or occasion with the homicide so as to indicate the state of mind of Victim or to produce a reasonable apprehension of great bodily harm by Appellant. (Tr. p. 358, line 10–p. 359, line 9).

Standard of Review

In general, all relevant evidence is admissible. Rule 402, SCRE. However, there are some exceptions to that rule. For instance, S.C. R. Evid. 404 provides the following constraints on the admission of character evidence:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> . . .
>
> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
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> . . .
>
> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

However, *State v. Day*, 341 S.C. 410, 535 S.E.2d 431 (2001), sets out an exception to the general prohibition on character evidence and evidence of prior bad acts:

> In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused.

341 S.C. at 419–20, 535 S.E.2d at 436 (internal citations omitted).

Analysis

The trial court did not abuse its discretion in finding the specific acts of violence by Victim were not so closely connected in time or occasion as to indicate the state of mind of Victim or to create in Appellant a reasonable apprehension of great bodily harm. As the trial court recognized, there is no bright-line rule for how recent an instance of violence must be in order to satisfy the standard set forth in *Day*. The South Carolina Supreme Court has found that a trial judge did not abuse his discretion in excluding an instance of violence that occurred twenty-three years before a homicide as too remote. *State v. Brown*, 321 S.C. 184, 187, 467 S.E.2d 922, 924 (1996). On the other hand, prior acts of violence that occurred only months before homicides have been found to be admissible under the standard articulated in *Day*. *Day*, 341 S.C. at 421, 535 S.E.2d at 437 (finding act that occurred four months prior to the homicide to be admissible); *State v. Mekler*, 368 S.C. 1, 14, 626 S.E.2d 890, 897 (Ct. App. 2005) (finding act of violence that occurred less than three months before the homicide to be admissible). The instances of violence by Victim that Appellant wished to introduce at trial occurred

approximately two and three years before Appellant shot Victim. Respondent submits that the trial court did not abuse its discretion in finding that the 2008 and 2009 instances were too far removed from the 2011 shooting to be admissible.

Appellant argues that this case is akin to *Mekler*, where this Court found that Mekler should have been able to introduce evidence regarding her knowledge of a prior domestic violence incident in which the victim, while drunk, had threatened his wife and beat on her door "until he broke through it with his fists." *See Mekler*, 368 S.C. at 13–14, 626 S.E.2d at 896–97. In that case Mekler shot the victim after he approached her and his wife on Mekler's front porch. *Id.* at 3–10, 626 S.E.2d at 891–94. "Mekler testified she retrieved the shotgun because there was no stopping [the victim], she had pleaded with him to leave, he came back to her home on foot, she was scared, and he had told her there was nothing that was going to stop him from coming on the porch." *Id.* at 9, 626 S.E.2d at 894. The evidence presented in *Mekler* showed that both the prior instance of violent conduct by the victim and the circumstances leading to the victim's homicide were domestic violence-type situations in which the victim was pursuing his wife. *Id.* at 8–9, 626 S.E.2d at 893–94. This Court found that the prior act of violence was admissible to show the victim's state of mind and to support Mekler's contention that she had a reasonable apprehension of great bodily harm from the victim. *Id.* at 14, 626 S.E.2d at 897.

Respondent submits that the circumstances of the prior acts of violence by Victim against James Odom are not close enough to the circumstances in which Appellant shot Victim to be admissible. According to the evidence recited by defense counsel, Victim had previously shot at Odoms's home, and, at a later date, he encountered Odom at a gas station, followed him, and then shot at his vehicle. While Appellant presented testimony that Victim had been involved in a shooting on Appellant's home and that he later encountered Victim at Subway, that is where the

similarities to the earlier instances of violence stop. There was no evidence that Victim got in his car and followed Appellant and Smalls. There was no evidence that Victim even followed the pair out of Subway. Indeed, after encountering Victim in Subway, Appellant was able to walk to his car, turn around, walk back into the restaurant, and then walk up to Victim (who was in the process of paying for his sandwich) and shoot him. Respondent submits that the prior instances of violent conduct and the circumstances of Victim's homicide were not close enough in time or occasion to reasonably indicate the state of mind of Victim or to produce a reasonable apprehension of great bodily harm in Appellant at the time of the shooting.[4] As such, the trial court did not abuse its discretion in find the prior instances inadmissible.

