

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

v.

MARCUS DWAIN WRIGHT,

Appellant.

Appellate Case No. 2013-001406

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RULES

Rule 613(a), SCORE.....	64, 65, 66
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OTHER AUTHORITIES

<u>C.J.S., Criminal Law, Section 900</u>	70
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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the court err in admitting evidence from the search of residence?
2. Did the defendant have a reasonable expectation in the residence searched?
3. Did the court apply the proper analysis?
4. Was the search warrant affidavit was sufficient?
5. Could the affidavit be supplemented by oral evidence where the affidavit contained false information?
6. Did the court err in admission of the SCDMV records?
7. Did the court err in the admission of evidence which was the result of illegal search of the defendant's hotel room?
8. Did the court err in excluding evidence of witness's prior inconsistent statement?
9. Did the court err in denying defendant's request to testify?
10. Does the court have to make specific findings as to prior convictions before it can sentence under LWOP?
11. Does the record support sentencing under LWOP?
12. If life is imposed and it is not clear whether or not it is under LWOP, should this court remand for re-sentencing?
13. Did the trial court err in refusing to charge the jury on the law of self-defense and manslaughter?

STATEMENT OF THE CASE

Appellant murdered Jerome J. Green, Jr., on April 30, 2012 in Horry County. Appellant was arrested for the murder on May 2, 2012 along with being arrested for trafficking in cocaine greater than 28 grams, possession with intent to distribute (PWID) crack cocaine, and possession of a weapon during a violent crime. The drug and weapon charges also occurred in Horry County. The Horry County grand jury indicted appellant for murder, trafficking in cocaine greater than 28 grams, PWID crack, and possession of a weapon during a violent crime. (Ind. #s 2012-GS-26-2339 – 40 & 2551 - 53). On June 17, 2013, appellant proceeded to a jury trial before the Honorable John C. Hayes, III. At its conclusion, the jury found appellant guilty as charged; and, he was sentenced to life for murder, five (5) years on the weapon charge, twenty-five (25) years for trafficking, and fifteen (15) years for PWID. All sentences other than the murder sentence were run concurrent but consecutive to the life sentence. (Tr. pp. 1, Indictments, Tr. pp. 11-12, 28-30, 46, 176-92, 279-80, 317-23, 351-52, 540-53). This appeal followed raising thirteen (13) issues; however, the issues can be grouped according to specific topics. Issues one (1) through six (6) deal with Judge Hayes' denial of the motion to suppress the fruits of the search of a residence. Issue seven (7) deals with the denial of the motion to suppress the search of a motel room. Issue eight (8) deals with the court's ruling on certain impeachment of a witness. Issue nine (9) deals with the denial of the request to re-open the case and allow the defendant to testify after the defense rested. Issues ten (10) through twelve (12) deal with an objection to appellant's life sentence. Finally, issue thirteen (13) deals with the denial of the request to charge voluntary manslaughter and self-defense. Rather than addressing each issue separately, Respondent will address the issues collectively under the appropriate topic involved.

RESPONDENT'S STATEMENT OF FACTS

It was undisputed at trial that on April 30, 2012, appellant Marcus D. Wright ("Wright") was a drug dealer/trafficker [specifically in crack and powder cocaine] who was using his subordinate Lanard Powell ("Powell") to distribute drugs out of a mobile home located at 5456 Figure Eight Road, in Socastee, S.C. The owner of the mobile home, Roy Sinclair ("Sinclair"), who is wheel chair bound because he is paralyzed from the waist down, allowed Wright and Powell to use his mobile home to distribute drugs in exchange for Sinclair receiving free drugs. This arrangement had been on-going for approximately three (3) to four (4) weeks at the time of the murder in this case.¹ (Tr. pp. 176-200, 231-33, 247-50, 254, 265-68).

On the day of April 30, 2012, Powell had been selling drugs out of the mobile home and left the home briefly that evening with his girlfriend, Qwanda Caldwell-Brown ("Qwanda" or "girlfriend") to make a drug sale or delivery for Wright and to pick up some items at a convenience store. Upon leaving the home, Powell took with him a 9 mm semi-automatic pistol Wright had provided Powell for protection during his drug distribution activities. (Tr. pp. 265-70, 178, 231-32).

While Powell was gone, appellant Wright remained at Sinclair's mobile home sitting at the kitchen table cutting up drugs, with his loaded *40 caliber* firearm beside him on the table. Also at the mobile home were the home's owner, Sinclair, and several women who were there to buy, use drugs, or with someone who was there for that purpose. (Tr. pp. 268-70, 176-81, 185, 189, 200-03, 215-17, 275).

¹ Powell testified that while operating their drug distribution business out of Sinclair's mobile home he, Powell, sold approximately two (2) to three (3) ounces of crack cocaine per week. Powell received approximately \$1,300 to \$1,400 dollars for each ounce. The money was split as follows: Wright would receive about \$1,000 for each ounce, and he, Powell, would receive \$300 to \$400 per ounce. (Tr. pp. 266-67)

Around 11:30 to 11:45 p.m., while Powell and his girlfriend were still gone, Jerome J. Green, Jr. ("the victim"), also known as "J.J.," knocked on the front door of Sinclair's home. Sinclair told Wright that it was okay to open the front door because it was Sinclair's cousin, "J.J." [the victim]. Wright, with his gun in his hand, opened the front door and let the victim come in. When the victim walked in, he looked around, saw what was going on, and stated to his cousin Sinclair, "you going to let these young boys come in here and run your house like this?" (Tr. pp. 176-81, 200-03, 215-18).

Appellant Wright took offense at the comment and asked the victim to repeat what he just said. The victim refused, ignored Wright, and continued to talk to a woman sitting in the living room. Wright, who had returned to the kitchen area, raised his loaded *40 caliber* firearm and shot the victim ten (10) times. The victim was shot in the back several times, in the chest, and in the arms. The victim fell to the floor dead. The victim died as a proximate result of the bullet wounds inflicted by Wright. (Tr. pp. 176-90, 200-08, 215-20, 223-24, 230, 241, 355-57, 367, 375-82, 384, 395-96, 410-19, 428-34).

Several individuals in the trailer who witnessed the shooting fled outside. Sinclair, the owner, fled down a handicap ramp to his home and down the street in his wheelchair. Two of the (2) women who were inside the mobile home also fled outside, one (1) through the front door and one (1) out the back door. (Tr. pp. 181-82, 202-08, 217-21, 223-24).

Appellant Wright fled from the mobile home as well, but not for the same reason. Once outside, Wright told one (1) witness, Mildred B. Small, that she better not say anything about what had just occurred. (Tr. pp. 220-21).

Wright got into his black BMW and started fleeing from the crime scene. As Wright was fleeing in his car, he saw his subordinate, Powell, returning to Sinclair's home with Powell's

girlfriend in Powell's car. Wright briefly spoke from his vehicle to Powell in Powell's vehicle. Sinclair, who was moving up the road in his wheel chair, overheard Wright say to Powell "go in the house, get your shit, I just murdered this nigger." Powell's girlfriend Qwanda heard Wright say to Powell: "Pick up the shell casings Brah."² (Tr. pp. 181-82, 187, 220-21, 231-33, 265-72).

Wright left the scene and drove to another location, abandoned his BMW there, and changed vehicles getting into a Cadillac Escalade. Wright also picked up a gas can and took it with him when he drove away from this location. (Tr. pp. 182, 231-37, 256-59, 269-72).³

Meanwhile, Powell and Qwanda pulled into Sinclair's residence. Veronica Chandler, an eyewitness, approached Powell and stated: "...that boy shot him. That boy shot him." Powell did as Wright had instructed him. Powell got out of his car with his 9mm pistol, went in Sinclair's mobile home, determined the victim was dead, and then removed drugs and money from the residence. While inside the mobile home, a woman tried to give or gave Powell some fired shell casings. Powell then got the victim's car keys. Powell left the mobile home and threw the money and the drugs in the vehicle his girlfriend was driving, and Powell got in the victim's vehicle, a Dodge Durango, and drove it away from the scene with Qwanda following in Powell's vehicle. (Tr. pp. 182, 233-35, 265-72).

² When crime scene experts processed the murder scene, they found only three (3) fired .40 caliber shell casings. Two (2) were under couch seat cushions and one (1) was found on the floor. No other caliber fired shell casings were found. No weapons were found at the scene of the murder. (Tr. pp. 353-55, 375-79, 383-84, 389, 410-21).

³ Daisy M. Menendez, the aunt of Wright's wife, testified that during the *early morning hours of May 1, 2012* she received a phone call from Wright's wife, Jacinda. Wright's wife asked her if she could park her black BMW, at the aunt's residence. Ms. Menendez stated that she could, and then still during dark, Wright came and parked the BMW in her garage. The BMW stayed in her garage for one (1) day. The next day, Wright came to her residence and stated he needed to get something out of the car. Wright went to the vehicle and got something out of the vehicle. Later, police came and seized the BMW. (Tr. pp. 256-59). The murder weapon was never recovered.

Wright and Powell then contacted each other by cell phone, and agreed to meet up at another location. Once there, Powell and Qwanda followed Wright to another location where the dark Cadillac Escalade was abandoned and Wright got in the victim's vehicle with Powell. Wright, Powell, and Qwanda proceeded to a gas station. Powell's girlfriend was instructed to go in the station and purchase gasoline, after which Wright and Powell filled up the gas can with gasoline. The three (3) individuals then proceed to Johnsonville, S.C. where they disposed of the victim's vehicle on a dirt road in some woods. Wright and Powell used the gasoline to attempt to burn the victim's Durango. (Tr pp. 233-37, 268-73).

Wright, Powell, and Qwanda then proceed together to a motel where they rented a room in Qwana's name. They stayed there for one (1) night. Wright then realized they needed another vehicle; so, they proceeded to the airport where a red Chevrolet Camaro was rented. The red Camaro was actually rented by Wright's wife, Jacinda. The vehicle was picked up by Qwanda, but Wright and Powell got into the red Camaro at another location. Wright and Powell then began driving the Camaro, and Qwanda returned to her home in Columbia, S.C. (Tr. pp. 237-241, 273-79, 336-37, 347). That night, Wright and Powell went to yet another hotel, the Sleep Inn in Conway, in the red Camaro, where Powell rented another motel room. Powell registered under a different name, Desmond Jetter, using a false I.D. Wright had provided Powell. (Tr. pp. 279-80, 333-34, 347).

By the morning of May 2, 2012, both Wright and Powell were suspects in the murder. Police eventually located Wright and Powell at the Sleep Inn by tracing Wright's cell-phone signal. Police then determined both suspects were in Room 105 through the motel desk clerk. There, Wright and Powell were taken into custody after one (1) of the suspects tried to flee back into the motel room after stepping outside the room and being identified by police. In plain view

on the refrigerator of the motel room was a large quantity of crack and powder cocaine along with cash. A search warrant was obtained and over twenty-eight (28) grams of cocaine, several grams of crack cocaine, and a large amount of cash [\$3,000] were found in the motel room rented by Powell. Police also found car keys, and hotel receipts from the first hotel [the LaQuinta]. Police also found the red Camaro, rented by Wright's wife, at the Sleep Inn in the parking lot. That vehicle was searched pursuant to a separate search warrant, and Powell's 9mm pistol was found within. A set of digital scales was also found. Police also found within this car a *40 caliber Glock box*, which had the paperwork in it. The paperwork showed the gun was registered to Wright's wife, Jacinda, and the receipt indicated it was for a *40 caliber* pistol. Police also found two (2) ammunition magazines or clips in the *box*, one containing nine (9) unfired rounds and one containing thirteen (13) unfired rounds, all of which were *40 caliber* bullets (Tr. pp. 279-83, 317-23, 331-48, 402-09, 410-21, 347).

Police then executed a search warrant on the residence of Wright's wife. There they found *two (2) fired .40 caliber shell casings* that were fired from a .40 caliber pistol by the manufacturer of the gun before the gun was sold. The envelope that contained these two (2) shell casings indicated the *40 caliber gun* had been test fired by the manufacturer and the two (2) shell casings were recovered by the manufacturer and put in the envelope to show the gun had been test-fired and was in working condition. This test firing occurred on May 20, 2008. The serial number for the *.40 pistol* from the receipt of purchase found in the red Camaro matched the serial number on the envelope which contained the two fired *40 caliber* shell casings found at Jacinda Wright's residence. The receipt of purchase for the pistol itself indicated it had been purchased by Wright's wife on June 7, 2008. Police also found on the

nightstand of the residence a receipt from April 24, 2012, seven (7) days before the murder, for two (2) boxes of ammunition. (Tr. pp. 360-70, 379-82, 396, 410-421).

Forensic examination by a firearms expert revealed the two (2) shell casings found in Wright's wife's residence matched the *40 caliber* shell casings recovered from the murder scene, i.e. these two (2) shell casings *were fired from the same gun* that fired the three (3) shell casings found at the murder scene by crime scene technicians. The projectiles removed from the victim's body at autopsy were consistent with having been fired from a *40 caliber* weapon, but not a 9mm. (Tr. pp. 355, 375, 410-21).

Police also executed a search warrant on the black BMW which Wright drove away from the crime scene the night of the murder. Inside this car, police found one (1) unfired *.40 caliber bullet* (Tr. pp. 339-40, 347). Although police searched, the murder weapon was never found. Wright got rid of it.

The autopsy determined the victim died as a result of multiple gunshot wounds. The victim was shot a total of ten (10) times. Six (6) projectiles were removed from the victim's torso. (Tr. 428-37, 360-67, 415-16).

At trial, Roy Sinclair testified to the arrangement with Wright and Powell to sell drugs from Sinclair's residence. Sinclair also testified to his witnessing Wright murder the victim and to overhearing Wright admit to Powell he murdered the victim and overhearing Wright instruct Powell to remove the drugs and money from the residence after the murder. Veronica Denise Chandler and Mildred Bobby Small also testified to their being there in the mobile home for Chandler to purchase drugs, and Chandler testified how appellant Wright murdered the victim with a firearm while she was talking with the victim. Lanard Powell also testified to the drug dealing arrangement he had with appellant Wright and how Sinclair was letting them use his

home as a drug distribution point. Powell also testified to what he saw upon returning to the mobile home shortly after appellant Wright murdered the victim; and, how he [Powell] assisted with the attempted cover-up of the crime including removing the cash and drugs from Sinclair's residence and disposing of the victim's vehicle. Powell's girlfriend also testified at trial and related what she overheard appellant Wright say to Powell upon leaving the crime scene; she testified to Wright's admission to her he shot and killed the victim, and she testified to her and Powell's role in attempting to and helping Wright to cover up the crime, get rid of any drug evidence from the crime scene, and avoid apprehension. (Tr. pp. 176-200, 200-12, 214-30, 265-308, 315-16, 231-55)

ARGUMENT I.

Judge Hayes did not err in denying the motion to suppress the fruits of the search of Jacinda Wright's home.

In ground's one (1) through six (6) of his initial brief, Wright challenges Judge Hayes denial of his motion to suppress the fruits of the search of his wife Jacinda Wright's residence. Respondent will address these issues under this one (1) argument because all of the issues have to do with this search, and there is no merit to these arguments because the search of Jacinda's residence was lawful, and Judge Hayes did not err in denying the motion to suppress. Further, the admission of this evidence was harmless given *the other* overwhelming evidence of Wright's guilt independent of the fruits of *this search*.

The Search at Issue

As previously stated, on May 2, 2012, Horry County police sought and obtained a search warrant from Horry County Magistrate Bradley D. Mayers to search the residence of Wright's wife, Jacinda Wright, located at 3635 Kate's Bay Road in Horry County. Police then executed

the search warrant and recovered two (2) fired .40 caliber shell casings that were fired by the manufacturer before a .40 caliber pistol was sold to Jacinda. Police also recovered a receipt for the purchase of ammunition made seven (7) days before the murder of the victim. Nothing else of evidentiary value was admitted as a result of this search. The State established Wright's wife purchased a .40 caliber pistol before the murder through the evidence found in the red Camaro. The State also established the victim was murdered with a .40 caliber pistol by what was recovered from the crime scene [3 fired .40 caliber casings] and what was recovered at the autopsy [fired projectiles consistent with having been fired from a .40 caliber weapon].

What Occurred Below

Prior to trial, Wright moved to suppress the fruits of the search of his wife Jacinda Wright's residence. An *in limine* or *in camera* hearing was held before Judge Hayes regarding the validity of this search at which both the officer who obtained the search warrant [the affiant] and the chief investigating officer on the case testified under oath. (Tr. pp. 53-61, 61-68, 68-82, 122, 137-45).

The testimony at the pre-trial hearing established that prior to obtaining the search warrant, Horry County police had obtained the following information pursuant to their murder investigation:

On April 30, 2012, at approximately 11:30 p.m. to 11:45 p.m., at 5456 Figure Eight Road in the Myrtle Beach section of Horry County, Jerome J. Green, Jr. had been murdered. When police arrived at the scene shortly after midnight on May 1, 2012, they found the victim's bullet riddled body of the floor of the residence. Police also recovered three (3) fired .40 caliber shell casings at the crime scene. As a result, the police were aware the homicide was the result of a shooting. Police were also aware they were looking for a .40 caliber pistol as the murder

weapon. Police were able to locate and apprehend a co-defendant of appellant, Lanard Powell. Powell informed police that appellant Wright was the shooter in Green's death. Both Powell and Qwanda Caldwell-Brown, Powell's girlfriend, informed police Wright had fled the scene in a black BMW vehicle and then switched getaway vehicles into a dark in color *Cadillac Escalade*. The police investigation revealed the shooter, appellant Wright, eventually drove to his wife's residence and left the above described Cadillac Escalade vehicle at his wife's residence in the Conway section of Horry County. Powell also informed police that the shooter, Wright, was carrying a firearm on the night of the shooting of Green and the gun was registered in the name of Wright's wife, Jacinda. Powell and his girlfriend also informed police that Wright's wife, Jacinda Wright, had rented another vehicle, a red Camaro, at Enterprise Rental at the airport on May 1, 2012, for them to operate in to avoid police. Captain Dale Buchanan of the Horry County Police Department, who lived in the same area as appellant's wife, and was thoroughly familiar with the area, informed officers he had seen both the black BMW and the dark in color *Cadillac Escalade* at Jacinda Wright's residence coming and going from the residence in the days leading up to and on the date of the murder of Jerome Green. Police confirmed through driving and property records that appellant's wife, Jacinda, resided at 3635 Kate's Bay Road, also in Horry County. Another officer, Detective Daniel Spencer went to the residence and confirmed that the dark in color *Cadillac Escalade* was present there and parked at the rear of the 3635 Kate's Bay Road property. The same officer also confirmed that appellant's wife Jacinda Wright lived at the residence by knocking on the front door and briefly speaking with her when she answered. Finally, an individual at the crime scene had given police appellant Wright's cell phone number, and on May 2, 2012, the South Carolina Law Enforcement Division (S.L.E.D.), who was tracing appellant Wright's cell phone, notified Horry County that on the night of May

1, 2012, appellant's cell phone "pinged" [sent a signal] at the location of 3635 Kate's Bay Road, Jacinda Wright's residence. (Tr. pp. 53-61, 61-68, 68-82). At the time police sought the search warrant, the murder weapon, which belonged to Jacinda Wright had not been recovered.

