

ORIGINAL

RECEIVED

SEP 1 9 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT.

APPELLATE CASE NO. 2013-002209

---

INITIAL BRIEF OF APPELLANT

---

CARMEN V. GANJEHSANI  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....1

TABLE OF AUTHORITIES .....2

STATEMENT OF ISSUES ON APPEAL .....3

STATEMENT OF THE CASE .....4

STATEMENT OF FACTS .....5

ARGUMENT

    I. The Trial Court erred in charging the jury on the “hand of one is the hand of all” theory of accomplice liability where the State did not present any evidence of a common plan or design between Appellant and her alleged accomplice to commit murder and where the evidence established that it was either one or the other who committed the murder alone .....24

    II. Appellant’s confession given on May 26, 2011 to police was inadmissible where she had advised investigators that she planned to retain an attorney before she turned herself in and spoke to police and the police interrogated her anyway without an attorney present thereby violating Appellant’s rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation .....33

    III. The Trial Court erred in refusing to charge voluntary manslaughter where the State presented at evidence at trial that the murder may have occurred after Appellant and the decedent had a heated argument after which he hit her numerous times and then she snapped. ....36

    IV. The Trial Court erred in holding evidence that Appellant’s co-defendant Wise had previously shot and killed her dogs without justification was inadmissible under Rule 608 where Appellant did not offer such evidence to impeach her co-defendant’s credibility, but rather offered such evidence to show her state of mind after the murder to explain why she feared for her life and why she engaged in certain actions after the murder.....40

CONCLUSION .....42

## TABLE OF AUTHORITIES

### **Cases**

<u>Edwards v. Arizona</u> , 451 U.S. 477 (1981).....	34, 35
<u>Fare v. Michael C.</u> , 442 U.S. 707 (1979).....	34
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964).....	33
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966).....	33, 34
<u>Montejo v. Louisiana</u> , 556 U.S. 778, 787 (2009).....	34, 35
<u>State v. Byrd</u> , 323 S.C. 319, 474 S.E.2d 430 (1996).....	36
<u>State v. Cole</u> , 338 S.C. 97, 525 S.E.2d 511 (2000).....	36, 37
<u>State v. Condrey</u> , 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).....	31
<u>State v. Dickman</u> , 341 S.C. 293, 534 S.E.2d 268 (2000).....	30
<u>State v. Gardner</u> , 219 S.C. 97, 64 S.E.2d 130 (1951).....	38
<u>State v. Garris</u> , 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011).....	27
<u>State v. Knoten</u> , 347 S.C. 296, 555 S.E.2d 391 (2001).....	37, 38
<u>State v. Langley</u> , 334 S.C. 643, 515 S.E.2d 98 (1999).....	27
<u>State v. Mattison</u> , 388 S.C. 469, 697 S.E.2d 578 (2010).....	27
<u>State v. Miller</u> , 397 S.C. 630, 725 S.E.2d 724 (Ct. App. 2012).....	27
<u>State v. Norris</u> , 253 S.C. 31, 168 S.E.2d 564 (1969).....	38
<u>State v. Smith</u> , 391 S.C. 408, 706 S.E.2d 12 (2011).....	38
<u>State v. Thompson</u> , 374 S.C. 257, 647 S.E.2d 702 (2007).....	31
<u>State v. Ward</u> , 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007).....	31
<u>State v. Wills</u> , 762 S.E.2d 3 (2014).....	28
<u>United States v. Blackshire</u> , 538 F.2d 569 (4th Cir. 1976).....	40
<u>United States v. Smith Grading &amp; Paving, Inc.</u> , 760 F.2d 527 (4th Cir. 1985).....	40
<u>Wilds v. State</u> , 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).....	28

### **Statutes**

S.C. CODE ANN. § 16-3-50.....	37
-------------------------------	----

### **Rules**

Rule 608, SCRE.....	40, 41
---------------------	--------

### STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court erred in charging the jury on the “hand of one is the hand of all” theory of accomplice liability where the State did not present any evidence of a common plan or design between Appellant and her alleged accomplice to commit murder and where the evidence established that it was either one or the other who committed the murder alone.
- II. Appellant’s confession given on May 26, 2011 to police was inadmissible where she had advised investigators that she planned to retain an attorney before she turned herself in and spoke to police and the police interrogated her anyway without an attorney present thereby violating Appellant’s rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.
- III. The Trial Court erred in refusing to charge voluntary manslaughter where the State presented at evidence at trial that the murder may have occurred after Appellant and the decedent had a heated argument after which he hit her numerous times and then she snapped.
- IV. The Trial Court erred in holding evidence that Appellant’s co-defendant Wise had previously shot and killed her dogs without justification was inadmissible under Rule 608 where Appellant did not offer such evidence to impeach her co-defendant’s credibility, but rather offered such evidence to show her state of mind after the murder to explain why she feared for her life and why she engaged in certain actions after the murder.