Moreover, even if the trial court had abused its discretion in failing to admit the 2008 and 2009 instances of violent conduct, the prejudice that Appellant now complains of—that "such instances of conduct . . . would have been additional evidence supporting a voluntary manslaughter and imperfect self defense charge[,]" Initial Br. of Appellant, p. 19—is off base. Respondent submits that both the voluntary manslaughter charge and the self-defense charge analysis would be completely unchanged if this evidence were admitted. As to voluntary manslaughter, even if the prior instances had been presented to the jury, Appellant would still lack one of the necessary elements (depending on the interpretation of the evidence) to receive a voluntary manslaughter charge. Therefore, the above analysis would not change. Likewise,

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[4] While Appellant may have testified that he feared for his life when he walked back into Subway and shot Victim, such fear was not reasonable in light of the evidence presented in this case. *See State v. Brown*, 79 S.C. 390, 60 S.E. 945 (1908) ("We do not make laws for overnervous men, and they must not get scared and strike quicker than a reasonable man would.").

Appellant would not be entitled to a self-defense charge even with the admission of this evidence.[5]

As an additional sustaining ground, Respondent submits that since Appellant was not entitled to a self-defense charge as a matter of law, he was not entitled to have the evidence regarding the 2008 and 2009 instances of violent conduct admitted. The exception set forth in *Day* allows for evidence of specific acts of violence by a victim to be admitted "[i]n the murder prosecution of one pleading self-defense against an attack by the deceased . . . ." 341 S.C. 410, 419, 535 S.E.2d at 436. Though Appellant pled self-defense, the trial court found that the evidence did not support the charge. Thus, Respondent respectfully submits that Appellant was also not entitled to present evidence under the exception to 404(b) articulated in *Day*.

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[5] Appellant is not challenging the trial court's refusal to charge either perfect or imperfect self-defense. Respondent submits that even if the evidence regarding the 2008 and 2009 incidents had been admitted, the trial court's analysis (Tr. p. 572, line 5–p. 575, line 3) would not change. The trial court found that Appellant was not entitled to any self-defense charge based on Appellant's own testimony. (Tr. p. 573, line 4–p. 575, line 3).

III.

The trial court did not err in denying Appellant's request to admit testimony of a forensic psychiatrist to opine that Appellant's fear was reasonable.

Introduction

Because the proffered expert testimony was not a matter of expertise, the trial court did not err in finding the expert testimony inadmissible. Additionally, the trial court did not err in refusing to admit the expert testimony because it improperly served to bolster Appellant's testimony. Finally, exclusion of the testimony, even if in error, was harmless.

How the Issue Was Raised at Trial

At trial defense counsel sought to introduce the testimony of Dr. Thomas Martin, an expert in forensic psychiatry. (Tr. p. 518, line 12–p. 520, line 5). Defense counsel offered that Dr. Martin's testimony was going to go to Appellant's state of mind. (Tr. p. 519, line 19–p. 520, line 1). The trial court had defense counsel proffer Dr. Martin's testimony. (Tr. p. 520, line 13–p. 547, line 6).

Dr. Martin opined that Appellant did not suffer from any mental illness, had no diminished capacity problems, and was criminally responsible for shooting Victim. (Tr. p. 527, line 12–p. 528, line 11). Defense counsel then went on to ask Dr. Martin about Appellant's fear:

Q . . . [D]id he appear in your opinion as scared genuinely scared of this man?

A It seems like he was living under a reign of terror the way he simply put it.

. . .

Q . . . Did Mr. Knight feel like, was it reasonable to him to be scared?

A Yes.

(Tr. p. 530, lines 1–12). Dr. Martin further testified about his understanding of the interaction between Appellant and Victim, which was based in part on his interview with Appellant and in part on other information he learned about Victim's past (some of which the trial court had already ruled inadmissible). (Tr. p. 530, line 13–p. 533, line 22).