As a result, on May 2, 2012, as is customary during a homicide investigation, the chief detective on the case, Todd F. Cox, directed another detective, David Weaver, to obtain a search warrant for Jacinda Wright's residence located at 3635 Kate's Bay Road to look for the murder weapon and any evidence related to the murder of Jerome Greene. As is common during a murder investigation, Detective Cox related to Detective Weaver the information that had been uncovered during the investigation recited above. (Tr. pp. 53-57). Detective Weaver went to Magistrate Mayers' office and submitted the following sworn search warrant affidavit to Magistrate Mayers. (Tr p. 62-63):

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF HORRY

Personally appear before me, one *Detective David Weaver*, who, being duly sworn, says there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Any and all items of evidentiary value that may aid in the investigation into the Homicide of one Jerome Green Jr which occurred at the residence of 5456 Figure Eight Rd located within the Myrtle Beach section of Horry County reference HCPD case # 12041053 These items may include but are not limited to any and all weapons, to include firearms and ammunition of any form, and any articles of clothing which may have been used or worn in the commission of said crime Any vehicles, latent fingerprints shoe prints, blood, or blood residue or any time believed to contain blood. Any and all DNA, fibers, hairs, any form of biological or trace evidence Any and all personal effects, papers, notes, documents, analog and/or magnetic media which may contain information that may aid in determining the identification of the person(s) occupied said vehicle and subsequently aided in said criminal action

DESCRIPTION OF PREMISES (PERSON OF THING) TO BE SEARCHED

A tanish color vinyl sided manufactured home located at 3635 Kates Bay Road which is located in the Conway section of Horry County. The mobile has a rock veneer bottom skirt with a white in color front door and the numbers 3635, clearly marked, next to the front door. The residence has wooden stairs and deck leading to the front door. The property is surrounded by a wooden six foot fence. In the left corner of the rear of the property, the back yard, there is a ten foot by ten foot tanish, with white trim, shed. There are two visible vehicles parked in the rear of the property. One of the vehicles is a dark in color Cadillac Escalade with chrome wheels and an older light brown Chevrolet sedan.

A 2003 Cadillac Escalade Exit SUV (VIN) 3GYEK63N93G334144) bearing South Carolina plate of 656 2DL. The vehicle is currently located at the above described location of 3635 Kates Bay road in the Conway section of Horry County.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On 05-01-12, members of the Horry County Police Department responded to the residential address of 5456 Figure Eight Rd., located in the Myrtle Beach section of Horry County, in reference to a shooting incident wherein the victim Jerome Green Jr. was shot to death. A co-defendant, Lanard Powell, informed law enforcement the shooter, identified as Marcus Dewain Wright, fled the scene at the above said location in a black in color BMW vehicle and then later switch[ed] getaway vehicles to a dark in color Cadillac Escalat[d]e. The shooter then drove to the address of 3635 Kates Bay Road which is in the Conway section of Horry County, and left the above said vehicle at that address. The co-defendant also informed law enforcement the shooter obtained the mu[r]der weapon, from his wife, at the above location. It is believed the shooter transported the murder weapon in the Cadillac Escalat[d]e back to the said residence and that it may still be present in the home and/or described vehicles.

The affidavit and warrant was sworn to before Judge Mayers at 1:40 p.m. Prior to the search warrant being issued, Detective Weaver also provided sworn supplemental oral testimony to Magistrate Mayers. (Tr. pp. 63, 64-65). Detective Weaver informed Judge Mayers that S.L.E.D. had been tracking or tracing Wright's cell phone, and, on May 1, 2012 Wright's cell phone "pinged" at the 3635 Kate's Bay Road residence, the residence of his wife Jacinda Wright. (Tr. pp. 63-65).⁴ After Detective Weaver submitted the sworn affidavit and oral testimony,

⁴ Apparently, either Detective Weaver failed to include this information in the affidavit through inadvertence or it was not conveyed to him by Detective Cox until Detective Weaver was on his way to the Magistrate's Office to obtain the warrant. (Tr. pp. 66-67).

Judge Mayers issued the search warrant for the residence of appellant Wright's wife, for the murder weapon and any evidence related to the murder of Jerome Green. (Search Warrant).

Trial Court's Ruling

At the conclusion of the *in camera* or *in limine* hearing, Judge Hayes denied the motion to suppress the fruits of the search of Jacinda Wright's residence. First, the Court found that Wright had not met his burden to show he had a possessory interest in the property that was searched.⁵ Second, Judge Hayes found that even if Wright could make that showing, the court would deny the motion to suppress, because even removing any factual inaccuracies from the affidavit, the warrant affidavit along with the sworn supplemental testimony before the Magistrate established probable cause to search Jacinda Wright's residence. (Tr. pp. 143-45). On appeal, Wright alleges both rulings were erroneous, and he should be granted a new trial. Wright is wrong on both issues, and he is not entitled to a new trial.

Standard of Review

(General Appellate Standard)

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278

⁵ During the *in camera* suppression hearing, Judge Hayes allowed the State to introduce Wright's official driving record from the S.C. Department of Motor Vehicles (DMV) which was introduced through the officer who "ran" the record by use of computer. Wright now challenges the admission of this evidence in the *in camera* hearing. The official driving record was admitted solely on the issue of appellant's standing to challenge the search of his wife's residence. The official driving record was admissible as a self-authenticating document. Furthermore, it makes no difference because the expectation of privacy issue was not dispositive of the search issue but the validity of the search warrant, and the search warrant was valid. Further, the good faith exception applies in this situation, and the exclusionary rule should not apply. Furthermore, the admission of the DMV record was harmless on the issue for which it was admitted where it only showed where appellant Wright resided in 2003. There was other evidence closer in time that showed Wright did not live at Jacinda Wright's residence. Further, Wright does not dispute the accuracy of the driving record as far as where he lived in 2003.

S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id.

Standard of Review

(Circuit Court's Affirmation of Probable Cause)

The standard of review of Fourth Amendment search and seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013); State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013); State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)(holding whether a search violated the Fourth Amendment depends upon "a number of antecedent determinations, each of which is inherently fact-specific" and "entails an inquiry into the totality of the circumstances" and an appellate court must affirm if there is "any evidence" to support the ruling); State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005)(deferential standard of review applies in a challenge to a trial court's fact-driven affirmation of probable cause.). As a result, if there is any evidence to support the trial judge's ruling as to the validity of a search with a warrant, it will be affirmed on appeal. Taylor, supra; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012); State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012). The appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling. State v. Khingratsaphon, 352 S.C. 62, 70, 572

S.E.2d 456, 459-60 (2002). In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law. Tynes, *supra*, citing State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Standard of Review

(Magistrate's Issuance of a Search Warrant)

Search warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a magistrate's determination of probable cause. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). When determining the propriety of the issuance of a search warrant, the duty of the appellate courts is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009); State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). In making such a decision, an appellate court must consider the totality of the circumstances. Jones, *supra* (stating under the totality of the circumstances test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed to issue a search warrant); State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. "The

Fourth Amendment by its terms prohibits [only] unreasonable searches and seizures.” McHam v. State, 404 S.C. 465, 480, 746 S.E.2d 41, 49, (2013), *quoting* New York v. Class, 475 U.S. 106, 116 (1986). The touchstone of an analysis under the Fourth Amendment is always “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *See* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977), *quoting* Terry v. Ohio, 392 U.S. 1, 19 (1968). “Reasonableness, of course, depends ‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’” Id. at 109 (citation omitted).

“A search warrant may issue only upon a finding of probable cause.” State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997), *citing* State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981). Under S.C. Code Ann. Section 17-13-140 (1985), a search warrant may be issued “only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant.”⁶ The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Dupree, *supra*. For an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of the

⁶ On appeal, Wright argues the search warrant affidavit did not comply with the more strict requirements of Section 17-13-140; however, from Respondent’s review of the record, Respondent cannot find where this issue was raised to the trial judge. As a result, Respondent believes this issue is not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). However, as previously stated, Respondent will respond to all of Wright’s appellate arguments collectively under this argument.

warrant, a reviewing court may consider only information brought to the magistrate's attention. Owen, supra; State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for ... conclud[ing] that probable cause existed." Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03. However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), citing State v. Sachs, 264 S.C. 541, 555, 216 S.E.2d 501, 508 (1975)(recognizing all that is necessary to justify issuance of a search warrant is probable cause)

Probable Cause

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984); (1984); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). Probable cause is a fluid concept-turning on the assessment of probabilities in a particular factual context--nor readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Illinois v. Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, supra, Gates, supra. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). South Carolina has adopted the "totality of the circumstances" test of Gates, supra, in determining whether sufficient probable cause exists to issue a search warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d

347, 348 (1999); Martin, *supra*. In Gates, the Court held: “The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is **a fair probability** that contraband or evidence of a crime will be found in a particular place. Gates, 462 U.S. at 238 (emphasis added); *accord* Herring, 387 S.C. at 212, 692 S.E.2d at 495-96; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(adopting the Gates totality-of-circumstances test); Spears, *supra*; State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004). Probable cause “does not demand any showing that such a belief be correct or more likely true than false.” State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742. “Under this formula, veracity and basis of knowledge are treated ‘as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.” Gates, 462 U.S. at 230; Weston, 329 S.C. at 290-91; 494 S.E.2d 802-03; State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). Again, in determining whether a search warrant should be issued, magistrates are concerned with probabilities not certainties. Bowie, *supra*, *citing* Sullivan, 267 S.C. at 617, 230 S.E.2d at 624.

An affidavit in support of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant. Sullivan, 267 S.C. at 614-15, 230 S.E.2d at 623 (finding a search warrant can be supported by information given to the affiant by other officers); *see* Jones v. United States, 362 U.S. 257 (1960), *overruled on other grounds* United States v. Salvucci, 448 U.S. 83 (1980); Morris v. State, 62 S.W.3d 817 (Tex. App. 2001)(information with which magistrate is supplied in affidavit for search warrant may be

hearsay). Probable cause for a search warrant can be supported by information given to the affiant by other officers. United States v. Ventresca, 380 U.S. 102, 108 (1965)(it is well settled that an affiant seeking a search warrant can base his information on information in turn supplied to him by fellow officers); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(affidavit for search warrant may be based on hearsay information); United States v. Weiebir, 498 F.2d 346 (4th Cir. 1974). Observations by fellow law enforcement officers engaged in a common investigation with the search warrant affiant are a reliable basis for a warrant applied for by one of their number. Ventresca, 380 U.S. at 111; State v. Hage, 568 N.W.2d 741 (N.D. 1997). See also United States v. Morales, 238 F.3d 952 (8th Cir. 2001)(probable cause may be based on collective knowledge of all law enforcement officers involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some degree of communication).⁷

As the United States Supreme Court recognized in Gates, *supra*, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no

⁷ Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the first-hand knowledge of the officer who executes the affidavit. State v. Stickelman, 207 Neb. 429, 299 N.W.2d 520(1980); see also Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002)(probable cause for a search warrant may be based upon information known to the law enforcement organization as a whole). A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (2002).It is not unusual for an affidavit of a law enforcement officer to contain hearsay information from another, which, in turn, is based on other information gathered by that person. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Hence, when a magistrate receives an affidavit which contains hearsay upon hearsay, he need not categorically reject this double hearsay information. Id. Rather, he is called upon to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the information was gained in a reliable way. Sullivan, 230 S.E.2d at 623-24.

proper place. See Ventresca, 380 U.S. 102. “Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion.” Bowie, *supra*, citing Sullivan, *supra*; Dupree, 354 S.C. at 683, 583 S.E.2d at 441. Affidavits must be judged on the facts presented, not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

The decision to issue a search warrant should include consideration of the veracity of the person supplying the information and the basis of the affiant’s knowledge. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). “The ‘experience of a police officer is a factor to be considered in the determination of probable cause.’” Dupre, 319 S.C. at 459, 462 S.E.2d at 282, quoting United States v. Fisher, 702 F.2d 372, 378 (2d Cir. 1983). See State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013)(recognizing well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training), citing United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004). Eyewitnesses and non-confidential informants are often given a higher level of credibility when supplying information to support probable cause to search. See State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct.App.1996).

Further, a warrant affidavit may be supplemented by sworn oral testimony before the magistrate. S.C. Code Ann. Section 22-3-710; Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006); State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975); Gist v. Berkeley County Sheriff’s Dept., 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999). Oral supplementation may only be used by an affiant “to supplement or to amend incorrect information in an affidavit which was not knowingly and intentionally, or recklessly supplied by the affiant.” State v. Jones, 331 S.C. 228, 500 S.E.2d 499 (Ct. App. 1999)(noting what its decision does not do: “First, our holding does not prevent oral

supplementation of a warrant affidavit which contains false information. In other words, oral supplementation pursuant to Sachs, *supra*, is not affected by this decision so long as it does not supplant false information knowingly and intentionally, or recklessly, provided by the affiant. Second, our holding does not prevent oral substitution of truthful information for false information contained within an affidavit so long as the affiant does not knowingly and intentionally, or recklessly provide it.”), *affirmed* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Gore, 408 S.C. 237, 246, 758 S.E.2d 717, 721 (Ct. App. 2014)(noting the holding in Jones but pointing out that “[o]ral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause.”).

The Fourth Amendment evidences a “strong preference for searches conducted pursuant to a warrant. Gates, 462 U.S. at 236. Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause. Bowie, *supra*, citing State v. Bennett, 256 S.C. 234, 241, 182 S.E.2d 291, 294 (1971); State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

The Lack of Merit of Wright’s Arguments

A. Lack of legitimate expectation of privacy in the premises searched

To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have legitimate expectation of privacy in the place to be searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable Oliver v. United States, 466 US. 170, 177 (1984), citing Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan,

concurring). It is fundamental that Fourth Amendment rights are personal in nature and may not be vicariously asserted. *Rakas*, 439 U.S. at 133-34. A person aggrieved by the introduction of evidence secured by an illegal search of a third person's premises or property has not suffered any infringement upon his Fourth Amendment rights. *Id.* at 134. Consequently, as Judge Hayes correctly found, a person challenging the legality of a search bears the burden of proving that he has a legitimate expectation of privacy in the premises searched. *Rakas*, 439 U.S. at 143.

During the suppression hearing, Wright personally offered no testimony on this issue. Wright did not call his wife Jacinda Wright on this issue. Wright did call his former probation officer; however, the probation officer could not verify where on Kate's Bay Road, he supervised Wright in *March* of 2012. And, the probation officer testified his supervision of Wright ended in March of 2012. SCDMV records from 2003 indicated that Wright lived at 3643 Kate's Bay Road, not 3635 Kate's Bay Road, the residence of his wife. (Tr. pp. 130, 144). Officer Chatfield testified that on May 2, 2012 [the same day this search warrant was issued], when he interviewed Wright, Wright informed Officer Chatfield that his residence was in Columbia, S.C. **not on Kate's Bay Road**. (Tr. p. 129).⁸ In June of 2012, when Wright was released on bond, he indicated his address was **not 3635 Kate's Bay Road** but another location. (Tr. p. 136, State's Ex. 5). The issue on appeal is whether Judge Hayes' ruling, that Wright had failed to meet his burden of proof to show a legitimate expectation of privacy in the premises searched, is supported by *any evidence*. *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013); *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010); *State v. Tynes*, 402 S.C. 211,

⁸ Earlier on the issue of probable cause to issue the search warrant, Detective Cox testified that Detective Daniel Spencer went to Jacinda Wright's residence and made contact with her and determined at that time that that is the residence where "they" reside. (Tr. p. 56-57). There was no explanation who "they" are.

740 S.E.2d 512 (Ct. App. 2013); State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000). The record clearly shows that it is. Id. As a result, there is no merit to this appeal.⁹

B. Wright's challenge to the search warrant

Wright alleges the affidavit contains recklessly false statements and the affidavit is not supported by probable cause.¹⁰ Wright is wrong on both points.

The sworn affidavit states that the victim was shot and killed at 5456 Figure Eight Rd., located in the Myrtle Beach section of Horry County. And, police arrived at the crime scene on May 1, 2012. These statements are true and were learned by detectives through the investigation. Appellant does not contest the veracity of these statements.

The affidavit states a co-defendant, Lanard Powell, informed law enforcement the shooter was Marcus Dewain Wright, and he fled the scene at the above said location in a black in color BMW vehicle. This statement is true and was learned through the investigation. (Tr. p. 76, 78, 79). Appellant does not contest the veracity of these facts.

The affidavit states Powell informed police Wright then later switch[ed] getaway vehicles to a dark in color Cadillac Escalade. According to Detective Cox sworn testimony at the suppression hearing this information was related to police by Powell.¹¹ (Tr. pp 55, ll. 12-19).

⁹ In his brief, Wright also argues the testimony of his wife's aunt in support of his argument of an expectation of privacy in his wife's home. However, Wright did not call his wife's aunt during the suppression hearing and offer any evidence from her on this issue. Wright's wife's aunt did not testify until during the trial before the jury. Wright also argues Captain Buchanan saw Wright coming and going from the residence in the days before the murder. (See IBOR, p. 5). That was not the testimony. Captain Buchanan saw the vehicles coming and going from the residence in the days leading up to the murder. (Tr. p. 55, ll. 4-6).