## STATEMENT OF THE CASE

On August 5, 2011, the Newberry County Grand Jury indicted Appellant Mandy Lenore Smith of (1) murder; (2) possession of a weapon during the commission of a violent crime; and (3) desecration of human remains. Tr. 11, ll. 3-12; R.\*

Appellant proceeded to trial on October 7, 2013 before the Honorable R. Knox McMahon and a jury. Tr. 1. Appellant was represented by Charles V. Verner, and the State was represented by Solicitor David M. Stumbo and Assistant Solicitor Christopher Dale Scott. Id.

On October 11, 2013, the jury found Appellant (1) guilty of murder; (2) not guilty of possession of a weapon during the commission of a violent crime; and (3) guilty of desecration of human remains. Tr. 1090, ll. 13-22.

On October 14, 2013, Judge McMahon sentenced Appellant to (1) forty (40) years for murder; and (2) ten (10) years for desecration of human remains. Judge McMahon ordered the sentences to run consecutive for a total of fifty (50) years. October 14/Tr. 19, ll. 12-20.

Appellant timely filed and served her Notice of Appeal.

## STATEMENT OF FACTS

The decedent, John Henry Mayers, was reported missing by his family on May 10, 2011. Tr. 236, ll. 18-21. His family had last seen him on May 7, 2011. Tr. 201, l. 5 – 202, l. 12; 230, ll. 7-22; 238, ll. 12-15. Mayers did not show up for work on May 9, 2011. Tr. 208, ll. 19-21. Mayers' family gave law enforcement the name of Appellant during the search for Mayers. Tr. 232, ll. 17-22.

Appellant grew up in Chapin, South Carolina. Tr. 844, ll. 7-8. She had lived a difficult life starting when she was a young child. When she was ten years old, she suffered from a condition called hysterical blindness which causes a person to experience temporary blindness when a traumatic event occurs in your mind. It is a type of mental issue. Tr. 816, l. 17 – 817, l. 21. Appellant had also been sexually molested by her grandfather has a child. Her grandfather was convicted and placed on the sex offender registry for his sexual abuse of Appellant. Tr. 817, l. 23 – 820, l. 15. When Appellant was about thirteen years old, she was sent to live at the Epworth's Children's Home in Columbia. Tr. 821, ll. 6 – 18.

Appellant met Mayers while she was still in high school, around the age of fourteen or fifteen. Tr. 844, ll. 16-21. Mayers was about eleven years older than her and was in his twenties. Tr. 844, l. 22- 845, l. 2. Mayers began a sexual relationship with Appellant. Tr. 846, ll. 3-5. Mayers also introduced Appellant to crack cocaine, and they would smoke crack cocaine together at least every day. Mayers and Appellant were together off and on until she was about eighteen years old. Tr. 846, ll. 13-25; 850, ll. 15-19.

About six months after Appellant began the sexual relationship with Mayers, she moved into his family home where Mayer's mother also lived. Tr. 825, ll. 4-10; 847, ll. 3-10; Mayers' family members confirmed at trial that Appellant lived with the Mayers family

as a teenager. Tr. 198, ll. 4-18; 221, l. 17 – 222, l. 17; 233, ll. 4 – 17. Mayers' family members also confirmed that Mayers had a crack cocaine addiction. Tr. 196, ll. 4-10; 199, ll. 17-20; 218, l. 24 – 219, l. 20;

Appellant loved Mayers and that he treated her nicely for the most part, although Mayers was often physically violent toward her. Tr. 848, l. 5 – 849, l. 7. The acts of violence occurred at least once a week. Tr. 850, ll. 20-21; 853, ll. 7-9. Appellant also asserted that Mayers would make her have sex with other men in exchange for crack cocaine. These encounters were arranged by Mayers. Tr. 851, l. 7 – 852, l. 8.