On cross-examination, Dr. Martin testified that Appellant knew the difference between right and wrong, had the ability to control himself, and, on the day he shot Victim, he made a conscious decision to go back inside and gun down an unarmed man. (Tr. p. 538, line 17–p. 539, line 1).

The trial court also questioned Dr. Martin regarding his opinion. (Tr. p. 544, line 16–p. 545, line 6).

Counsel for the State objected to Dr. Martin's testimony and argued that the testimony was not admissible. (Tr. p. 547, line 16–p. 549, line 16).

Defense counsel, on the other hand, argued that Dr. Martin's testimony should be admitted to show state of mind. (Tr. p. 549, line 20–p. 556, line 10). Defense counsel noted, "[I]f the jury has any information or any evidence that they can infer that there was some kind of provocation or that there was some kind of reasonable threat of harm perceived by the defendant, they can find either manslaughter or not guilty under self defense. . . ." (Tr. p. 550, line 23–p. 551, line 3). Defense counsel cited *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990), in support of his position. (Tr. p. 554, lines 7–12). Defense counsel further pointed out that experts in gang activity and drug activity had been qualified to testify as to state of mind in South Carolina courts. (Tr. p. 554, line 18–p. 555, line 24).

In response, counsel for the State pointed out that *Atkins* dealt with diminished capacity and that other cases with expert testimony on state of mind involved battered women's syndrome. (Tr. p. 556, lines 12–20).

The trial court then asked defense counsel, "[W]hat does Dr. Martin add to the testimony that your client's already put up here other than the fact that he's a doctor?" (Tr. p. 557, lines 17–19). Defense counsel responded, "I think it's an aid to the triers of fact that he has talk to someone of Dr. Martin's past, his experience, his expertise in being able to show that his perceptions of fear could be held as reasonable." (Tr. p. 557, line 25–p. 558, line 3). When the trial court about whether Dr. Martin was merely bolstering Appellant's testimony, defense counsel stated,

> Your Honor, I don't think it's bolstering my client's testimony. The problem is is that my client can only testify as he already has to the jury that he was scared. Dr. Martin can talk about the fact that based on all the factors that he's looked at in his examination of my client, that those fears could be seen as reasonable based on everything that he was going through.

(Tr. p. 559, lines 4–20). Counsel for the State argued that Dr. Martin was not an expert on reasonableness and further stated that he would object to Dr. Martin testifying to the jury that Appellant's fear was reasonable. (Tr. p. 560, line 21–p. 561, line 10). Additionally, counsel for the State pointed out that Dr. Martin's testimony was only bolstering Appellant's and additionally relying on evidence that the judge had ruled inadmissible. (Tr. p. 562, line 21–p. 563, line 1).

After taking some time to look into the issue further, (Tr. p. 563, lines 2–5), the trial court found Dr. Martin's testimony to be inadmissible. (Tr. p. 577, line 14–p. 581, line 2). In its ruling, the trial court stated,

> [I]t was argued to some degree, that Dr. Martin will testify as to reasonableness, the reasonableness of this defendant's conduct on the day in question. Dr.

> Martin's testimony in the Court's opinion does not add, is not of scientific, technical or specialized testimony that would add [sic] the trier of fact in this particular case. He in essence reiterated the very things that the defendant testified to himself.
>
> It is the Court's opinion that Dr. Martin's testimony is simply in some sense to bolster the defendant's testimony and his resulting actions by virtue of expert testimony.

(Tr. p. 579, lines 3–15).

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Analysis

Respondent submits that the trial court did not abuse its discretion in declining to admit Dr. Martin's testimony as the proffered testimony did not meet the requirements of S.C. R. Evid. 702. Furthermore, Dr. Martin's testimony would have only served to bolster Appellant's testimony and was, thus, improper under South Carolina law. Finally, even if the trial court erred in excluding Dr. Martin's testimony, the error was harmless.