¹⁰ Wright conceded below that there was no intentionally false statements by the affiant in filling out the search warrant affidavit. (Tr. pp. 82, ll.12-16)

¹¹ Respondent has reviewed *the transcript* of Lanard Powell's orally recorded statement to police apparently prepared by the defense. Respondent cannot find a reference in that transcript where Powell told police Wright changed vehicles into a dark in color Escalade. In one portion of the

Further, Qwanda Caldwell-Brown, who police interviewed before Powell, informed police of the same information, including the fact Wright switched vehicles from the BMW into the dark in color Cadillac Escalade. (Tr. pp. 55, ll. 7-11). Wright does not argue on appeal that this statement in the affidavit was false or inaccurate. (Initial Brief of Appellant).

The affidavit then states that the shooter then drove to the address of 3635 Kates Bay Road which is in the Conway section of Horry County and left the above said vehicle [the Escalade] at that address. This is a true statement and came from several sources of information gathered during the homicide investigation including the previously mentioned information or facts developed above. Additionally, Captain Dale Buchanan, who lived in the area of Jacinda Wright's residence had seen the black BMW and the dark Cadillac Escalade coming and going from Jacinda's residence in the days leading up to and on the day of the murder. (Tr. pp. 54, n. 21 – 55, ln. 7). Police also verified through going to the residence of 3635 Kate's Bay Road, after the murder, that the dark in color Cadillac Escalade was *parked behind* Jacinda's residence. (Tr. pp. 55, ln. 24 – 56, ln. 5, p. 78). The search warrant states the vehicle is at the location.

statement, Powell is asked if Wright met him at a pawn shop in the Escalade, and Powell states he did not see him in that vehicle. However, Detective Cox testified at the suppression hearing that the actual recording of Powell's statement would be more accurate than the transcript that defense counsel submitted. Additionally, defense counsel's transcript indicates there are portions of the tape that are inaudible. Further, while Cox testified the oral recorded statement of Powell was the only interview of Powell, upon Respondent's review of the transcript of Powell's statement, it is clear that Powell talked to police in the police car on the way to the police station, and he mentions having talked to other police officers who were not in the interview room. Detective Cox testified at the suppression hearing that Powell definitely told them that Wright switched vehicles after the murder from the BMW into the Escalade. Further, Detective Cox testified at the suppression hearing that Qwanda Caldwell-Brown also informed police Wright switched vehicles from the BMW to the Escalade after the murder. Both Powell and Qwanda testified during the trial that Wright switched vehicles from the BMW to the Escalade after the murder.

The affidavit then states the co-defendant also informed law enforcement the shooter obtained the murder weapon, from his wife, at the above location. What the co-defendant Powell actually told the officers verbatim was that the shooter, Wright, was carrying a firearm on the day of the murder, and the firearm was owned by his wife, Jacinda. (Tr. p. 73, 75-76). So, the weapon *did not* belong to Wright, and he would had to have obtained the firearm *from his wife*, who was the registered owner. The investigation, including a check of the property records and going to the residence, revealed appellant's wife, Jacinda, the owner of the gun, *did reside* at 3635 Kate's Bay Highway. Police admitted at the pre-trial hearing that the prepositional phrase, "at the above location," was factually incorrect. Powell told police the shooter, Wright, got the gun from his wife, who was the owner. Police determined through their own investigation that Wright's wife resided at 3635 Kate's Bay Highway. Finally, the officer provided sworn oral testimony to the magistrate that SLED traced Wright's phone and had detected it pinging [sending a signal] at the 3635 Kate's Bay Highway address on May 1, 2012, which would have been shortly after the murder. (Tr. pp. 61-72). The murder was committed shortly before midnight on April 30th. Police did not arrive at the crime scene until just after midnight, May 1st. This information was also gathered during the murder investigation and came directly from SLED to Horry County police. (Tr. pp. 54, ln 9-20, 68-72).

Finally, the affiant stated that it is believed the shooter transported the murder weapon in the Cadillac Escalade back to the said residence and that it may still be present in the home and/or described vehicles. This information was based on the fact investigators had been unable to locate the murder weapon, Wright had initially placed the gun in the black BMW, and then changed vehicles into the Escalade and parked the Escalade behind Jacinda's residence, the residence of the owner of the handgun, which had been confirmed by an officer who had gone to

the scene. Further, the sworn supplemental testimony before the magistrate was S.L.E.D. had traced appellant Wright's cell-phone to the residence to be searched, on May 1, 2012, the night immediately following the murder.

As a result, based on the affidavit alone, or the affidavit in conjunction with the supplemental oral testimony, there was a *fair probability* that the murder weapon or evidence related to the murder would be found inside the residence at 3635 Kate's Bay Highway, the residence of appellant's wife, the registered owner of the murder weapon.

Based on the totality of the circumstances outlined in the affidavit and/or in the sworn oral testimony, and considering the nature of the evidence sought (the murder weapon or any evidence related to the murder), the type of offense involved (murder), and the experience of the officer involved, the magistrate, made a practical, common sense decision that **a fair probability** existed that additional evidence regarding the murder of the victim could be found in the residence of the murderer's wife, the registered owner of the gun, including the murder weapon. State v. Clifton, 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990)(magistrate is to make practical, common sense, decision whether under the totality of the circumstances there is a fair probability evidence of a crime will be found in a particular location); United States v. Severance, 394 F.3d 222, 230 (4th Cir.), *vacated on other grounds*, 544 U.S. 2047 (2005)(recognizing "that the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.")(internal quotation marks omitted); United States v. Suarez, 906 F.2d 977, 979 (4th Cir. 1990)(noting that search warrant application was based, inter alia, on officer's surveillance of defendant during day before search, when he was seen walking to targeted residence of his girlfriend). A practical, common sense, and logical interpretation of the affidavit accompanying the search warrant in

this case, along with the deference which must be accorded a magistrate, overcomes any deficiency alleged by Wright. State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d, 129, 132 (1984).¹²

The record shows police were working together in a joint criminal investigation. The chief investigator reported to the affiant information and facts developed by criminal investigators at the scene and during the investigation. These facts were included in the warrant and accompanying affidavit which the affiant provided to the magistrate. There was no confidential informant involved in this investigation. There was no requirement that the affiant corroborate the information provided by other officers in the affidavit. The salient facts in the affidavit were provided by criminal investigators engaged in a joint criminal investigation. The magistrate could rely on this fact in determining the reliability and credibility of the information averred to in the affidavit. Taylor; Dupree. There is no merit to Wright's argument. This ground of Wright's appeal must be dismissed. Sullivan. See State v. Pressley, 288 S.C. 128, 341 S.E.2d 626 (1987)(during the execution of a lawful search, an officer may seize items that are in plain view that are clearly contraband or related to the crime).

Further, even though there are some factual inaccuracies in the search warrant affidavit, removing any factual inaccuracies, the affidavit alone, and the affidavit with the supplemental

¹² Further, this was not a search warrant based a confidential informant or even a concerned citizen. The search warrant was based on information gathered by police officers and investigators in the midst of a criminal investigation for murder who gathered facts they directly observed. Reliability or corroboration was not necessary. See Gates. Our appellate courts have recognized "[t]he 'experience of a police officer is a factor to be considered in the determination of probable cause.'" Dupre, 319 S.C.at 459, 462 S.E.2d at 282, *quoting* Fisher, 702 F.2d at 378. In State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013), our Supreme Court recognized the well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training. *Id. citing* United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004). As a result, there is no merit to this argument.

sworn testimony,¹³ provided sufficient probable cause to justify the issuance of the warrant. Franks v. Delaware, 438 U.S. 154 (1978). In determining whether alleged misstatements in an affidavit render a search warrant invalid, the court must conduct the analysis set forth in Franks. Franks outlined a two-part test for challenging the warrant affidavit's veracity. First, to mandate an evidentiary hearing, there must be 'allegations of deliberate falsehood or of reckless disregard for the truth ... and those allegations must be accompanied by an offer of proof.' ... Second, ... the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause." State v. Davis, 354 S.C. 348, 359-60, 580 S.E.2d 778, 784 (Ct.App.2003), *citing* State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)) (internal citations omitted). "There will be no Franks violation if the affidavit ... still contains sufficient information to establish probable cause." Franks, 438 U.S. at 171-72; Missouri, at 554, 524 S.E.2d at 397; State v. Sachs, 264 S.C. 541, 555, 216 S.E.2d 501, 509 (1975)("However, even if the officer was delict, so long as probable cause was established by affidavit or affirmation without the aid of the erroneous fact, the warrant satisfies the constitutional demands.").¹⁴ If the questioned allegations are essential, and falsity is shown by a balancing of the probabilities, the warrant must be voided and the fruits of the search excluded. Franks.

¹³ Contrary to Wright's argument in his brief, the affiant was not attempting to supplant, substitute, or amend incorrect information in the affidavit which was knowingly, intentionally, or recklessly supplied by the affiant. See Jones. The affiant and the State are using the "oral testimony" to supplement the search warrant affidavit, which is entirely proper. Gore, supra.

¹⁴ See also Rugendorf v. United States, 376 U.S. 528 (1964)(even if a veracity challenge were permitted, the alleged factual inaccuracies in that cases affidavit were only of peripheral relevancy to the showing of probable cause, and not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit).

In State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2006), this Court held that the trial judge erred in suppressing the evidence obtained by a search warrant that contained falsified or incorrect information in the affidavit, where such information was not directly relevant to the search. In State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007), this Court found that where the search warrant affidavit stated “officers recovered marijuana, marijuana seeds, and marijuana stalks from 162 Bailey Avenue, the fact “that officers actually found marijuana residue in a trash can outside of the residence, which affiant stated to magistrate in supplemental testimony at time the warrant was issued, did not constitute reckless disregard for the truth.

While Wright may have shown negligence or inadvertence on the part of the affiant, he did not show the officer filled out the affidavit for the warrant in reckless disregard for the truth with the intent to deceive or mislead the magistrate. Detective Weaver received the information he put in the affidavit from Detective Cox. He drafted the affidavit in the heat and hurry of an ongoing murder investigation. Those misstatements in the affidavit were supported by other information gained during the murder investigation.

Even striking from the affidavit those statements appellant Wright alleges are inaccurate or erroneous, there is still sufficient probable cause to issue the search warrant for Jacinda Wright’s residence to look for the murder weapon or evidence of this crime. Judge Hayes did not err. The task is simply to make a practical, common-sense decision whether, given all the circumstances there is **a fair probability** that evidence of a crime will be found in a particular place. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999). “ ‘In dealing with probable cause ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men,

not legal technicians, act’.” State v. Dupree, 319 S.C. 454, 458, 462 S.E.2d 279, 282 (1995), quoting Brinegar v. United States, 338 U.S. 160, 175 (1949).

Here, police knew through their investigation that Jerome Green had been murdered shortly before midnight of May 1, 2012. Green had been shot to death. A named co-defendant, Lanard Powell, had informed police that appellant Wright was the person who shot and killed the victim and that Wright was carrying a gun on the night of the murder of the victim that Wright had received from his wife, Jacinda Wright, the gun’s owner. Police confirmed Jacinda Wright lived at 3635, Kate’s Bay Road, in Horry County. Wright had left the murder scene after the shooting in a black BMW, but he had switched vehicles into a dark in color Cadillac Escalade. The black BMW and the dark in color Escalade had been seen by a police officer, who lived in the area, coming and going from Jacinda Wright’s residence in the days leading up to and on the date of the murder. Police had confirmed the Escalade was now parked, just one (1) day later on May 2, 2012, at the residence of appellant’s wife Jacinda Wright, the same person from whom Wright had obtained the weapon, the gun’s owner. And, police had traced appellant Wright’s cell-phone to Jacinda Wright’s residence on the night of May 1, 2012.

There was more than sufficient evidence constituting probable cause to search appellant’s wife’s residence for the murder weapon and evidence of the crime of Jerome Green’s murder. There was more than sufficient evidence from the court could determine there was a fair probability that the murder weapon or evidence of the crime would be found in appellant’s wife’s residence. Franks.

The Exclusionary Rule Should Not Apply

Even if this Court determines Judge Hayes erred in finding the magistrate’s determination of probable cause was supported by substantial evidence, the exclusionary rule should not apply.

The 4th Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, 131 S.Ct. 2419 (2011). The Supreme Court fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the 4th Amendment. Id. at 2423. “Exclusion is not a ‘personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search.” Id. at 2426 (citations omitted). “The rule’s sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations.” Id. This Court and our state Supreme Court have recognized the same principle.¹⁵ Because “[e]xclusion exacts a heavy toll on both the judicial system and society at large,” the U.S. Supreme Court and our Supreme Court have stated “the deterrence benefits of suppression must outweigh its heavy costs” for the exclusion to be appropriate. Davis, at 2427; State v Brown, *supra*. “Real deterrent value is a ‘necessary condition for exclusion,’ but it is not ‘a sufficient’ one.” Davis, at 2427, *citing Hudson v. Michigan*, 547 U.S. 586, 596 (2006).

“[T]he United States Supreme Court has narrowly interpreted the scope of the exclusionary rule in recent years.” State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324 (Ct App 2011), *citing Hudson*, 547 U.S. at 591-94 (noting exclusionary rule generates “substantial societal costs”). The fact that a 4th Amendment violation occurred – i.e. that a search or arrest was unreasonable – does not mean that the exclusionary rule applies. Herring v. United States,

¹⁵ “[T]he exclusionary rule was not designed to apply to every violation of the Fourth Amendment.” State v. Jenkins, 398 S.C. 215, 229, 727 S.E.2d 761 (Ct. App. 2012); *See Weston*, 329 S.C. at 293, 494 S.E.2d at 804 (“Suppression is appropriate in only a few situations. . .”), State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987)(“Exclusion of evidence is not the only means available to insure that warrants are properly issued.”), *citing Sachs* 264 S.C. 556, 216 S.E.2d at 509. In Sachs our Supreme Court observed “[t]he exclusionary rule is harsh medicine,” and “[e]xclusion should be applied only where deterrence is subserved.” 264 S.C. at 566, 216 S.E.2d at 514.

555 U.S. 135 (2009), *citing* Gates, 462 U.S. at 233. “Indeed, exclusion ‘has always been our last resort, not our first impulse,’ Hudson v. Michigan, 547 U.S. 586, 591, 126 S.Ct. 2159 (2006), and our precedents establish important principles that constrain application of the exclusionary rule.” Herring, 555 U.S. at 140. The Supreme Court “has repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.” Id., *citing* United States Leon, 468 U.S. 897 (1984). Instead, the Court has “focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.” Id., *referencing* United States v. Calandra, 414 U.S. 338, 347-55 (1974); Stone v. Powell, 428 U.S. 465, 486 (1976). The exclusionary rule applies only where it “‘result[s] in appreciable deterrence.’” Herring, *supra*, *quoting* Leon, *supra*, at 909 (*quoting* United States v. Janis, 428 U.S. 433, 454 (1976)).

In addition, the benefits of deterrence must outweigh the costs. Id., *citing* Leon, *supra* at 910. “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” Id. at 141, 129 S.Ct. 700, *citing* Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 368 (1998). “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” Id., *quoting* Illinois v. Krull, 480 U.S. 340, 352-53 (1987)(internal quotation marks omitted).¹⁶ For exclusion to be appropriate, the deterrence

¹⁶ “The principal costs of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free – something that ‘offends basic concepts of the criminal justice system.’” Id. at 141, 129 S.Ct. 701, *quoting* Leon, *supra*, at 908. “It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence.” Davis, *supra* at 2427, *citing* Stone, 428 U.S. at 490-91. “And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.” Id. at 2427, *citing* Herring, *supra*, at 141. “Our cases hold that society must swallow this bitter pill when necessary, but only as a ‘last resort.’” Id., *citing* Hudson, *supra* at 591. “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application” Herring, 555 U.S. at 141, *quoting* Scott, *supra*, at 364-65, 118 S.Ct. 2014 (internal

benefits of suppression must outweigh its heavy costs. Davis, *supra*; Herring, 555 U.S. at 141; Leon, *supra* at 910.

The Supreme Court has abandoned the old reflexive application of the exclusionary rule and imposed a more rigorous weighing of its costs and deterrence benefits. Davis, *supra*, *citing* Arizona v. Evans, 514 U.S. 1, 13 (1995)(other citations omitted). In a line of cases starting with Leon, the Court recalibrated their cost-benefit analysis in exclusion cases to focus the inquiry on the “flagrancy of the police misconduct” at issue. Davis, at 2427. *citing* Leon, at 909, 911.¹⁷

If a warrant is found to be defective, the evidence obtained from the warrant should be suppressed “only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. Leon, 469 U.S. at 918. “In analyzing the applicability of the [exclusionary] rule, Leon admonished that we must consider the actions of the police officers involved.” Herring, 555 U.S. at 140, *citing* Leon, 468 U.S. at 923, n. 24. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. Davis; Herring, 555 U.S., at 144. The conduct of the officers here was neither of these.

quotation marks omitted); *see also* United States v. Havens, 446 U.S. 620, 626-27 (1980); United States v. Payner, 447 U.S. 727, 734 (1980).

¹⁷ The basic insight of this line of cases is that the deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct” at issue. *Id.*, *citing* Herring, 555 U.S. at 143. When police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. Davis, at 2427, *citing* Herring, 555 U.S. at 144. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, Leon, *supra*, at 909, (internal quotation marks omitted), or when their conduct involves only simple, “isolated” negligence, Herring, 555 U.S. at 137, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.” Davis, at 2427-28 *citing* Leon, *supra* at 919, 908, n. 6, (*quoting* United States v. Peltier, 422 U.S. 531, 539 (1975).

Under the circumstances of this case, exclusion would not further the purposes of the exclusionary rule, and suppression is not proper. Id.; State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(recognizing the main purpose of the exclusionary rule is deterrence of police misconduct). See Gates, 462 U.S. 213 (recognizing affidavits are drafted by non-lawyers in the midst and haste of a criminal investigation). At most there was some miscommunication of specific details of information police had from the chief investigator to the detective directed to obtain the search warrant. The conduct of the investigators here did not violate Wright's 4th Amendment rights deliberately, recklessly, or with gross negligence. Herring, *supra*.

Further, under the facts of this case, suppression of the evidence would make no sense where there is no evidence of police misconduct, there is no question the residence searched was that of Wright's wife, officers had probable cause to search the residence, officers did not conduct a warrantless search, but obtained a search warrant from a neutral and detached magistrate before entering Wright's wife's residence. See Illinois v. McArthur, 531 U.S. 326 (2001); Davis, *supra*; Brown, *supra*. The evidence seized from Wright's wife's residence should not be excluded. Id.¹⁸

In addition, judicially created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule. Id.; Brown.