Appellant testified that while Mayers was pleasant and friendly when he was sober, Mayers usually became verbally abusive and aggressive after smoking crack cocaine. Tr. 852, l. 18 – 853, l. 6. During Mayers' violent episodes, he would slap her and hit her with closed fists. These incidents did not occur in front of Mayers' family. Tr. 853, ll. 10-18; 854, ll. 12-20. Mayers also punished her by making her have anal sex. Tr. 854, l. 21 – 855, l. 4.

When Appellant was eighteen year old, she moved to Georgia and then to Michigan. Tr. 855, l. 8 – 858, l. 11. Around 2003 or 2004, she returned to the Lake Murray area and rekindled her relationship with Mayers. That lasted until she got married to a serviceman and moved to Germany for almost two years. Tr. 858, l. 18 – 859, l. 11.

Appellant got divorced and eventually moved back to South Carolina to a property on Wheeland School Road near Little Mountain. Tr. 862, ll. 1-6; 864, ll. 7-19. When she moved back to the Little Mountain area, Appellant met a man named Timothy Wise on the internet. She had one sexual encounter with Wise but then they became very good friends because Appellant was not interested in Wise as a boyfriend. Tr. 866, l. 15 – 868, l. 10.

Appellant believed she met Wise around 2009. As good friends, they saw each other almost every day. Tr. 869, ll. 6 – 13.

After Appellant had moved back to the Wheeland School Road property, Mayers found out she was back and living there. Mayers showed up at her residence one day. Tr. 870, ll. 13-21. Appellant and Mayer began seeing each other again and had been seeing each other for six or so months prior to his last being seen on May 7, 2011. They would meet a few times a week. Tr. 876, ll. 7-13. They often times went to a place out in the woods off of Judy B. Road for their encounters. Tr. 883, ll. 1-13.

On April 8, 2011, Appellant had a restraining order placed against Mayers because he had come to her property one night and hit her quite a few times. Tr. 879, l. 12 – 881, l. 23. Timothy Wise and another friend, Kris Hansen, helped Appellant obtain the restraining order. Tr. 880, ll. 18-20. Kris Hansen testified at trial that the incident which resulted in the restraining order occurred around March 23, 2011 after he and Appellant had returned back to her house from Waffle House. The two were sitting the car chitchatting when “two headlights just popped on and all of sudden [Appellant] was getting hauled out of the passenger side . . . .” Hansen saw “two arms and a fist, pulling her out and beating her.” Hansen was able to pull Appellant back into the car. As a result of this incident, Hansen testified at the restraining order hearing, and the restraining order was issued against Mayers. Hansen and Wise were in attendance at the hearing with Appellant. Tr. 749, l. 22 – 753, l. 2.

Despite the restraining order, Appellant began seeing Mayers again approximately three days after the restraining order was issued. Tr. 881, ll. 1-4; 882, ll. 6-8. Mayers showed up at Appellant’s home. They talked about the restraining order, and Mayers

apologized. Appellant and Mayers resumed a sexual relationship, and they saw each other about three to four times a week. Tr. 882, ll. 6-23.

When Mayers went missing, Detective Billy Derrenbacher of the Lexington County Sheriff's Office was assigned the case on May 11, 2011. Tr. 236, ll. 3-21; 238, ll. 16-18. Detective Derrenbacher had been given Appellant's name as someone that might have information on Mayers. Tr. 240, ll. 8-11. He went out to the Wheeland School Road residence where Appellant had been living, but found an empty trailer. Tr. 240, l. 18 – 241, l. 2.

Detective Derrenbacher first made contact with Appellant on either May 17 or 18 at the residence of Wise. Tr. 242, ll. 10-17. He had learned that Appellant was staying there with Wise who lived there with his mother. Tr. 243, ll. 8-11. Detective Derrenbacher spoke with Appellant that day. He did not speak to Wise. He believed that Appellant had already spoken to Major Wesley Boland of the Newberry County Sheriff's Office the previous day. Appellant acknowledged to Detective Derrenbacher that she had a relationship with Mayers. She told Detective Derrenbacher that she was not seen Mayers in a little while. Tr. 244, l. 6 – 246, l. 10. Appellant also stated that she had last seen Mayers getting into a vehicle with Elvis Hill. Tr. 247, ll. 6-11.