Under S.C. R. Evid. 702,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Supreme Court of South Carolina has provided the following instruction for trial courts dealing with expert testimony:

> When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate.

State v. Council, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999). The Court has also noted that scientific evidence is subject to attack for relevancy. *Id.* (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)).

Though Dr. Martin was originally offered as an expert in forensic psychiatry to testify regarding Appellant's state of mind, it is clear from the discussions between counsel and the trial court that the opinion that the defense sought to elicit from Dr. Martin was that Appellant's fear was reasonable. However, that opinion is not a proper matter for *expert* testimony because Dr. Martin's expertise in forensic psychiatry does not form a basis for him to opine on the reasonableness of Appellant's fear.

As Appellant points out, expert testimony regarding a defendant's state of mind is admissible in some cases, but Respondent would note that in those cases, the expert testimony is based on some scientific, technical, or other specialized knowledge as required by S.C. R. Evid. 702. *See, e.g.*, *State v. Atkins*, 303 S.C. 214, 220–21, 399 S.E.2d 760, 763–64 (1990) (finding the admission of expert testimony regarding state of mind and whether a defendant lacked substantial capacity to conform his conduct to the requirements of law to be proper); *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986) (finding expert testimony regarding battered woman's syndrome to be relevant as evidence of a defendant's state of mind at the time of the crime). Indeed, this Court, in *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991), reversed a trial court's decision to exclude expert testimony on the state of mind of an accused who had

presented evidence that she suffered from battered woman's syndrome. This Court relied on *Hill* and noted, "Nothing in [*Hill*] suggests that an expert who states the defendant suffers from battered woman's syndrome cannot also give an opinion connecting that condition to her state of mind at the time of the homicide. Indeed, the Court strongly implies just the opposite." *Wilkins*, 305 S.C. at 276, 407 S.E.2d at 673. Here, that *connection* between state of mind and some area of expertise by the expert is absent from Dr. Martin's testimony. And for that reason, the trial court properly excluded Dr. Martin's testimony regarding Appellant's state of mind and the reasonableness of Appellant's state of mind.

As the trial court found, Dr. Martin's testimony did nothing more than bolster Appellant's testimony. When defense counsel asked Dr. Martin if Appellant's fear seemed genuine, Dr. Martin replied, "It seems like he was living under a reign of terror the way he simply put it." (Tr. p. 530, lines 1–4). Indeed, the gist of Dr. Martin's testimony was that Appellant was truly scared of Victim and that, based on the information Dr. Martin received, Appellant had reason to be scared. However, it is well-recognized in South Carolina that "witnesses are generally not allowed to testify whether another witness is telling the truth. Similarly, witnesses may not improperly bolster the testimony of other witnesses." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). For example, expert reports by forensic interviewers in child abuse cases have been found to be inadmissible where "[t]here is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Respondent would submit that in this case, too, Dr. Martin's testimony was properly excluded as the conclusion to draw from his testimony was that Appellant was being truthful.

Appellant claims that Dr. Martin's testimony did not simply bolster Appellant's own testimony at trial and cites *State v. Williams*, 386 S.C. 503, 516–17, 690 S.E.2d 62, 68–69 (2010), in support of that proposition. However, that case is inapposite here. In *Williams*, during the sentencing phase of a capital case, the prosecution presented the lay testimony of a forensic psychiatrist, Dr. Pamela Crawford, regarding the defendant's state of mind at the time of crime. 386 S.C. at 506–08, 690 S.E.2d 63–64. On appeal, the defendant challenged the trial judge's refusal "to declare a mistrial because Dr. Crawford's testimony impermissibly bolstered and vouched for the solicitor's decision to seek the death penalty." *Id.* at 516, 690 S.E.2d at 68. The South Carolina Supreme Court found "nothing improper about the solicitor's examination of Dr. Crawford as a lay witness" and further noted, "We have long held that a lay witness may testify as to a defendant's mental state." *Id.*, 690 S.E.2d at 69. Of course, in this case defense counsel did not attempt to have Dr. Martin's testimony admitted as lay testimony. Furthermore, though the Court in *Williams* noted that Dr. Crawford could have testified as an expert, it also tied that testimony to her "professional expertise," *id.*, and, as explained above, Dr. Martin's opinion was not a matter of his professional expertise as a forensic psychiatrist. Additionally, the sort of bolstering referred to in *Williams*—the bolstering of the solicitor's decision to seek the death penalty—is different than the bolstering presented in this case—the bolstering of another witness's testimony.