The Evidence is Admissible under the Good Faith Exception

Further, the evidence recovered from Jacinda Wright's residence is admissible under the "good faith" exception to the warrant requirement. Herring, 555 U.S. 135; Leon, 468 U.S. 897; United States v. Williams, 548 F.3d 311 (4th Cir. 2008); State v. Herring, 387 S.C. 201, 212, 692

¹⁸ Furthermore, if Wright's argument is correct, that he had a possessory interest in the residence of his wife, this only adds to the probable cause police had to search the residence since he had been identified as the shooter and he had obtained the weapon from his wife.

S.E.2d 490, 495 (2009). In Leon, the Court held that the Fourth Amendment exclusionary rule does not ban evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but later found to be invalid for lack of probable cause. Id. As the Court made clear in Herring v. United States:

These principles are reflected in the holding of Leon: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated warrant. 468 U.S., at 922, 104 S.Ct. 3405. We (perhaps confusingly) called this objectively reasonable reliance “good faith.” Ibid., n. 23, 104 S.Ct. 3405. In a companion case, Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed. 2d 737 (1984), we held that the exclusionary rule did not apply when a warrant was invalid because a judge forgot to make “clerical corrections” to it. Id., at 991, 104 S.Ct. 3424.

Herring, 555 U.S. at 142. The Fourth Circuit addressed the “good faith” exception in Leon at length in Williams, *supra*.

As the Supreme Court instructed in Leon, “a court should not suppress the fruits of a search conducted under the authority of a warrant, even a ‘subsequently ‘invalidated’ warrant, unless ‘a reasonable well-trained officer would have known that the search was illegal despite the magistrate’s authorization.’” United States v. Byrum, 293 F.3d 192, 195 (4th Cir. 2002) (*quoting Leon*, 468 U.S. at 922, n. 23, 104 S.Ct. 3405). The Leon Court explained “that the deterrence purpose of the exclusionary rule is not achieved through the suppression of evidence obtained ‘by an officer acting with objective good faith’ within the scope of a search warrant issued by a magistrate.” United States v. Perez, 393 F.3d 457, 461 (4th Cir. 2004)(*quoting Leon*, 468 U.S. at 920, 104 S.Ct. 3405, 82 L.Ed. 2d 677). “Hence, under Leon’s good faith exception, evidence obtained pursuant to a search warrant issued by a neutral magistrate does not need to be excluded if the officer’s reliance on the warrant was ‘objectively reasonable’ ” Id. (*quoting Leon* 468 U.S. at 922, 104 S.Ct. 3405, 82 L.Ed.2d 677).

Williams, *supra* at 317. The Leon Court admonished that searches conducted “pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.” 468 U.S. at 922 (internal quotation marks omitted). An officer’s reliance on a warrant would not qualify as “objectively reasonable,” however, in the following four (4) circumstances:

(1) Where “the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.” Id. at 923. 468 U.S. at 3405.

(2) Where “the magistrate acted as a rubber stamp for the officers and so ‘wholly abandoned’ his detached and neutral ‘judicial role,’” Bynum, 293 F.3d at 195, *quoting Leon* at 468 U.S. at 923, 104 S.Ct. 3405.

(3) Where a supporting affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” Leon, 468 U.S. at 923, 104 S.Ct. 3405 (internal quotation marks omitted); and

(4) Where “a warrant is so facially deficient - - - i.e., in failing to particularize the place to be searched or the things to be seized - - - that the executing officers cannot reasonably presume it to be valid.” Id.

Williams, 548 F.3d at 317.

South Carolina also recognizes a good faith exception to evidence seized pursuant to a warrant that is defective under S.C. Code Ann. Section 17-13-140, if the officers made a good faith attempt to comply with the affidavit requirement under S.C. Code Ann. Section 17-13-140. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). *See also State v. McKnight*, 291 S.C. 110, 112-13, 352 S.E.2d 471, 472 (1987)(refusing to apply good faith exception where the officers failed to attempt to comply in good faith to the affidavit requirements), *and State v. Covert*, 382

S.C. 205, 675 S.E.2d 740 (2009), *Toal, C.J. concurring in result*.¹⁹ Recently, the South Carolina Supreme Court again recognized a good faith exception to the search warrant requirement and the requirements of Section 17-13-140 in State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009).

Recently, however, we recognized that there is a “good faith” exception to the statute’s [S.C. Code Ann. 17-13-140] requirements where the officers make a good faith attempt to comply with the statute’s affidavit procedures.” State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing McKnight*. [fn 6] [In Covert, we left open the question of whether a good faith exception applies when “the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid.” *Id.* at 209, 675 S.E.2d at 743. Given our recognition of an exception for an officer’s good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, Such that the search should be upheld.]

Herring, 387 S.C. at 215.

In the present case, police did not search Jacinda Wright’s residence without a warrant, but obtained what they believed to be a valid search warrant from a neutral and detached magistrate, who independently determined probable cause existed, and, in reliance on that search warrant, police searched Jacinda’s residence for the murder weapon and evidence related to the murder. The affidavit was not based on an informant’s information, but on facts developed in

¹⁹ South Carolina, like the Supreme Court and the 4th Circuit, refuses to apply the “good faith” exception when one of the four (4) circumstances listed above apply. *See State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997)(finding reliance on warrant was not objectively reasonable where there was no indicia of probable cause in the affidavit); State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(finding magistrate abandoned his neutral and detached role when affidavit contained no indicia of reliability of informant and no police corroboration); State v. Adolphe, 314 S.C. 89, n. 5, 441 S.E.2d 832 (Ct. App. 1994)(explaining holding in Johnson and finding similarly good faith did not apply because there was no indicia of reliability of informant or corroboration of police in affidavit or in supplemental testimony), State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991)(officer could not have objectively relied on search warrant in good faith because there was no evidence of reliability of informant or police corroboration of the same in affidavit and officer testified he actually knew the affidavit was insufficient)

the murder investigation. On this record, none of the four (4) circumstances listed above barring the application of the “good faith” exception apply: (1) There is no evidence the magistrate was misled by knowingly false or recklessly false information;²⁰ (2) There is no contention the magistrate was not neutral and detached or acted as a rubber stamp; (3) The affidavit was not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;” (4) The warrant particularly describes the place to be searched and the items to be searched for. Leon. The Fourth Circuit has rejected arguments similar to those made by Wright in this case, finding the good faith exception applied. *See United States v. Harris*, 215 Fed. Appx. 262, 272 (4th Cir. 2007)(unpublished)(applying good faith exception, despite officer’s omission from affidavit (1) that defendant resided in targeted premises and (2) their grounds for believing defendant lived there, because “[t]he apartment to be searched is prominently identified in the affidavit, and it is easy to read the affidavit and not realize that the officers failed to connect the final dots specifically linking the defendant to the apartment.”), *citing United States v. Procopio*, 88 F.3d 21, 28 (1st Cir. 1996). *See Williams*, 548 F.3d 311 (applying good faith exception), United States v. Lelor, 996 F.2d 1578 (4th Cir. 1993)(apply good faith exception). In this case, this was the residence of Wright’s wife. In such a situation, the good faith exception should apply and the exclusionary rule should not be enforced.

²⁰ While there may have been some factual inaccuracies or misstatements in the affidavit, those are attributable to the communication of information from one investigator to another who is directed to go obtain a search warrant during the heat and hurry of a murder investigation. Wright does not argue any intentional misstatements in the affidavit; he merely argues the misstatements were made in reckless disregard for the truth. Wright has not proven the statements were made with reckless disregard for the truth. The fact remains, officers had probable cause to search Jacinda Wright’s residence based on the information developed during the investigation.

Harmless Error

Regardless, even if Judge Hayes erred in admitting the fruits of the search of Jacinda's home, the admission of this evidence was harmless because the evidence of Wright's guilt was overwhelming despite this evidence. State v. Herring, *supra* (finding even if search of defendant's home was illegal, any error was harmless given the overwhelming evidence of the defendant's guilt independent of the evidence seized in his home), *citing* State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991)(holding improperly admitted evidence harmless given overwhelming evidence of guilt). *See also* State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006).

At trial, Roy Sinclair testified to the arrangement he had with Powell and appellant Wright to allow them to sell drugs out of his residence, the crime scene. Sinclair testified Powell left the residence earlier in the evening of April 30th, 2012 with Powell's girlfriend. Sinclair testified Wright remained at Sinclair's home sitting at the kitchen table cutting up drugs. Sinclair testified that Wright had his pistol next to him on the kitchen table. Sinclair testified Wright was acting strangely before the victim was murdered, accusing Sinclair of saying something derogatory about a woman in the residence. Thereafter, the victim arrived and made the previously referenced comment to Sinclair to which Wright took offense. Sinclair testified Wright then shot the victim multiple times with the pistol Wright had with him in the kitchen. Sinclair testified the victim was not armed. Sinclair testified he fled the residence, but as he was fleeing down the road, he overheard Wright tell the returning Powell that he [Wright] had just murdered the victim and that Powell needed to get his stuff out of the residence. Powell did exactly what Sinclair overheard Wright instruct Powell to do.

Veronica Denise Chandler testified consistent with the testimony of Roy Sinclair. She testified she was present in Sinclair's home and witnessed the murder of the victim. She testified Sinclair was also in the home and witnessed the murder. She testified the victim came into the residence and made a remark to Sinclair that the man in the kitchen [Wright] took offense to. The victim was talking to Veronica when Wright shot the victim numerous times, and she, Veronica, fled outside the home. Wright left the scene after the murder, and Powell arrived and went into the mobile home. Veronica then immediately left the scene and stopped at a nearby store and called her husband and called the police.

Mildred B. Small testified she was present in the mobile home with Veronica who was in the living room as Veronica described in her testimony. Roy Sinclair was also inside the residence. Mildred testified there was a man in the kitchen at the kitchen table [Wright]. The victim came into the residence and then someone started shooting and the victim was killed. Mildred fled outside and Veronica fled outside as well. The man who was at the kitchen table left the scene, then another man arrived [Powell] and went into the mobile home with a gun but did not fire his weapon. Mildred and Veronica left the scene and went and called the police.

Lanard Powell also testified at trial. Powell testified there was an agreement with Sinclair in which Wright and Powell were allowed to distribute drugs from Sinclair's mobile home. Powell testified he was selling drugs for Wright. Powell testified he and his girlfriend left the scene before the murder occurred to make a drug sale. Powell testified when he left Sinclair's residence, Wright was still there at the residence sitting at the kitchen table. Powell testified Wright carried a *40 caliber* pistol, which belonged to Wright's wife. When he and his girlfriend returned to Sinclair's residence, Wright was leaving the residence in his black BMW. Wright spoke to Powell from his vehicle. Powell then went into the residence, saw the victim

had been killed, and Powell removed drugs and cash from the residence and put them in his car. Powell took the victim's car keys, but he did not see any weapon on the victim or remove any other weapon from the crime scene. Powell then left the crime scene in the victim's vehicle with his girlfriend following in the other vehicle. Powell and Wright made contact by phone, and Powell met up with Wright, and he and Wright attempted to get rid of the victim's vehicle with gasoline. He and Wright then got a rental car and hid out at different motel rooms until they were arrested. Powell rented the last room under an alias using a fake I.D. Wright had given him. Powell testified that while he was with Wright before they were arrested, Wright told him he killed the victim.

Qwanda Caldwell Brown, Powell's girlfriend, also testified at trial. She testified consistent with Powell that Powell was selling drugs out of Sinclair's mobile home. She and Powell left the mobile home before the murder occurred. When they left, Wright was still there at the mobile home. When they returned, Wright was leaving the residence in his black BMW. Wright spoke out the window of his vehicle to Powell and told him to pick up the shell casings. Qwanda testified there was a dead man lying on the floor inside the front door of the mobile home. Powell entered the mobile home with Powell's 9mm but he did not fire his weapon. Powell returned with a book bag containing something and put it in the car Qwanda was driving. She and Powell then left the crime scene with Powell driving the victim's car. They later met up with Wright, who had switched vehicles, and they disposed of the victim's vehicle on a dirt road. She eventually rented a motel room for the three (3) of them. They then picked up a rental car, which Wright and Powell eventually got into, but she returned to her home. She also testified Wright told her he killed the victim. She also heard Wright make an admission to killing the victim in the first hotel room that was rented.

Crime scene technician's established consistent with the above witnesses' testimony that the victim was murdered inside the mobile home. Three (3) fired *.40 caliber* shell casings were found inside the mobile home. Two (2) of these shell casings were found under the cushions of a couch in the living room and one (1) was found on the floor between the kitchen and the living room. No other fired shell casings were found at the scene. No weapon was found on or around the victim.

The autopsy findings were consistent with the above witnesses' testimony and with what was found at the crime scene. The victim died from multiple gunshot wounds. The projectiles taken from the victim's body were consistent with a *.40 caliber* weapon and not a 9 mm pistol.

Forensic firearm and tool-mark identification revealed the three (3) fired *.40 caliber* shell casings found at the crime scene were fired by *the same gun*.²¹

Police arrested Wright at Powell together in the same room at the Sleep Inn motel. Police searched the rental car found in the motel parking lot and found a gun case which contained two (2) *.40 caliber* magazines/clips containing *.40 caliber* ammunition and registration papers for a *40 caliber* pistol. The registration papers showed the *40 caliber* pistol was purchased by Wright's wife, Jacinda Wright.²²

Police also searched the BMW which Wright fled the murder scene in. In that automobile, police found one unfired *.40 caliber* bullet.²³

²¹ Even if the court were to exclude the two (2) fired shell casings found in Jacinda Wright's home, the firearm's examiner still testified that the three (3) fired shell casings found at the murder scene were fired by one and the same gun.

²² Wright did not challenge the search of the red Camaro at trial and does not challenge the search of the red Camaro on appeal.

²³ Wright did not challenge the search of the BMW below and does not challenge the search of the BMW on appeal.

As a result, even if the admission of the fruits of the search of Jacinda's home was erroneous, its admission was harmless given the overwhelming evidence of Wright's guilt introduced at trial *independent of that found in Jacinda's residence*. Herring; Gillian; Garner; Baccus.

Conclusion

There is evidence in the record supporting Judge Hayes finding Wright did not meet his burden of proof to establish he had an expectation of privacy in the residence searched. Judge Hayes did not err in finding the magistrate had a substantial basis for finding probable cause existed to issue the search warrant for Jacinda's residence. Even assuming *arguendo* Judge Hayes somehow erred in finding the magistrate had a substantial basis for finding probable cause existed, the exclusionary rule should not apply. Further, the evidence was still admissible because the officers relied in good faith on the search warrant issued by the Magistrate in searching Jacinda's residence. Finally, the admission of the evidence was harmless given the other overwhelming evidence of Wright's guilt independent of that recovered from Jacinda's residence. As a result, there is no merit to any of the appellate grounds raised as to this search.

ARGUMENT II.

Judge Hayes did not err in denying the motion to suppress the evidence found in the hotel room rented by Lanard Powell because the initial intrusion into the motel room was reasonable and the evidence was in plain view.

Standard of Review

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004)(citation omitted. “The appellate court will reverse only when there is clear error.” Id. (citation omitted).

The Seizure of the Evidence in Room 105 of the Sleep Inn Motel

As previously stated under the Statement of Facts, on May 2, 2011, police tracked Wright and Powell to the “Sleep Inn” motel in Conway. Police already had an arrest warrant for Powell for murder, and were looking for Wright and Powell as suspects in connection with the shooting murder of Jerome Green. Police determined through the desk clerk that Powell had rented a room with a fake I.D. in the name of Desmond Jetter. Police also determined through the desk clerk, by showing him a photograph, that Wright was in the same motel room, Room 105. Police had the motel clerk call the room and ask the occupants to step outside. Police surrounded the motel room. When Powell or Wright opened the door to the room and stepped outside and saw it was police, that individual fled or retreated back into the motel room and attempted to slam the door shut, but police were able to prevent them from doing so. Police entered the room and Powell and Wright were taken into custody. After detaining Wright and Powell in the room, without searching, police saw in plain view on top of a refrigerator in the motel room a quantity of crack cocaine, a quantity of powder cocaine, and over \$3,000 in cash. Police did not search

the room, but secured it and obtained a search warrant for the room, and pursuant to the execution of the search warrant, seized the drugs and cash.

What Occurred Below

Prior to trial, Wright moved *in limine* to suppress the fruits of the search of the Sleep Inn motel room rented by Powell. The State called two (2) witnesses at the pre-trial suppression hearing and introduced the search warrant obtained by the Horry County police for the room. The State also introduced the arrest warrant for Powell that was obtained the day before police entered Room 105. Appellant Wright did not testify at the pre-trial hearing or call any witnesses at the suppression hearing.

The testimony at the pre-trial hearing

Detective Mark Chatfield of the Horry County Police Department testified that he was involved in the investigation of the murder of Jerome Green. On May 2, 2012, he went to the Sleep Inn motel in Conway as part of the murder investigation. The reason Chatfield responded to the Sleep Inn is because police received information that one person that they were looking for, appellant Marcus Wright, was at the Sleep Inn motel. Specifically, the information came from Lieutenant Squires of the Horry County Police Department who was receiving information from the South Carolina Law Enforcement Division (S.L.E.D.) who was tracing Wright's cell phone and was receiving "pings" from Wright's phone at the above motel. Lieutenant Squires directed Detective Chatfield to go to the Sleep Inn and attempt to locate Wright. Detective Chatfield also testified he also went to the Sleep Inn in an attempt to locate Lanard Powell, Wright's co-defendant, as well. (Tr. pp. 103-04, 106).

When Detective Chatfield arrived at the motel, he met Sergeant Trexell, his direct supervisor. Sgr. Trexell had a driver's license photo of Wright. Sergeant Trexell showed the driver's license photo of Wright to the motel desk clerk, and the clerk stated that Wright was in Room 105 of the Sleep Inn motel. (Tr. p. 104).