Detective Derrenbacher went back to the Wise residence on May 20. Tr. 247, ll. 23-25. This time Detective Derrenbacher went with Major Boland. They were met by Wise's mother who informed them that Appellant and Wise were not at the house but had gone to Wal-Mart. The officers drove to Wal-Mart to look for Wise's black Ford L450 pickup truck, but did not see the truck in the parking lot. They returned to the Wise residence. Appellant was not at the residence, but this time Wise was there. They spoke with Wise

who indicated that Appellant left in an unknown vehicle with unknown males at the Wal-Mart. Tr. 248, l. 5 – 249, l. 9. Detective Derrenbacher said they received a telephone call from Appellant indicating that she was out of town and would be more than happy to meet at the Newberry County Sheriff's Department when she returned in about two hours. Tr. 249, ll. 15-19. He said Appellant did not show up later. Tr. 250, ll. 13-15.

Detective Derrenbacher spoke with Wise again on May 20 where he provided a written statement. Tr. 250, l. 16 – 251, l. 3; 278, ll. 14-16. In this statement, Wise said he did not know anything about the disappearance of Mayers and did not kill Mayers or have any part in his disappearance. He also stated that Appellant had not told him that anything had happened to Mayers. He further claimed that he felt Appellant was capable of hurting or killing Mayers in self-defense. Finally, Wise stated that if Appellant did anything, her motive for hurting or killing Mayers would be "fear or blackout rage." Tr. 278, l. 14 – 280, l. 4; State's Ex. 30 (Wise May 20, 2011 Statement).

Major Wesley Boland of the Newberry County Sheriff's Department testified that he spoke with Appellant on May 16 at Wise's home, and that she gave him the name of Elvis Hill. Tr. 300, l. 21 – 301, l. 18; 303, ll. 2 – 13. On May 22, after Appellant had left town, she called Major Boland and said she wanted to retain an attorney and then turn herself in to speak with law enforcement. On May 23, Appellant, however, did not appear at the Newberry Sheriff's Department. Tr. 311, l. 19 – 313, l. 7.

Major Boland had gathered information that Appellant was staying at her mother's house in Greenville, and around midnight on the evening of May 24 or the early morning hours of May 25, Major Boland, along with Greenville County officers, arrested Appellant at her mother's house. She was actually arrested and brought in on a forgery charge for

selling Mayers' car to a scrapyard on April 21, 2011 approximately two or three weeks before Mayers went missing. Mayers had not filed any report for a stolen vehicle. Major Boland admitted that he brought Appellant in on the forgery charge so he could further investigate the possible murder of Mayers. Tr. 313, l. 10 – 317, l. 1.

Major Danny Gilliam of the Newberry Sheriff's Department first became involved in the missing persons case of Mayers when Captain Robert Dennis of the Newberry County Sheriff's Department asked him to speak to Wise. Tr. 332, l. 11 – 333, l. 15. He asked Wise that if Appellant had wanted to go somewhere or put something somewhere, where would she go. Wise informed Major Gilliam that there was a road out on Brazelman's Bridge Road that she liked to go to. Major Gilliam asked Wise if there was a possibility that she put a body out there and Wise indicated that he did not know. He then asked Wise if he could take the officers out there, and Wise agreed. Major Gilliam, Captain Dennis, and Wise drove out to the area. This occurred on May 25, 2011. Tr. 333, l. 16 – 334, l. 7.

Wise took them out to Judy B. Road in the Sumter National Forest. As the officers approached, Captain Dennis lowered the windows, and Wise wanted to know why the windows were being lowered. The officers informed Wise that they could possibly pick up a smell. Major Gilliam looked back, and Wise had covered up his nose. Major Gilliam said it was not much further when the smell hit. Captain Dennis said, "I think we are here." Tr. 336, ll. 1-24; 337, ll. 11-17. Major Gilliam felt that when Wise covered up his nose, he knew the smell was coming and he was anticipating it. Tr. 336, l. 25 – 337, l. 10; 344, l. 23 – 345, l. 24.

The officers parked at the end of Judy B. Road, started walking, and found the body of Mayers. Tr. 337, l. 23 – 338, l. 18; 360, ll. 8-22. The body was located in the woods. Captain Dennis also found some shells. Tr. 340, ll. 6-15.