Lastly, Respondent would note that even if the trial court had admitted Dr. Martin's testimony, Appellant would not be entitled to either a voluntary manslaughter or self-defense charge. Dr. Martin's testimony would have merely been cumulative to Appellant's own testimony that he feared for his life (which highlights the point that Dr. Martin's testimony only bolstered Appellant's testimony).

For all of the foregoing reasons, the trial court did not abuse its discretion in refusing to admit Dr. Martin's testimony.

CONCLUSION

For all the foregoing reasons, Respondent respectfully asserts that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully Submitted,

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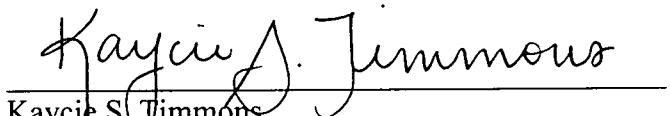

Kaycie S. Timmons
ATTORNEY(S) FOR RESPONDENT

May 21, 2014
Columbia, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAJERICK LOVELLE KNIGHT,

APPELLANT,

Appellate Case No. 2012-213529.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent agrees with Appellant's proposal regarding the designation of matter on appeal. Respondent requests the following material be included in the record on appeal:

(1) Indictment Numbers 2011-GS-07-01673 & 2011-GS-07-01674;

(2) Transcript Pages: 1, 13, 52–63, 108, 109, 114–23, 159–65, 174–79, 185–89, 199–208, 212–18, 232–37, 240–43, 266–68, 349–63, 372–75, 487–506, 509, 518–81, 598–613, 622, 636;

(3) Notice of Appeal; and

(4) State's Exhibit 10.

I certify that this designation contains no matter that is irrelevant to this appeal.

Respectfully Submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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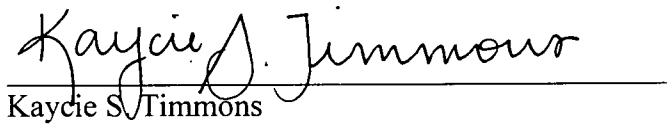

Kaycie S. Timmons
ATTORNEY FOR RESPONDENT

May 21, 2014

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STATE OF SOUTH CAROLINA
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THE STATE,

RESPONDENT,

V.

RAJERICK LOVELLE KNIGHT,

APPELLANT,

Appellate Case No. 2012-213529.

PROOF OF SERVICE

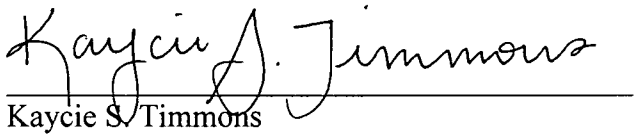
I, Kaycie S. Timmons, counsel for Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record at:

Robert M. Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

Katie Fowler Monoc
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247

I further certify that all parties required by Rule to be served have been served.

This twenty-first day of May, 2014.



Kaycie S. Timmons
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ALAN WILSON
ATTORNEY GENERAL

May 21, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Rajerick L. Knight
Appeal from Beaufort County
Appellate Case No. 2012-213529

Dear Ms. Kitchings:

Enclosed please find the original plus one (1) copy of ***Initial Brief of Respondent*** and ***Designation of Matter***, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Kaycie S. Timmons
Assistant Attorney General

KST/mv

Enclosures

cc: Katie Fowler Monoc, Esq.
Robert M. Dudek, Chief Appellate Defender
The Honorable Isaac McDuffie Stone, III, Fourteenth Circuit Solicitor
Sandi Wofford, Victim Services