Detective Chatfield testified the clerk called Room 105 while police officers were standing outside Room 105. Someone stepped out of the room. Detective Chatfield could not remember if it was Wright or Powell who stepped out of the room. At that point, the person who stepped out of the room was identified as one of the individuals they were looking for. The Detective and others outside the motel room identified themselves as police officers. The person who stepped out of the room, either Powell or Wright, fled or retreated back into the room and attempted to close the door to Room 105. Police held the door open and made entry into the room and Wright and Powell were detained and taken into custody. Detective Chatfield testified he was not aware an arrest warrant for Powell for murder was outstanding at the time they entered the motel room. (Tr. p. 104-05).

Detective Chatfield testified that when they walked into the motel room there were illegal drugs and some United States currency in plain view. Marcus Wright and Lanard Powell were taken into custody and taken out of the room. Detective Chatfield testified that Detective Johnson also entered the room at that time. Detective Chatfield provided Detective Johnson with the information provided by the motel clerk regarding the identity of who was in the room. The room was not searched at that point. Detective Chatfield testified everyone backed out of the room and the room was secured, while Detective Johnson went to secure a search warrant for the

motel room from a magistrate. Detective Johnson did secure a search warrant for the motel room. (Tr. pp. 105-07).

Detective Paul Johnson of the Horry County Police Department testified that he had been employed as a police officer for six (6) and one half (1/2) years and was assigned to the Narcotics and Vice Section. Johnson testified he is also involved in Special Operations for the Horry County Police Department as well. He also was instructed to go to the Sleep Inn motel *in relation to the homicide investigation* of Jerome Green. Specifically, he was asked by Lieutenant Stewart to assist the Violent Crime Section of their Office in apprehending Wright. Detective Johnson followed Lieutenant Stewart to the Sleep Inn motel. Once there, he and other detectives set up an outside perimeter covering all exits. (Tr. p. 108).

Detective Johnson testified that Detective Chatfield and Sgt. Trexell went to the front desk. The employee at the front desk confirmed that Wright was in Room 105. At that time, Detective Johnson positioned himself outside the window of Room 105 in case the subjects inside ran or fled. It was then communicated to Detective Johnson that the front desk called Room 105 and asked Wright to step outside. According to Johnson, once Wright opened the door and observed the police presence, he tried to close the door and at that time he was taken into custody. (Tr. pp. 108-09).

Detective Johnson did not enter the room until after Wright and Powell were taken into custody. When the officers who entered the room notified other officers that Wright was under arrest, Johnson went around to the front of the room. Before he entered the room, the door was open, and Detective Johnson could see an amount of narcotic drugs sitting on the refrigerator of the hotel room in plain view. Wright and Powell were removed from the room. Everyone left

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the room, the room was secured, and Detective Johnson went and obtained a search warrant from a magistrate. The search warrant was dated May 2, 2012. (Tr. p. 109, 113, State's Ex. 1 [search warrant]). Detective Johnson returned to the Sleep Inn motel and executed the search warrant. Detective Johnson seized the narcotic drugs [Cocaine and crack cocaine] and the U.S. currency [\$3,000] found in the motel room in plain view. (Tr. pp. 112-13, State's Ex. 1 [search warrant]).

Detective Johnson also testified there were two (2) individuals who were arrested, detained, or taken into custody in Room 105 of the Sleep Inn. Detective Johnson testified Wright *and* Powell were both arrested or taken into custody in the motel room. Detective Johnson identified State's Ex. 2, the arrest warrant for Lanard Powell for the crime of murder. Johnson also testified under oath and confirmed that the arrest warrant for Lanard Powell was issued and signed by the Magistrate on May 1, 2012, the day before police entered Room 105 of the Sleep Inn motel and arrested Powell. (Tr. p. 113). The arrest warrant for Lanard Powell's arrest was marked as State's Ex. 2 for identification for the purpose of the suppression hearing. (Tr. p. 113, State's Ex. 2).

The Search Warrant

The search warrant Detective Johnson obtained provided as follows:

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF HORRY

Personally appear before me one Detective Paul Johnson, who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises of this County.

DESCRIPTION OF PROPERTY SOUGHT

Specifically, cocaine, marijuana, heroin, crack cocaine, and any other illegal controlled and controlled substances. Items used to facilitate the distribution of controlled substances such as scales, baggies, vials, containers, etc, firearms, ledgers, books and papers. Any computers, hard drives or any type of electronic storage devices including any GPS devices. Any cellular devices used for incoming, outgoing calls, text messages and voice messages to include telephone numbers from the address book and contacts list. Any and all saved or deleted text messages and voice messages. Any and all photograph and videos saved to the cellular SIM card. Any paraphernalia used to facilitate the use any controlled substances such as pipes, bongs, spoons, straws, hypodermics, and etc. that could show that the occupants of the residence are involved with the possession, personal use/or sale of controlled substances. Any currency, monies, or merchandise related to the sale of marijuana or any other illegal controlled substances. Items of personal property that may establish ownership and control of areas searched.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

The place to be searched is the Sleep Inn Hotel located at 3145 Church Street Conway, South Carolina 29526. The room to be searched is specifically room 105. The room is plainly marked with a plastic marker with the number 105 beside the room door. Coming from ML Brown Public safety Building you will travel south west on Main street for 1.1 Mile and then turn left onto 16th Avenue and travel .5 Mile. Then you will turn right onto Highway 501 and travel 3.1 Miles and you will arrive at the Sleep Inn Hotel which will be located on the left side of the Highway.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

I am a police officer, certified in South Carolina. I have been employed by the Horry County Police Department for 5 years and am currently assigned as a Detective. I have received training in the following: Criminal Investigations Class at the SC Criminal Justice Academy. I have been involved in other search warrants relating to the seizure of illegal narcotics. I am authorized to make searches and seizures. On May 2, 2012 Detectives with the Horry County Police Department responded to 3345 Church Street Conway South Carolina at the Sleep Inn Hotel in reference to a wanted murder suspect. Upon arrival Detectives confirmed with the front desk that the suspect was in room 105. The front desk called the suspect and when the suspect stepped outside the room, the detectives confirmed the identity of the suspect. While the front door was open the detectives observed in plain view a baggy of off white substance and a baggy of green leafy substance on top of the refrigerator. It is my belief that there may be more illegal substances in the residence.

(State's Ex. 1) The search warrant affidavit was sworn to and the search warrant was signed by the Magistrate on May 2, 2012 at 9:50 a.m. (State's Ex. 1).

At the conclusion of the *in camera* hearing, Judge Hayes denied the motion to suppress. Specifically, Judge Hayes found that the officers had the right to act as they did in entering the room and eventually recovering the evidence that was in plain view. Judge Hayes found that based on articulable reasonable information that the officers had at the time, their actions were reasonable. (Tr. pp. 121-22).

Analysis

Judge Hayes did not err. There were several recognized exceptions to the search warrant requirement that made entry by Horry County police into the motel room reasonable; and, as a result, the evidence seized in plain view was admissible at Wright's trial regardless of the subsequent search warrant. Further, the admission of the evidence from the motel room was harmless as to the charge of murder and the charge of possession of a weapon during a violent crime.

The initial intrusion was reasonable and the evidence was in plain view

Police initially entered the motel room because an identified murder suspect fled or retreated into the motel room and attempted to close the motel room door when he recognized police. Because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. Herring, 387 S.C. at 210, 692 S.E.2d 490, *citing* Katz v. United States, 389 U.S. 347, 357 (1967). The Supreme Court has recognized that one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. Id., *citing* Brigham City, Utah v. Stuart, 547 U.S. 398 (2006). An action is

“reasonable” under the Fourth Amendment, regardless of the individual officer’s state of mind, “as long as the circumstances, viewed objectively, justify [the] action.” *Id.*, at 210, *quoting Scott v. United States*, 436 U.S. 128, 138 (1978). “A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement.” *Id.*, *citing Schmerber v. California*, 384 U.S. 10, 15 (1948). “The likelihood a suspect will flee is also an exigency warranting such an intrusion.” *Id.*, *citing Johnson v. United States*, 333 U.S. 10, 15 (1948). “Protecting the safety of police officers has also been held an exigent circumstance.” *Id.*, *citing Chimel v. California*, 395 U.S. 752 (1969). “A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling.” *Id.*, *citing Minnesota v. Olson*, 495 U.S. 91 (1990). In such circumstances, a protective sweep of the premises may be permitted. *Id.*, *referencing Maryland v. Buie*, 494 U.S. 325, 337 (1990); *cf. State v. Abdullah*, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004).

“Under the ‘plain view’ exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced in evidence.” *State v. Beckham*(1999)," \s "WSFTA_e283f133971b4e7ab072a8da1e40bf4c" \c 3 *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606 , 613 (1999) To satisfy the “plain view” exception, two elements must be met: “(1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. *State v. Wright*, 391 S.C. 436, 443, 702 S.E.2d 324, 327 (2011).

The initial entry was lawful pursuant to a Terry stop

Judge Hayes did not err in denying the motion to suppress, because the police officers could lawfully seize or detain both Wright and Powell pursuant to Terry v. Ohio, 392 U.S. 1 (1968) and its progeny. Under Terry and its progeny, a law enforcement officer may briefly detain and frisk a suspect, if the officer has a *reasonable suspicion* that the person has been *involved in or is wanted in connection with a completed felony*, as well in cases where there is a reasonable suspicion that a person is committing a crime or about to commit a crime. United States v. Hensley, 469 U.S. 221 (1985); United States v. Place, 462 U.S. 696 (1983); State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992).²⁴

When the officers responded to the motel, they were in the middle of a homicide investigation regarding the shooting death of Jerome Green. They were looking for two (2) subjects, Wright and Powell, who were suspects in the shooting murder of the victim. Police had received information or a tip that Wright was at the motel. S.L.E.D. had traced Wright's cell phone to the motel. When police spoke with the desk clerk, he confirmed that Wright was in Room 105. Further, Lanard Powell, the other person they were pursuing, actually rented the room in a false name, Derrick Jetter, using a fake I.D. (Tr. pp. 279-81).

Officers surrounded the room, and had the clerk call the room and ask Wright and Powell to step outside. One of the men [Wright according to Detective Johnson] opened the hotel room door and stepped outside. His identity was confirmed. When he recognized police, he fled back into the motel room and attempted to close the door. See Illinois v. Wardlaw, 528 U.S. 119, 125-

²⁴ See also State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977); State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984); State v. Khingratsarpon, 352 S.C. 32, 572 S.E.2d 456 (2002); State v. Morris, 312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993).

26 (2000). The officers stopped him from closing the door and escaping detention or apprehension. Officers entered the motel room and Wright and Powell were detained. Officers saw the drugs and currency in plain view while making a reasonable Terry stop or detention of the two (2) subjects who officers had reasonable suspicion had committed and were wanted for a completed felony, murder Terry. The drug evidence was therefore admissible because it was seen in plain view; it was readily apparent it was illegal contraband, and officers were lawfully within the interior of the room to detain the first subject. State v. Johnson, ___ S.E.2d ___, 2014 WL 2930442 (Ct. App. 2014), *not yet released for publication*; State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999)(“Under the ‘plain view’ exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced in evidence”). Further, underscoring the officers’ reasonableness, the officers did not attempt to search the room, but secured the room, and had Detective Johnson obtain a search warrant. The officers did not go in the room to look for narcotics but to detain or apprehend two (2) wanted murder suspects for questioning. It was only after securing of the search warrant that the room was actually searched.

Protective Sweep

Further, the entry into the motel room was justified by the recognized exception of “protective sweep.” In State v. Brown, 289 S.C. 58, 347 S.E.2d 882 (1986), the South Carolina Supreme Court recognized under almost the same exact factual scenario, that police had the right to make a protective sweep of the interior of a motel room after apprehending a suspect who stepped outside the motel room for whom police had no arrest warrant or search warrant for the motel room. Id. The Court found that police had the right to conduct a protective sweep of the

motel room to make sure no further subjects were within the room that could endanger the officers, and anything found in plain view during that protective sweep would be admissible in evidence. Id.²⁵ However, in Brown, the case was reversed because the State failed to prove by any competent testimony that the evidence recovered from inside the motel room was actually seen in plain view. *See Brown, supra.*²⁶ Here, in this case, the State established through the testimony of the first officer who entered the room and the second officer who was standing outside the motel room that there were narcotic drugs visible in plain view on top of the motel room refrigerator.

In the present case, police officers were investigating a homicide in which the victim Jerome Green was shot ten (10) times. No weapon was found at the crime scene. Police had identified both Wright and Powell as suspects in the homicide and had actually obtained a warrant for Powell's arrest for murder. Police had information Wright was at the Sleep Inn motel and confirmed he was in Room 105. Powell actually rented the motel room. When Wright or Powell [Wright according to Detective Johnson] opened the door to Room 105 and stepped out of the room, that person was identified by police. When that individual recognized police, he fled or retreated back into the motel room and attempted to close the door. It was reasonable for police to believe that person *or* concealed persons remaining in the room might pose a danger to the officers or others given the crime they were investigating and the murder

²⁵ In Brown, the Court found the "exigent circumstances" exception to the warrant requirement did not apply because police had the motel surrounded for approximately two (2) and one-half (1/2) hours and could have gone and gotten a warrant. Id. However, the Court found that "the protective sweep" exception *did apply* for officer safety. *See Brown.*

²⁶ In Brown, the only witness who testified at the suppression hearing was Lt. Ennis who admitted he could not say under oath whether the seized evidence was in plain view or not. He did not go in the motel room. He would be relying on what other officers told him. Id.

weapon was still missing. See Herring, 387 S.C. at 211, 692 S.E.2d 490 (“Police officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon.”). It was reasonable for police to stop that individual from closing the motel room door and to enter the motel room to detain that individual, and police had the right to conduct a protective sweep of the motel room and detain any individuals within the motel room pursuant to Brown. The drugs were seen in plain view during that lawful entry and remaining; the drugs criminal nature was readily apparent to the officers (Tr. pp. 105, 109), and the drugs were therefore admissible at trial. Maryland v. Buie; Coolidge v. New Hampshire, 403 U.S. 443 (1971); Texas v. Brown, 460 U.S. 730 (1983); Brown, 289 S.C. at 587-88, 347 S.E.2d 882.²⁷

Exigent Circumstances

Further, in this case, exigent circumstances justified the officers entry into the room when one (1) of the individuals, either Wright or Powell, fled or retreated into the motel room after recognizing police and attempted to close the door. “A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling.” State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324 (2011), *quoting* Herring, 387 S.C. at 210, 692 S.E.2d at 495, *citing* Minnesota v. Olson, 495 U.S. 91, 100 (1990) “In such circumstances, a protective sweep of the premises may be permitted.” Id., *quoting* Herring, *citing* Buie, 494 U.S. at 337, *and* Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. “The Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.” Id., *quoting* Whren

²⁷ See also State v. Abdullah, 357 S.C. 344, 351-52, 592 S.E.2d 344, 348-49 (Ct. App. 2004); State v. Johnson, ___ S.E.2d ___, 2014 WL 2930442 (Ct. App. 2014), *not yet released for publication*; State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999).

v. U.S., 517 U.S. 806, 814 (1996)(citations omitted)(emphasis in original). In the Fourth

Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action. Id., referencing Whren, 517 U.S. at 815.

In this case, police responded to the motel because they received information S.L.E.D. had traced Wright's cell phone to the motel. The motel clerk confirmed Wright was in Room 105. Powell rented the motel room under an alias. The above information allowed police to move forward in their investigation. Police could approach the door of the motel room and even knock to speak with Wright or Powell. Wright, *supra*, quoting United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990)(citations omitted)("A policeman may lawfully go to a person's home to interview him ... In so doing, he obviously can go up to the door). Further, immediately outside of a motel room is a common area of the motel, not private property. When Wright or Powell opened the door to the motel room and stepped outside, that person was identified by police as one of the individuals they were looking for as suspects in the shooting murder of Jerome Green. When that individual recognized police, he fled back into the motel room and attempted to close the door. "Exigent circumstances developed when the suspects [sic] started fleeing." Wright, 391 S.C. at 445, 706 S.E.2d 324. Moreover, the presence of another individual or potential other individuals in the motel room who might be armed created a potential danger to the officers. Id. "Hence, the deputies had the authority to perform a protective sweep of the premises." Wright, 391 S.C. at 445. The officers could stop the individual from closing the motel room door and enter to perform a protective sweep. Id.²⁸ "Police officers were looking

²⁸ Additionally, the officers did not immediately search for or seize the evidence in the motel room even though it was in plain view. They waited until Detective Johnson returned with a search warrant. "The reasonableness of the officer's conduct may be further gleaned from the

for a suspected murderer whom they knew was likely to be armed with a deadly weapon ” Herring, 387 S.C. at 211, 692 S.E.2d 490. As a result, the drugs observed in plain view in the motel room were admissible at trial. Wright.

Police could enter to room to arrest Powell because police had a warrant for his arrest

As an additional sustaining ground, police could also enter Room of 105 of the Sleep Inn because they had an arrest warrant for the person who rented to motel room, Lanard Powell. *See Payton v. New York*, 445 U.S. 573 (1980)(An arrest warrant carries with it by implication the authority to enter the suspect’s dwelling when there is reason to believe he is within); Goins v. State, 367 S.C. 568, 574, 726 S.E.2d 1, 4 (2012)(“police are allowed to enter a hotel room to arrest an occupant when acting pursuant to a valid arrest warrant.”); State v. Asbury; 328 S.C. 187, 493 SE.2d 1997)(same); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)(same); State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981)(same). Powell rented Room 105 of the Sleep Inn with a fake I.D. Wright had provided him. (Tr. p. 279-81). Police confirmed that both subjects, including Powell, were in the motel room before approaching the room. (Tr. pp. 317-20). Police had an arrest warrant for murder for Powell, which had been issued the day before the officers went to the Sleep Inn motel. (Tr. pp. 113, State’s Ex. 2 for Suppression Hearing). The arrest warrant for Powell had been issued on May 1, 2012. (Tr. pp. 113, State’s Ex. 2). Officers entered the motel room on May 2, 2013. (Tr. pp. 104, 113). It makes no difference whether the officers who testified at the suppression hearing were unaware of the arrest warrant, the knowledge of the other officers in the investigation is imputed to the officers who were seeking

decision to secure a search warrant to seize the contraband once the protective sweep was concluded and exigent circumstances unquestionably ceased to exist.” State v. Abdullah, 357 S.C. 344, n. 2, 592 S.E.2d 344 (Ct. App. 2004); Johnson, quoting Abdullah, not yet released for publication.

to apprehend Powell through the “fellow officer rule” or the “collective knowledge doctrine.” Johnson v. State, 660 So.2d 648 (Fla. 1995)(“knowledge of the existence of a valid warrant is imputed to all officers in the departments working on the case from the moment the warrant is signed, without regard to actual knowledge, at least where the arrest is prompted by the crime identified by the warrant or its accompanying papers”). Moreover, the collective knowledge doctrine provides that an officer may act on instruction of another officer if the instructing officer or officers had sufficient information to justify taking such action [himself]. United States v. Hensley, 469 U.S. 221 (1985); United States v. Massenburg, 654 F.3d 480, 492 (4th Cir. 2011).²⁹ As a result, police could lawfully enter the motel room to arrest Powell, and seize any items in plain view while lawfully in the motel room. See State v. Johnson, ____ S.E.2d ____ 2014 WL 2930442 (Ct. App. 2014)(finding initial entry into motel room to arrest subject, for whom officers had an arrest warrant, who had cracked the door and then backed away from the door into the motel room was justified and resulting protective sweep was justified and evidence

²⁹ See also United States v. Joy, 336 F.App’x 337, 342 (4th Cir. 2009); United States v. McRae, 336 F.App’x 301, 305 (4th Cir. 2009)(collective knowledge doctrine can also supply reasonable suspicion), citing United States v. Hensley, 469 U.S. 221, 232 (1985); United States v. Wells, 98 F.3d 808, 810 (4th Cir. 1996)(Under the collective knowledge doctrine, law enforcement officers cooperating in an investigation are entitled to rely upon each other’s knowledge of facts when forming a conclusion that a suspect has committed or is committing a crime); United States(4th Cir. 1980)_" \s "WSFTA_97577190929b436597edfbf2502d075c" \c 3 United States v. Laughman, 618 F.2d 1067 1072 (4th Cir. 1980); United States v. Pitt, 382 F.2d 322, 324 (4th Cir. 1967); Jones v. Camden Police Department, 2010 WL 3489021 (D.S.C. 2010), *Report and Recommendation*, (UNPUBLISHED). See also Morelli v. Webster, 552 F.3d 12, 17 (1st Cir. 2009)(holding that the doctrine applies to police officers “engaged in a joint mission” and “derives from a felt sense that officers acting in concert actually do, and are entitled to, assume that fellow officers are acting in a manner consistent with their legal responsibilities”), cited in United States v. Putt, 990 F.Supp. 2d 571 (E.D. Va. 2013); United States v. Williams, 627 F.3d 247, 252 (7th Cir. 2010)(explaining that “[t]he collective knowledge doctrine permits an officer to stop, search, or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion to permit the given action[]”).

seized in plain view was admissible); State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997)(entry into residence was lawful where officers were told suspect was usually home at that time, light was on in the home, kitchen window was open, officers had reasonable belief suspect was home-evidence in plain view was properly seized).

Entry Pursuant to a Lawful Warrantless Arrest

Further, as an additional sustaining ground, police had the right to make a lawful warrantless arrest for a felony, and neither Wright nor Powell could defeat the arrest by retreating into the motel room to avoid arrest. United States v. Santana, 427 U.S. 38 (1976). Police officers can make a warrantless arrest for a felony when an officer of the law has reasonable grounds to believe a felony has been committed and the person arrested is the party who committed the felony. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)(other citations omitted); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966). The limitation being the arrest must be in a public place. Kirk v. Louisiana, 536 U.S. 635, 123 S.Ct. 2458 (2002); United States v. Watson, 423 U.S. 411 (1976). However, once Wright or Powell stepped out of the motel room into a public place, they could not avoid a lawful felony arrest without a warrant by retreating back into the motel room. United States v. Santana, 427 U.S. 38 (1976)(“a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient escaping to a private place”). In Santana, the defendant was standing in the doorway of her house, and retreated into her home.

Inevitable Discovery

Furthermore, the evidence would have inevitably been discovered. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998).³⁰ To the extent this Court determines Judge Hayes erred in some fashion, this Court should find the evidence would have been inevitably discovered. Officers had the hotel room surrounded. They were not going to allow appellant Wright or Powell to escape. Wright and Powell would have eventually come out of the motel room and surrendered, justifying a protective sweep of the motel room under Brown and the discovery of the drugs in plain view, or officers would have eventually brought the arrest warrant for Powell to the scene and entered the motel room to arrest Powell, or would have gone and gotten a search warrant to enter the motel room and seize Powell and Wright and search for evidence of the crime. As a result, the drugs and U.S. currency found on the refrigerator would have been inevitably discovered. Id.

The Search Warrant was Valid

Additionally, the search warrant was valid even though it *may* have contained a factual misstatement. Franks v. Delaware.³¹ While this Court must determine the legality of the initial

³⁰ See United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987); State v. Brown (recognizing inevitable discovery is an exception to the exclusionary rule); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(remanding to determine if inevitable discovery doctrine applied); State v. Bruce, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013)(recognizing exception but finding exception not met on the record before the Court); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)(evidence may be admitted “if the government can prove the evidence would have been obtained *inevitably*.” (emphasis added).

³¹ The search warrant affidavit states that the officers who initially entered the motel room saw the drugs in plain view when the door was first opened and they were standing outside. The officer who obtained the search warrant testified before the jury that this was the information that was related to him before he went and obtained the search warrant (Tr. pp. 319-20). The affiant also testified at the suppression hearing that both officers who initially entered the room saw the drugs in plain view when the motel room door was first opened. (Tr. p. 112, ll. 7-23). However,

entry into the motel room, the Magistrate's sole determination was whether *there was probable cause to issue the search warrant to search the motel room for drugs or narcotics*, not the legality of the entry of the room. Even excluding any *possible* misstatement about when officers first saw the drugs in plain view, whether when the door was opened or after entry into the motel room, the fact remains officers inadvertently discovered drugs and currency in plain view on the refrigerator of the motel room. Further, the affiant saw the drugs in plain view from outside the motel room. Therefore, there was probable cause to issue the search warrant to search the motel room for drugs or narcotics. Franks.

The Exclusionary Rule should not apply

Further, the exclusionary rule should not apply in this situation. Police had obtained a valid arrest warrant for Lanard Powell for murder; police had verified Powell was in the room as well; Powell rented the motel room; and, therefore police had the right to enter the motel room to arrest Powell where knowledge of fellow officers in the investigation was imputed to all officers working on the case, and these officers had been directed to go to the Sleep Inn and apprehend the subjects. Johnson v. State, 660 So. 2d 648 (1995)(finding exclusionary rule should not be applied where police had obtained valid arrest warrant for the defendant but officer who actually made the arrest was not aware of the existence of the warrant; police had complied with the warrant requirement; there could be no remedial value in such a draconian penalty). Further, police obtained a search warrant after inadvertently finding the drugs, and only then seized the drugs found in plain view.

at the suppression hearing, the officer who first entered the motel room was only asked what he saw after entering the motel room. (Tr. p. 105). In response, he stated he saw the drugs in plain view after entering the room. (Tr. pp. 104-05).

Harmless Error

Finally, with regard to the murder charge and weapon charge, the evidence seized from the motel room was harmless and could not have affected the verdict on either. The evidence seized from the motel room was important to the trafficking and PWID charge, not the murder or weapon charge. The testimony of the eyewitnesses to the murder, the cover-up of the murder as testified to by Qwanda Caldwell-Brown and Powell, the admissions of the defendant as testified to by Sinclair, Qwanda, and Powell, and the physical evidence recovered at the crime scene in addition to that in the red Camaro,³² the BMW, and Jacinda Wright's residence was what resulted in Wright's conviction for murder, not what was recovered in Room 105. Even if Judge Hayes erred in admitting the evidence from Room 105, its admission was harmless on the murder and weapon charge and could not have affected those verdicts. State v. Herring, *supra*.

ARGUMENT III.

The issue alleging Judge Hayes erred in not allowing counsel to question a witness about a prior statement is not preserved for appellate review; and, even if the issue was preserved, Judge Hayes did not err in preventing counsel from questioning the witness about a prior statement where the defendant did not meet the requirements of the Rule; however, even assuming *arguendo* error, it was harmless given the other impeachment and admissions of the witness and the over-whelming evidence of Wright's guilt.

What Occurred Below

After lengthy cross-examination and impeachment of Lanard Powell, Wright sought to impeach Powell with the contents of a letter Powell purportedly wrote to Wright while the two were incarcerated together in the county jail. Wright *alleged* the witness stated in the letter a third person committed the murder, a man nicknamed "Two Guns." (Tr. p. 208). The Solicitor

³² Police established Jacinda rented the red Camaro for her husband Wright by introducing the lease agreement and through the testimony of Qwanda and Powell

objected on the basis she could not tell what statement Wright was referring to, and she had requested the letter be provided or disclosed to her previously and it had not been disclosed, and she was again asking to see the letter before counsel cross-examined the witness on the contents of the letter. (Tr. p. 308-11). Wright argued that under the South Carolina Rules of Evidence he did not have to produce the statement because there might be something in the statement that was nefarious to his client. (Tr. pp. 309-10). The Solicitor indicated she had spoken to the witness prior to trial and the witness indicated he was coerced into writing a statement by the defendant, but the only thing he said in the statement was that he did not see anything or know anything about the case. Not what Wright was claiming. (Tr. p. 310). Wright did not produce the letter prior to trial when requested by the Solicitor, and he did not produce it to the Solicitor when requested during the examination of the witness. (Tr. pp. 310-15). During the initial questioning of the witness on this issue, counsel claimed he could not find the letter, then outside the presence of the jury he admitted they could not find the letter. (Tr. p. 308, 309, 313) After some argument outside the presence of the jury, counsel informed the court the witness admitted he wrote the statement, and counsel was satisfied with the fact he was able to ask the question in front of the jury. (Tr. p. 310, ll. 207, Tr. p. 313, ln. 11 & 23-25). As the *in camera* hearing continued, counsel acquiesced to the trial's ruling he would not allow the impeachment. (Tr. p. 313, ln. 11 & ll. 23-25). Judge Hayes informed both parties he was going to give a curative instruction regarding this particular statement, and Wright made no objection to the curative instruction the court proposed. (Tr. p. 313, 314, ll. 1-15). And, Wright made no objection to the curative instruction when it was given to the jury or after it was given. (Tr. pp. 314, ln. 16 – 315,

ln. 1). Wright now alleges Judge Hayes erred in refusing to allow him to impeach Powell on the letter which he never produced to opposing counsel.

The Lack of Preservation of this Issue

This issue is not preserved for appellate review. First Wright stated he was satisfied with his cross-examination given the fact the witness admitted he wrote the statement, and given the fact Wright was able to ask the question in front of the jury regarding “Two Guns”. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). Further, Wright made no offer of proof what Powell’s testimony would have been if asked the question. State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004); State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991). And, there was no proffer of the extrinsic evidence. Id. Further, Wright acquiesced to Judge Hayes ruling, not once, but twice, and agreed he would ask no further questions of the witness on this subject. Benton; State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). Finally, Wright acquiesced to the curative instruction given by the court regarding the proposed impeachment and raised no objection to it. As a result, this issue is simply not preserved for appellate review and must be denied.

The Lack of Merit of this Issue

Further, there is no merit to this ground. Rule 613(a), SCRE, specifically provides in pertinent part:

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, *but on request the same shall be shown or disclosed to opposing counsel.*

Rule 613(a), SCRE (emphasis added). The record shows that “opposing counsel” [the Solicitor] requested that the written statement [letter] in question be shown to her or disclosed to her, as the Rule requires. Appellant Wright failed to do so. In fact, the Solicitor requested she be shown the statement or the statement be disclosed to her before trial and again at the time Wright sought to question the witness. Wright *did not* show her the statement or disclose the same to her prior to trial *or* at the time Wright sought to question the witness. In fact, Wright stated under the South Carolina Rules of Evidence he did not have to produce the statement because it might contain something nefarious about him. Wright is wrong. The Rule provides the statement must be produced to opposing counsel when requested. As a result, Wright failed to comply with the requirements of the Rule before examining the witness about the prior statement and its alleged contents. Rule 613(a), SCRE; *South Carolina Evidence*, 2nd Ed , Danny R. Collins, p. 140, ll. 2-8 (pointing out that the holding in State v. Rowell, 75 S.C. 494, 56 S.E.2d 23 (1906) suggesting that a prior inconsistent statement does not have to be shown to opposing counsel before it is used for impeachment is no longer good law on this point), *citing* Rule 613(a), SCRE *and referencing also* State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). The efficacy of this rule is evident. Where only a portion of the statement is introduced for impeachment, the entire statement is generally admissible to explain the inconsistency. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); *South Carolina Evidence*, 2nd Ed , Danny R. Collins, p. 141. “[A]fter a witness has been impeached, the party offering the witness can use the rule of completeness to require the cross-examiner to bring out any other matters that ought in fairness be considered with the prior statement.” *South Carolina Evidence*, 2nd Ed , Danny R. Collins, p. 143. Wright wanted to impeach the witness but not allow the State

to effectively offer any reply or rebuttal testimony with the contents of the statement itself. Further, this was not the first time during the trial Wright had sought to impeach a witness about something that was alleged to be in a prior statement, and the witness disputed what was actually in the statement. On that prior occasion, Wright did not offer the extrinsic proof to substantiate the prior inconsistency. (Tr. pp. 209-12). As a result of the failure of Wright to comply with the requirements of Rule 613(a), SCRE, Judge Hayes could not have erred in denying the request to cross-examine the witness about the prior statement because Wright did not comply with the requirements of the Rule. Wright should not be heard to complain about his own actions in failing to comply with the Rule. *Id.*

Harmless Error

Even if Judge Hayes somehow erred in denying the requested impeachment, the error was harmless. In State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 33-24 (1998) and State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999), the South Carolina Supreme Court held that the failure to allow impeaching evidence was subject to harmless error analysis and found in both of those cases the error was harmless.

In determining harmless error regarding any issues of witness credibility, we will consider the importance of the witness testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995), (quoting Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

Id. at 70, 508 S.E.2d at 34. See also State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Here, Powell's testimony was not critical to the State's case for murder, trafficking, PWID, or the weapon charge. Powell was not an eyewitness to the murder by his own admission. Powell was involved only in the cover-up of the crime, after the fact. Qwanda Caldwell-Brown's testimony corroborated Powell's testimony regarding what occurred when she and Powell returned to the mobile home after the murder and regarding the cover-up of the crime by Wright, Powell and Qwanda. Qwanda testified appellant Wright told Powell to "pick up the shell casings." Qwanda testified to Powell going in the mobile home after the murder and returning with items and placing them in her car. Qwanda testified to the fact she, appellant, and Powell disposed of the victim's vehicle. She also testified to appellant Wright's admission to her that he killed the victim. Roy Sinclair and Veronica Chandler *were eyewitnesses* to the crime. Sinclair testified to the fact that Wright shot the victim because of the statement the victim made to Sinclair upon entering the mobile home. Chandler also testified the man in the kitchen [Wright] shot and killed the victim because of the comment the victim made to Sinclair upon entering the mobile home. Chandler's companion also corroborated Powell's testimony that he entered the mobile home after the murder with his 9mm and then took the victim's Durango from the crime scene after the murder. Roy Sinclair also testified to the statement he overheard appellant Wright make to Powell as Wright was leaving the crime scene, i.e. that he, Wright had just murdered someone and Powell needed to get his stuff [drugs] out of the mobile home. Sinclair, Qwanda, and Chandler all testified to Wright being in possession of a firearm.³³ The

³³ None of the witnesses who were present at the crime scene when the murder actually occurred stated that a person named "Two Guns" committed the offense, instead of Wright. Sinclair had known Wright for approximately three (3) to four (4) weeks at the time of the murder and positively identified Wright in court as the person who murdered the victim. Impeaching the Powell with the letter in which Powell allegedly stated "two guns" committed the murder, would

physical evidence also corroborated the fact that Wright committed the murder. Fired forty (.40) caliber shell casings were found at the crime scene adjacent to the victim's body. The projectiles removed from the victim's body were consistent with a .40 caliber weapon. A gun case was found in the vehicle Wright's wife rented for Wright, the red Camaro, and that gun case was for a .40 caliber pistol. The paperwork in the gun case showed the .40 caliber pistol was owned by Wright's wife. Further, an un-fired .40 caliber bullet was found in the BMW which appellant Wright drove away from the crime-scene. Finally, two (2) fired .40 caliber shell casings were found in Wright's wife's residence, and those shell casings matched the fired shell casings from the crime scene, i.e. they were fired from the same weapon. Further, the drugs that were the basis of the trafficking and PWID charge were found in the hotel room in which Wright and Powell were arrested. Sinclair also testified to the agreement he had with Wright and Powell to allow them to distribute drugs from his residence. And, Sinclair testified to the fact Wright was sitting in the kitchen cutting up drugs before the murder occurred. Additionally, Judge Hayes allowed Wright to cross-examine Powell extensively before the jury regarding his credibility. (Tr. pp. 285-308). An error, if any, in the limitation of cross-examination was harmless given this record. Beckam; Fossick; McLeod.

ARGUMENT IV.

Judge Hayes did not err in denying the defendant's late request to testify.

What Occurred Below

During the trial of the case, Judge Hayes reviewed with Wright his right to testify and his right not to testify. Judge Hayes fully explained to Wright his constitutional rights in this regard,

not have made any difference because Powell was not even inside the mobile home when the murder occurred.

and Wright stated under oath on the record that *he did not wish to testify*. The defense rested its case the following morning after Judge Hayes declined to allow a defense' witness to testify. The jury was instructed that all of the evidence in the case had been introduced and the only thing that remained was the closing arguments and charge on the law. The parties then engaged in a charge conference with Judge Hayes. At the close of the charge conference, Judge Hayes informed the parties he would not charge self-defense or voluntary manslaughter. He also informed the parties exactly what he would charge in the case. Both the Solicitor and Wright's attorney stated they were ready for closing arguments and the charge on the law. The jury was being brought in to the courtroom, and the parties were about to give closing arguments in the case, when Wright informed Judge Hayes that he wanted to speak with the court. Wright's attorney then informed the court that Wright would now like to testify. Judge Hayes declined Wright's late request to testify. (Tr. pp. 477-82). There is no merit to this appellate ground.

Obviously, a criminal defendant has the right to testify in a criminal case Rock v. Arkansas, 483 U.S. 44 (1987); State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). However, a criminal defendant's right to testify is not unfettered, and there are limitations on its exercise, such as the accommodation of legitimate interests in the trial process. Rock 483 U.S. at 55; United States v. Scheffer, 523 U.S. 303, 308 (1998); Commonwealth v. Baldwin, 619 Pa. 178, 59 A.3d 754 (Pa. 2012)(same). Where the defendant tells the court he does not wish to testify, and the defense rests its case, the defendant's right to testify is no longer absolute and his request to re-open his case so he can testify may be declined. Commonwealth v. Baldwin, 619 Pa. 178, 59 A.3d 754 (Pa. 2012)(Defendant was not entitled to reopen and testify after the parties had rested), *affirming Pennsylvania Superior Court's decision in* Commonwealth v. Baldwin, 8 A.3d

901 (Pa. Super. 2012); United States v. Peterson, 233 F.3d 101 (1st Cir. 2000)(trial court did not err in refusing to allow defendant to re-open his case and testify where his change of mind occurred after the jury had been told the parties had rested and to expect closing arguments and had recessed, and a charging conference had been held); United States v. Jones, 880 F.2d 55, 60, n. 5 (8th Cir. 1989)(trial court did not err in refusing to allow defendant to re-open for purpose of him testifying where the decision was not communicated until after the parties had prepared jury instructions and summations, and potential rebuttal witnesses had been released and were unavailable, and defendant had previously stated on the record he understood he had the right to testify and not testify and stated on the record he chose not to); United States v. Byrd, 403 F.3d 1278, 1283 (11th Cir. 2005)(following 1st and 8th Circuit's decision in Peterson and Jones); Harrison v. Commonwealth, 2011 W.L 66016 (Va. App 2011)(Unpublished)(similar); United States v. Larson; 596 F.2d 759, 779 (8th Cir. 1979). See Minor v. Commonwealth, 16 Va. App. 803, 433 S.E.2d 39 (1993); State v. Caillier, 450 So.2d 53 (La. App. 3rd Cir. 1984); C.J.S., Criminal Law, Section 900. As a result, Judge Hayes did not err in declining Wright's late request to testify after he had rested, after a charge conference, and as the parties were preparing to argue and charge.

ARGUMENT V.

Wright's challenge to his sentence is not preserved for appellate review; and, there is no merit to the argument in any event.

Wright alleges on appeal his sentence of life imprisonment for murder is illegal or improper. He raises several grounds challenging the life sentence. These grounds are not preserved for appellate review. At sentencing, Wright did not object to his sentence of life when

it was imposed, on any basis. As a result, these issues are not preserved for appellate review. Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009).³⁴ This ground must be dismissed.

Further, the record does not reveal Judge Hayes sentenced Wright to life on the basis of the LWOP notice or S.C. Code Ann. Section 17-25-45. Wright was convicted of murder and was eligible for a life without parole sentence based solely on the crime of murder itself. S.C. Code Ann. Section 16-3-20(A)(“For the purposes of this section, “life” or “life imprisonment” means until death of the offender without the possibility of parole.” “No person sentenced to ‘life imprisonment’ pursuant to this section is eligible for parole, ...”). Additionally, this was a particularly heinous murder. The victim was shot ten (10) times while Wright was engaged in drug trafficking in the home of a third party, and Wright burned or attempted to burn the victim’s vehicle after the murder. Finally, Wright had already been to prison for several previous convictions including carjacking, assault and battery of a high and aggravated nature where he shot a 7 year old child with a high-powered BB gun, malicious injury to personal property, and carrying a pistol, and, Wright had not been rehabilitated. (See Court’s Ex. 1). Judge Hayes could have sentenced Wright to life simply because of the circumstances of this crime and Wright’s prior criminal record. In fact, the record reveals, Judge Hayes sentenced Wright on the murder indictment as he did for this very reason:

³⁴ See State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)(“This Court has repeatedly held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.”), citing State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981); State v. Winestock, 271 S.C. 473, 248 S.E.2d 307 (1978); State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012)(defendant failed to preserve for appellate review his claim trial court erred when sentencing him to LWOP where he did not raise the issue to the trial court). Therefore, this issue is not preserved for appellate review. State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997)(challenge to death penalty statute was not preserved for appeal where it was not raised at guilty plea or sentencing) citing State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995).

THE COURT: The sentence on murder is life imprisonment. All sentences are to run concurrent to each other and consecutive to the life sentence, and it is five years for the weapons charge, twenty-five years for the trafficking charge, and fifteen years for the possession of cocaine base, crack cocaine with intent to distribute, so it's life, followed by those three – two drug charges and the pistol charge sentences. Thank you.

(Tr. pp. 552, ll. 14-21). There is no indication Judge Hayes imposed the life sentence based on Section 17-25-45 instead of the facts and circumstances of this case and Wrights prior record. In fact, Judge Hayes did not even use the words life without parole or the acrostic LWOP. Finally, and importantly, the sentencing sheet for the murder indictment reflects Judge Hayes sentenced Wright to life for murder, not pursuant to Section 17-25-45. (Sentencing Sheet, Indictment number 2012-GS-26-02551). The sentencing sheet indicates Wright was sentenced to life imprisonment for violation of 16-3-20 & 20, and the box for sentencing Wright pursuant to 17-25-45 was not checked by Judge Hayes. Further, the sentencing sheet states Wright was sentenced to life imprisonment not LWOP. (Sentencing Sheet, 2012-GS-26-02551).

Finally, Wright was convicted of murder in this trial, a “most serious offense” under S.C. Code Ann. Section 17-25-45(A) & (C)(1). And, the record shows Wright had previously been convicted of carjacking, which is a “most serious offense” under S.C. Code Ann. Section 17-25-45 (C)(1). (See Court’s Ex. 1). And, Wright had been properly noticed by the State prior to this trial that if he was convicted of murder or voluntary manslaughter the State was seeking a sentence of life without parole (LWOP). S.C. Code Ann. Section 17-25-45(A) & (B). As a result, Wright **was subject to an LWOP sentence** pursuant to the recidivist statute. S.C. Code Ann. Section 17-25-45(A) & (C)(1). Therefore, even if Judge Hayes sentenced Wright to “life” pursuant to Section 17-25-45, the sentence was legal and entirely proper.

Furthermore, Wright had previously been convicted of assault and battery of a high and aggravated nature (ABHAN) a “serious” offense under S.C. Code Ann. Section 17-25-45(C)(2)(b). (See Court’s Ex. 1). The carjacking and the ABHAN were separate offenses occurring in the years 2002 and 2001 respectively. (Court’s Ex. 1). This also made Wright subject to an LWOP sentence separately when the ABHAN conviction [a serious offense] is considered in conjunction with his prior conviction for carjacking [a most serious offense]. S.C. Code Ann. Section 17-24-45(B)(1),(2),(3),(4) & (C)(1) & (C)(2)(b). And, Wright had been properly noticed by the State prior to this trial that if he was convicted of murder or voluntary manslaughter the State was seeking a sentence of life without parole (LWOP). S.C. Code Ann. Section 17-25-45(A) & (B). As a result, the Judge Hayes properly sentenced Wright to LWOP. As a result, there is no merit to this issue. This ground of this appeal must be dismissed with prejudice.

ARGUMENT VI.

Judge Hayes did not err in declining to charge voluntary manslaughter or self-defense.

What Occurred Below

Prior to the jury being instructed on the law, Wright requested Judge Hayes instruct the jury on the lesser included offense of voluntary manslaughter and on the complete defense of self-defense. Judge Hayes heard arguments from both sides and reviewed the testimony in the record. He declined to charge the jury on voluntary manslaughter or self-defense based on the testimony in the record. (Tr. pp. 463-77). Judge Hayes did not err in declining to instruct the jury on voluntary manslaughter and self-defense given the evidence presented at trial

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S. C. 439, 452, 529 S.E.2, 721, 728 (2000).

Jury Charges

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Commander, 396 S.C. 294, 721 S.E.2d 413 (2011), *quoting* State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 583. If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2011), *citing* State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007). A trial court commits error

when it fails to give a requested charge on an issue raised by the evidence presented. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). The court has a duty to charge the jury as to the law applicable to the facts brought out in the testimony. State v. West, 138 S.C. 421, 136 S.E. 736 (1927).

In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). For a court to refuse to charge a jury on voluntary manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). However, “[a]n instruction should not be given unless it is justified by the evidence.” State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979) “Only the law applicable to the case should be charged to the jury.” State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). “If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury.” Id. Furthermore, a trial judge must be cautious in charging a lesser included offense. If a trial judge improperly charges the jury on a lesser included offense that is not supported by the facts, and the jury returns a verdict of guilty on the lesser included offense, then upon reversal of the conviction of the lesser included offense, the Double Jeopardy clause prevents retrial of the defendant on the greater offense. See Price v. Georgia, 398 U.S. 323 (1970); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)(discussing fact that prosecution on retrial of greater offense than that for which defendant was convicted would constitute a violation of the Double Jeopardy Clause); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992)(finding trial counsel ineffective for falsely informing defendant he could be convicted of murder on retrial if he appealed and

succeeded in vacating his manslaughter conviction). When the record contains no evidence to support a lesser included offense, a charge on the lesser included offense should not be given. *See State v. Smith*, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005), *referencing State v. Cooley*, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-69 (2000).

Under South Carolina law, the defense of self-defense is recognized; however, simply because a defendant requests an instruction on the defense of self-defense does not mean he is entitled to one. In order to be entitled an instruction on the law of self-defense, the defendant must produce some evidence or some evidence must be presented at trial establishing the elements of self-defense. *State v. Bryant*, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999)(A self-defense charge is not required unless supported by the evidence); *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994)(a self-defense charge is not required unless supported by the evidence); *State v. Williams*, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), *quoting State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)(“The law to be charged must be determined from the evidence presented at trial.”); *State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996)(holding that the defendant was not entitled to a self-defense charge where he presented no evidence that he believed that he was in imminent danger when he shot the victim). “If there is any evidence in the record from which it could reasonably be inferred the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge’s refusal to do so is reversible error.” *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008). “Because all of the elements are required to establish self-defense . . . [i]t is an axiomatic principle of law that [self-defense] has not been established if any one element is disproven.” *In re Tracy B.*, 391 S.C. 51, 704 S.E.2d 71 (Ct.App. 2011), *quoting State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d

572, 586 (2010). A self-defense charge is not required unless supported by the evidence. State v. Bryant, 336 S.C. at 344, 520 S.E.2d a 321; Goodson, *supra* (a self-defense charge is not required unless supported by the evidence). Moreover, “[n]o instruction should be given which tenders an issue which has not been presented or supported by the evidence ...[as] even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury.” See State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010), *quoting* State v. Mollison, 319 S.C. 41, 48, 459 S.E.2d 88, 93 (Ct. App. 1995)(internal citation and quotation omitted). See also State v. Bruno, 322 S.C. at 536, 473 S.E.2d at 452 (holding that the defendant was not entitled to a self-defense charge where he presented no evidence that he believed that he was in imminent danger when he shot the victim).

Voluntary Manslaughter

Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden head of passion upon sufficient legal provocation. State v. Smith, 391 S.C. 408, 412,-13, 706 S.E.2d 12, 14 92011); State v. Frazier, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013). The sudden heat of passion upon sufficient legal provocation, ...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 Childers, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007). The sudden heat of passion “must cause a person to lose control.” State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604 (2010).

Self-defense

The elements of self-defense under South Carolina law are as follows: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in actual danger of losing his life or sustaining serious bodily injury; (3) if his defense is based on his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such that would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his life; and (4) the defendant had no other probable means of avoiding the danger. If however the defendant was on his own premises he has no duty to retreat before acting in self-defense. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010), *citing* State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). *See also* State v. Frasier, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013) Appellant was not entitled to a charge on voluntary manslaughter or to a jury charge on self-defense given the evidence introduced at trial.

Analysis

Wright alleged his request for a jury instruction on the lesser included offense of voluntary manslaughter and the affirmative defense of self-defense should be given based statements he made to witnesses after the crime, and to some portions of eyewitness' testimony. Therefore, it is necessary to review the testimony of these witnesses at trial.

The Eyewitnesses

Roy Sinclair

Roy Sinclair testified that the victim, his cousin, was let into Roy's residence and the victim spoke to him, Sinclair. The victim stated "...you got these dudes running your house like that?" Sinclair responded: "...no, ain't nobody running my house but me." At this point, appellant Wright stated: "...what the fuck you just say, nigger?" The victim responded "nah, man, I didn't say nothing. Everything cool." At that point, appellant Wright jumped up from the table with the gun and said: "...aw, fuck this shit, nigger," and started shooting at the victim multiple times while walking toward the victim as he was shooting. (Tr. p. 181, ll. 10-24). Sinclair testified that he never saw a weapon on the victim, the victim did not carry a weapon, and the victim did not threaten Wright before the shooting occurred. (Tr. p. 186, ll. 4-13). Obviously, this testimony would not entitled Wright to a charge on voluntary manslaughter or self-defense and needs no discussion.

Veronica D. Chandler

Veronica D. Chandler testified she had just arrived at Sinclair's home to purchase crack cocaine. The victim, J.J. arrived shortly after she did. She testified when the victim came in Sinclair's home he "...made a statement because somebody opened the door and he [the victim] was like that's how you got your house run. You got people opening your doors and what not." She testified when the victim came in he spoke to everybody in the home, and then he spoke to her. She and the victim were talking. She testified the man in the kitchen [Wright] said something, and the victim said: "...yeah, yeah, yeah." She testified there was no argument or fussing or anything. She did not hear the victim threaten anyone, and he [the victim] resumed

talking to her in the living room. Then the person in the kitchen [Wright] started shooting: “boom, boom, boom, boom.” (Tr. 202, ln. 12 – 203, ln. 22, 204-05). She was close enough to the victim when he was shot, that she thought she had been shot, and the victim’s blood splattered on her clothing. (Tr. pp. 205-07). On cross-examination, defense counsel *tried* to get Chandler to admit she told police she thought she saw a gun on the victim. However, Chandler testified she did not recall ever telling the police she saw or thought she saw a weapon on the victim; she did not give a written statement as defense counsel suggested on cross-examination, and she only gave a recorded statement which she had reviewed prior to trial and in that statement she did not tell police she thought she saw a weapon on the victim. (Tr. pp. 209-12).³⁵ She did remember telling the police that she saw the victim raise his shirt up on one (1) occasion, but she did not see a gun on him. (Tr. pp. 209-12). Obviously, this testimony would not entitle Wright to an instruction on voluntary manslaughter or self-defense either.

Mildred B. Small

Mildred Small testified she was at the mobile home because her friend Veronica Chandler was there to purchase something. She testified she was in the kitchen, and there was a man sitting at the kitchen table [Wright]. She testified she saw a clip for a semi-automatic weapon on the kitchen table where Wright was sitting. There was a knock at the door and Roy [Sinclair] said that’s J.J. because he’s supposed to be coming over here to bring me a drink. Veronica was in the living room. Mildred was talking to a white girl in the kitchen. She did not hear any arguing or fussing. She did not hear anyone threaten anyone. Wright disappeared from the kitchen table. The next thing she heard was “..pow, pow” and she got on the floor. When

³⁵ Appellant Wright did not introduce any prior inconsistent statement, written or recorded, to impeach Veronica Caldwell-Brown on these facts

she looked up, the victim was laying on the floor and blood was coming out of his mouth. She saw no weapon in the victim's hand. She testified his hand was wrapped or looked like it was injured or something. She ran out of the house. Her friend Veronica came running from behind the house. Mildred testified Veronica thought she had gotten shot. She saw a man run to a black car. She heard someone say to her, if you say anything about what just happened, "we will kill you." (Tr. pp. 215-20). Obviously, this testimony would not entitle Wright to a charge on voluntary manslaughter or self-defense. Mildred Small did not hear the victim threaten Wright, she did not see a weapon on the victim, and she did not see the victim make any threatening gesture. She did not even hear any argument. (Tr. pp. 215-30).

The non-eyewitnesses

Relevant Law Enforcement Testimony

Law enforcement found no weapon on the victim or around his body. (Tr. pp. 353-55; 370-379, ln. 4; 383, ln. 23 -384, 9). The autopsy determined the victim died as a result of multiple gunshot wounds. The victim was shot a total of ten (10) times. Three (3) in the back. (Tr. 428-37, 360-67, 415-16).

Qwanda Caldwell-Brown

Powell's girlfriend, Qwanda Caldwell-Brown, testified that when she and Powell returned to Sinclair's residence shortly after the murder occurred, she was driving the vehicle she and Powell were in. Appellant Wright was leaving Sinclair's residence in his black BMW, and Wright stopped beside her vehicle coming in the opposite direction from Qwanda and spoke out his driver's side window next to her driver's side window. (Tr. p. 233, ll. 1-9; pp. 251, ln. 4 – 252, ln. 18). Wright stated out his driver's side window to Powell: "Pick up the shells Brah."

(Tr. p. 233, ll. 1-9; pp. 251, ln. 4 - 252, ln. 17). That was all he said according to Qwanda. (Tr. pp. 252, ll. 15-18).

Powell's girlfriend, Qwanda Caldwell-Brown also testified to what appellant Wright told her about the murder while she was assisting in the cover-up of the crime:

Q. During the time that you were in the vehicle with Marcus, did you ask him what happened at the trailer?

A. Yes, I did. I asked him what happened, and he told me that - - he was explaining to me that when - - when the victim came and knocked on the door and he asked who it was, he didn't recognize who it was, and he asked - - at that - - they called Roy Unc, the guy in the wheelchair, he asked Unc did he know who it was at the door, and he told him yes, that's my cousin, open the door. So he said he opened the door for him and when he opened the door, he was explaining to me that when someone is walking in, you've got to watch how they stand because you never know what could happen, and he opened the door, the victim came in, and Marcus said that the victim, Jerome, asked Unc why you got these young boys in here, something to that extent, and I believe that's when words were exchanged, a argument happened, and then he said - - I can't recall if he said that he - - that if that - - Jerome had a gun or not, but I do remember him saying that he [the victim] had to get got.

Q. And this was Marcus [Wright] talking?

A. Yes.

Q. What was - - as Marcus is describing this, and this is - - when y'all were talking about this, how long after the shooting is this?

A. Maybe five, six hours later.

Q. And what was his demeanor? Do you understand - - do you understand what I'm saying, demeanor?

A. Yes.

Q. What was Marcus's demeanor when he was telling you about this?

A. Just speak - - talking regular, just a regular conversation, you know, no jitterness, or regret, or remorse or anything, just like, you know, just explaining like this is what happened, this is how it is, in that sense?

Q. Have you seen Marcus [Wright] with a gun?

A. Yes, I have.

Q. Was it that day?

A. Yes, it was.

Q. Where was it?

A. It was on the kitchen table.

(Testimony continues on an unrelated subject)

(Tr p. 241, ln. 9 – 242, ln. 23).

Qwanda then testified as follows:

Q. Did Marcus ever tell you that he took a gun from the victim?

A No.

(Testimony continues on an unrelated subject).

(Tr. p. 243, ll. 17-19). Qwanda also testified she only saw two (2) guns that day, the nine (9) mm pistol that her boyfriend Lanard Powell took with them in the vehicle when they left the mobile home before the murder, and the gun appellant Marcus Wright had on the kitchen table. (Tr. pp. 242-43). Qwanda also testified that at the La Quinta motel she heard Wright say out loud: “he knew he was going to have to shoot him or kill him a nigger tonight.” (Tr. p. 245, l. 9-15). Obviously, the testimony of Qwanda Caldwell-Brown would not entitle Wright to an instruction on voluntary manslaughter or self-defense. Because the victim made a statement to his cousin, Roy Sinclair, and Wright was offended by the statement, did not give Wright the right to shoot and kill the victim or lessen Wright’s culpability. This evidence only proves malice and murder, not voluntary manslaughter or self-defense.

Lanard Powell

Powell testified that when he and Qwanda returned to Sinclair's residence from making the drug delivery, Wright stated out the window of his car: "nigger trying to pull a jack move" or "nigger tried to pull a jack move." (Tr. pp. 297, ll. 1-2, 298, ln. 9). Powell did not hear Wright say anything else. No testimony was introduced at trial what a "jack move" was.³⁶ Powell testified when he entered Sinclair's residence, there was no weapon on or around the victim. Powell did not take a weapon off the victim, and no one gave Powell a weapon from the victim.

On direct examination, Lanard Powell testified to what appellant Wright told him occurred during the shooting.

Q. Did you and Marcus talk about what had happened in the trailer?

A. Yes.

Q. What did Marcus tell you about that?

A. He told me that Mr. Green – he say he heard him knock on the door. He say he swung the door open. He say he [Wright] had a gun in his hand, say everybody else was just like basically roaming in there, and Mr. Green came in saying such things as you got these boys in your house now. He indicated that Mr. Green looked as if he was going for a gun.

Q. So if he indicated that Mr. Green looked like he was going for a gun, he [the victim] didn't have – he [the victim] wouldn't have had it in his hand, right?

A. No.

Q. So - - and it's important. Did Marcus – what did Marcus tell you about that?

A. He said that he looked like he was – he took like – he said Mr. Green took like three steps into the home and was reaching by his abdomen, indicating he had a gun, so he shot him.

³⁶ According to *Urban Dictionary*, a "jack move" is to steal something without their consent. An action which someone does to another person for their personal belongings.

Q. Did Marcus ever tell you he saw a gun?

A. No.

Q. Did he tell you what he [Wright] did with the forty [caliber, Wright's gun]?

A. No.

Q. Did you ask him?

A. No.

Q. Did you see it once y'all got in the car together, the Durango?

A. No ma'am.

Q. Did he say that Mr. Green threatened him in any way?

A. No.

(Testimony continues on another subject).

(Tr. p. 275, ln. 21 – p. 277, ln. 1).³⁷ This testimony would not entitle Wright to an instruction on voluntary manslaughter or self-defense.

There is nothing from this testimony that would entitle Wright to a charge on voluntary manslaughter. The fact that the victim took three (3) steps into the home and reached by his abdomen, indicating he had a gun, would not naturally disturb the sway or reason and render the

³⁷ The only other thing that Powell testified to that could have any relation to a charge on voluntary manslaughter or self-defense was an admission that he, Powell, wrote a letter, *at Wright's insistence*, absolving Wright of any wrongdoing. Powell admitted that in the letter, he wrote at Wright's insistence, he stated that Wright did not do anything wrong. Powell testified that based on what Wright told him to write in the letter, Wright did not do anything wrong. However, Powell did not testify to what was in the letter, or what Wright had told him, that led him to believe Wright did nothing wrong. (Tr. pp. 304, ln. 25 – 308, ln. 2). And, Wright did not introduce the letter. This testimony would not entitle Wright to an instruction on voluntary manslaughter or self-defense. If this is the same letter wherein Wright alleged Powell stated that "Two Guns" committed the crime **not Wright**, this would certainly not entitle Wright to an instruction on voluntary manslaughter or self-defense. (Tr. pp. 304, ln. 25 – 315, ln. 6).

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. Childers. There were no prior threats by the victim against Wright. The victim did not point a gun at the victim, or even pull a gun. And, Wright did not tell Powell he even saw a gun. Further, Powell never saw a gun alleged to have come off the victim at any time while covering up the crime with Wright or hiding out with him. Judge Hayes did not err in declining to charge voluntary manslaughter.

There is no evidence in the record the defendant was entitled to a charge on self-defense. There is no evidence Wright was without fault in bringing on the difficulty. Wright went and opened the door with a gun in his hand, the .40 caliber. According the Wright, the victim made the comment to his cousin, Roy Sinclair. Wright took offense to the comment and started an arguing at the victim with a loaded .40 caliber pistol in his hand Wright simply cannot show he had no fault in bringing on the difficulty.

There is no evidence Wright was in actual imminent danger of losing his life or sustaining serious bodily injury when the fatal blow was struck or that he believed that he was in imminent danger. Davis, supra. See State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996)(holding that the defendant was not entitled to a self-defense charge where he presented no evidence that he believed that he was in imminent danger when he shot the victim); State v. Goodson, 312 S.C. 278, 440 S.E 2d 370 (1994)(same); see also Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992)(where there is no evidence to suggest defendant believed she was in imminent danger of loss of life at the time she killed, counsel's failure to secure expert on self-defense was not ineffective assistance because the defense was not applicable).³⁸ If Wright's alleged

³⁸Wright argues he was entitled to a self-defense instruction under State v. Light, supra.

statement to Powell about a “jack move” relates to the victim allegedly trying to take his drugs and drug money, Wright was not in fear of his life or serious bodily injury but only of losing his illegal drugs and illegal drug profits. Additionally, Wright did not tell Powell that he ever saw a gun on the victim. In fact, Wright stated he [Wright] had a gun in his hand when he opened the door and let the victim into the residence. Further, there is no evidence Wright was in danger or losing his life or suffering serious bodily injury when he shot the victim at total of ten (10) times, three (3) of which were in the back. No weapon was found on the victim or around the victim. Powell did not take a weapon off of the victim. Powell never saw a weapon in the two (2) following days he spent with Wright, that Wright represented or alleged belonged to the victim.

Even if Wright believed he was in danger of losing his life or suffering serious bodily injury that belief was not reasonable under the circumstances and a reasonable person would not have so believed. State v. Fuller, 297 S.C. 440, 442-43, 377 S.E.2d 328, 330 (1989). See State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987)(finding on the facts of that case that any belief in the necessity of using deadly force was unreasonable as a matter of law; consequently holding that the trial judge did not err in failing to instruct on defense of habitation, and noting defendant *was not* entitled to self-defense instructions he did receive). No one saw a weapon on the victim, including Wright. The victim came to Sinclair’s residence at Sinclair’s invitation. No threats

However, Light is clearly distinguishable from the present case. In Light the defendant was in his own home and had no duty to retreat. Further, in Light the victim had armed herself with a loaded rifle that the defendant stated he took away from the victim and in taking the gun away from the victim the gun accidentally discharged. Id. That did not occur in this case. Further, in Light, the victim had previously threatened the defendant before that if she caught him running around with another woman it was going to be bad and had found what she believed was a woman’s hair and confronted the defendant with it shortly before the shooting. In the present case, there was no evidence of any previous threats by the victim against the defendant, but the opposite. Light is not controlling on these facts.

were ever made by the victim to Wright. Wright's paranoia as a drug trafficker or dealer would not entitle him to kill the victim because he saw the victim move his hand toward his abdomen.³⁹ And, there was no testimony in the record what a "jack move" was. Even if Wright's version is believed, the belief that he needed to use deadly force was unreasonable. See State v. Wood, 1 S C.L. (1 Bay)(1794)(key to self-defense is the defendant can only respond with proportionality).

Further, appellant Wright was not in his own home but the home of Roy Sinclair. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Chambers, 310 S C. 43, 425 S.E.2d 45 (Ct. App. 1992). The victim was an invitee to Sinclair's home.⁴⁰ Wright had a duty to retreat and there was no evidence that he retreated before the fatal blow or blows he intentionally inflicted. Brown; Chambers. "It is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased." State v. Frasier, *citing* State v. Jackson, 227 S C. 221, 279, 87 S.E.2d 681, 685 (1955). Even assuming a "jack move" is an attempted hijacking of drugs, Wright was not acting in self-defense but to protect his illegal contraband, crack and powder cocaine and illegal drug profits. "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), *quoting* Bixby, 388 S.C. at 554, 698 at 586. Wright *failed to present any*

³⁹ The victim had a cell phone case containing a cell phone on his belt next to his abdomen. The victim's right hand was bandaged and had a splint on one finger. (Tr. pp.354-55, 371-74, 378-79)

⁴⁰ Sinclair testified he had invited the victim to come over to his home later that evening to drink, and Sinclair testified he directed Wright to open the front door and let his cousin, the victim, in. Compare State v. Osborne, 202 S.C. 475, 25 S.E.2d 561 (1943); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942)(a lawful guest attacked in the owner's home has no duty to retreat where the attacker is *an intruder*).

evidence that retreating would have increased the danger to himself. And, *there was no evidence in the record* that retreating would have increased the danger to Wright. Frasier; Jackson.

Finally, Wright had other means of avoiding the difficulty rather than to act as he did. Instead of shooting the victim ten (10) times with a .40 caliber pistol, Wright could have simply pointed his .40 caliber weapon at the victim, which Wright had in his hand when he opened the front door, and told the victim not to move when he reached by his abdomen. Or, waited until the victim actually started pulling out an actual gun before shooting the victim ten (10) times. As a result, Wright is not entitled to an instruction on self-defense. Rivera, *supra*.

The Defense case

Appellant Wright introduced no evidence during the defense case. The only evidence Wright introduced during the trial was *an envelope* on cross-examination of a State's witness. (Tr. pp. 463-65). There was nothing introduced by Wright or in his case in chief that would justify an instruction on voluntary manslaughter or self-defense. As a result, Judge Hayes did not abuse his discretion in declining to charge voluntary manslaughter and self-defense under the facts of this case.

Harmless Error

Further, even assuming *arguendo* appellant was somehow entitled to a voluntary manslaughter instruction and/or a self-defense instruction, the failure to do so was harmless under the particular facts of this case. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding harmless error analysis is appropriate for the failure to charge a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(same). This Court has previously held that the refusal to charge the jury with an appellant's requested instruction is

subject to harmless error analysis. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007), *affirmed* 387 S.C. 310 (2010); State v. Jeffries, 316 S.C. 13, 21, 446 S.E.2d 427, 431 (1994) (noting that the harmless error analysis is appropriate where the error complained of is a “trial error” rather than a “structural defect” in the trial mechanism itself). *See also* State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (2010), *Toal, C.J. concurring* *Contra* Light; Lee.

The failure to charge voluntary manslaughter and self-defense in this case was harmless where Wright’s version of events was so preposterous and non-credible and the evidence of guilt was overwhelming, that the jury would not have accepted the same and convicted him of voluntary manslaughter or acquitted him of murder even had self-defense been charged. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). “When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’” Middleton, *supra*, *quoting* State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). “In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” Id., *citation omitted*. “Thus, whether or not the error was harmless is a fact intensive inquiry.” Id.

A fact intensive inquiry shows the trial court’s not charging voluntary manslaughter and/or self-defense did not contribute to the verdict. The evidence presented by the State showed that on April 30, 2012, Wright and Lanard Powell were distributing crack cocaine from Roy Sinclair’s home, and they had been doing this illegal activity for three (3) to four (4) weeks. Wright had given Powell a 9mm pistol to carry while dealing drugs from Sinclair’s mobile home and making drug deliveries. On the night of April 30, 2012, Powell left the mobile home with

his girlfriend Qwanda Caldwell-Brown to make a drug delivery and to go to a local store. Powell took the 9mm pistol with him. Wright remained at Sinclair's residence cutting up drugs at the kitchen table with his .40 caliber pistol beside him.

Several witnesses arrived at Sinclair's residence, including Veronica Chandler and Mildred Small. Both women came into the residence with Small going into the kitchen and Chandler remaining in the living room. Both were inside the residence before the victim arrived.

The victim Jerome J. Green, Jr. was a cousin of Roy Sinclair, the owner of the residence. Green came over to the residence to bring Sinclair some alcohol to drink. When the victim knocked on the door, Sinclair told Wright that it was his cousin "J.J." and it was okay for Wright to let him in the residence. Wright opened the door with his .40 caliber handgun in his hand. After the victim entered the residence, he spoke to his cousin Sinclair stating something to the effect: "So this is how it is, you going to let these young boys run your house."

Wright took offense to the statement. Wright asked the victim to repeat what he just said. The victim declined and turned to speak with Veronica who was in the living room with the victim. Wright, who was in the kitchen, raised his .40 caliber pistol and shot the victim and continued shooting at the victim as he walked toward him. Wright shot the victim ten (10) times. The victim was shot three (3) times in the back. Sinclair and Veronica both witnessed the murder. Neither Sinclair nor Veronica saw any weapon on the victim. Sinclair testified his cousin the victim did not carry a weapon. Neither eyewitness heard or saw the victim threaten Wright in any way. Mildred did not see the shooting but immediately dropped to the floor.

Sinclair, Veronica, and Mildred fled from the residence. Wright fled from the residence, not out of fear, but because of what he had done. He took his .40 caliber pistol with him. He got

into his black BMW and started to drive away from the scene. Powell and Qwanda were returning to the residence, and Wright spoke to Powell. Roy Sinclair overheard Wright say he had just murdered someone and Powell needed to get his stuff out of the mobile home. Qwanda heard Wright tell Powell to “pick up the shell casings.” Wright then fled the scene in his black BMW.

The testimony at trial established Powell did exactly as Wright told him to do. Powell, Qwanda, and Mildred all testified Powell pulled into the residence, got out of his car, and went into the residence with a 9mm pistol; however, Powell did not fire his weapon. Powell determined the victim was dead and then did as Wright had instructed him. He got the drugs and money out of the residence and threw them in the car driven by Qwanda. Powell did not see any weapons on the victim and did not pick up any weapons inside the home. Powell took the victim’s car keys and drove away in the victim’s vehicle. At Powell’s instructions, Qwanda followed him in her own car.

While Powell was cleaning up the crime-scene at Wright’s instructions, Wright drove his BMW to another location and switched vehicles. He then contacted Powell by phone and met Powell and Qwanda at another location. Wright was now driving a dark Cadillac Escalade. The three (3) then drove to another location, where the Escalade was abandoned, and Wright got into the victim’s truck with Powell. The three (3) then drove to a gas station where Qwanda was instructed to purchase gasoline, which she did. Wright and Powell put gasoline in a gas can. The three (3) drove the victim’s truck to a secluded location, and Wright attempted to burn the victim’s vehicle

The three (3) then proceeded to a motel where Qwanda then rented a motel room for Wright and Powell in her name. The following day, Wright's wife rented a red Camaro for Wright, which Wright, Powell, and Qwanda picked up at the airport. Wright and Powell eventually got in the red Camaro and went to another motel, where Powell rented a room using an alias and fake I.D. which Wright had given Powell. When police apprehended the two (2) men together in the motel room, there was a large amount of crack cocaine, over twenty-eight (28) grams of powder cocaine, and over three thousand dollars (\$3,000) in U.S. currency in plain view atop a refrigerator in the motel room.

When police searched the red Camaro, they found Powell's 9mm pistol. Importantly, they found the gun case for a .40 caliber pistol, which contained paperwork showing Wright's wife had purchased a .40 caliber pistol before the murder. Police also found two (2) ammunition clips containing .40 caliber ammunition.

When police searched Wright's wife's residence, they found two (2) fired .40 caliber shell casings that matched the three (3) fired shell casings found at the crime-scene adjacent to the victim's body. All five (5) fired shell casings were fired by the same gun, a .40 caliber pistol.

When police searched the black BMW which Wright used to flee from the crime scene, they found one (1) unfired .40 caliber bullet. Police never found the .40 caliber pistol because Wright got rid of the murder weapon. Wright offered no evidence in the defense case.

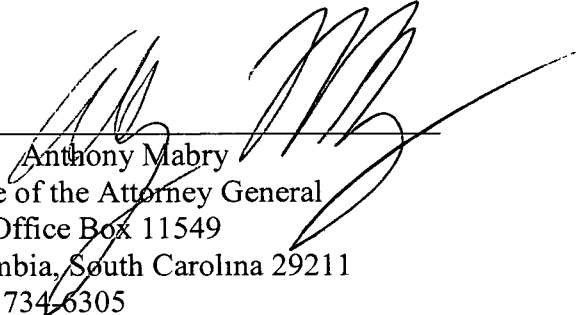
Given the evidence *in this particular case*, it is clear the failure to charge voluntary manslaughter or self-defense was harmless beyond a reasonable doubt. Middleton, *supra* (finding failure to charge lesser included offense was harmless after a fact specific inquiry); *see Battle*, *supra* (finding failure to charge lesser included offense was not harmless after a fact

specific inquiry in that particular case). Further, the failure to charge voluntary manslaughter or self-defense could have had no effect on the guilty verdicts for PWID crack cocaine, trafficking in cocaine greater than 28 grams, and possession of a pistol during a violent crime.

CONCLUSION

For the above stated reasons, appellant's convictions and sentences for murder, trafficking in cocaine greater than 28 grams, PWID crack, and possession of a weapon during a violent crime should be affirmed and this appeal dismissed.

Respectfully submitted,

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