Captain Dennis testified that on May 20, 2011, Wise gave a statement that he had loaned a gun to Appellant and that Wise had informed law enforcement where the gun was located. Captain Dennis retrieved the gun from the center console of Wise's truck. Tr. 597, l. 10 – 599, l. 17; 675, ll. 8-10. The State's firearm and tool mark examination expert testified that it was her opinion that this gun had fired the shell casing found where Mayers was killed. Tr. 392, l. 20 – 393, l. 6; 404, l. 22 -405, l. 2; 411, ll. 8-11. The State's expert could not say whether two bullets retrieved from Mayers' body during the autopsy were fired by this gun, and her opinion as to that was inconclusive. Tr. 402, l. 23 – 403, l. 13. There was no evidence presented at trial as to any fingerprints found on the gun.

As Major Gilliam had already described at trial, Captain Dennis said that on May 25, 2011, Wise indicated Judy B. Road as a place he thought Appellant might have gone with Mayers. Wise directed Major Gilliam and Captain Dennis out to Judy B. Road. Tr. 602, l. 11 – 606, l. 11. Captain Dennis also described rolling down the windows to see if there was any smell of decomposition and ultimately smelling an odor. Tr. 606, l. 12 – 607, l. 2. He confirmed that Wise started covering his nose before any smell could be detected, and in Captain Dennis' opinion, it was clear based on his observation of Wise's behavior that Wise had been close to Mayers' body before. Tr. 678, ll. 6-20. Captain Dennis said he located the body in the wood line. His body was positioned face down and his arms were outstretched above where his head would be. The head was not located with the body. Tr. 607, l. 5 - 609, l. 2. Captain Dennis believed that Mayers' body had been dragged into the

woods due to the fact that his' hands were outstretched above where the head would have been and the shirt was rolled up. Tr. 680, ll. 8-16.

Captain Dennis collected a spent cartridge casing as well as a cigarette butt. Tr. 609, ll. 3-11. SLED was unable to obtain any DNA from the cigarette butt. Tr. 610, ll. 15-19.

After Wise took Captain Dennis and Major Gilliam to the end of Judy B. Road where Mayers' body was found, he gave another written statement on May 25, 2011. Tr. 614, ll. 12-15; 616, ll. 5-7; State's Ex. 31 (Wise May 25, 2011 Statement). In this statement, Wise said that on May 7, 2011, he was texted by Appellant and asked to call Mayers since she did not have minutes on her phone. Wise called Mayers and advised him that Appellant was moving from the residence on Wheeland School Road and that she no longer wanted anything to do with Mayers. Wise told Mayers that Appellant was going to be safe and she would be happy. Wise said that around 1:00 a.m. on May 8, 2011, Appellant texted him that she was on Brasselman's Bridge Road and needed directions to I-26. Wise said he told her which direction to go. Wise learned Mayers was missing the following Monday and claimed he became suspicious of Appellant when she started becoming paranoid. He further stated in his written statement that he told deputies he thought she might have hidden a body off Judy B. Road which was off Brasselman's because she and Appellant had been there before and since Appellant was on Brasselman's the night Mayers disappeared. State's Ex. 31 (Wise May 25, 2011 Statement); Tr. 616, l. 17 – 617, l. 11. In this May 25, 2011 statement, Wise still did not put himself at the scene of the crime. Tr. 617, l. 12-14.

Because Wise mentioned text messages, law enforcement retrieved his phone, but they were unable to retrieve any text messages. Therefore, law enforcement was unable to verify Wise's claims of the texts between Appellant and Wise. Tr. 617, l. 15 – 618, l. 20.

Captain Dennis met with Wise again on May 26, 2011 after Appellant had already been brought to the Newberry County Detention Center on unrelated charges. Tr. 619, ll. 1 – 17. On the 26th, Wise admitted being at the dead end of Judy B. Road when Mayers was shot. In this statement, Wise said Appellant texted him that evening and asked him to call Mayers and tell him that she was going to be at the stop sign besides Mr. J's. Wise called Mayers and told him. Then Wise sat down to play cards on the computer. Around 11:30 p.m., Wise said he received another text from Appellant to meet them at the end of Judy B. Road. Wise left his house at 11:45 p.m., went to the end of Judy B. Road and waited approximately twenty-five minutes. Appellant and Mayers then arrived and they stood around talking for about thirty minutes. State's Ex. 32 (Wise May 26, 2011 Statement); Tr. 620, l. 12 – 621, l. 13.

In his statement, Wise claimed that Mayers then walked away from them towards the woods when Appellant pulled out a gun Wise had loaned her which she fired and hit Mayers in the right shoulder area. Wise said Mayers ran and tried to get away in the woods and that Appellant followed and fired one more time and emerged from the woods a couple of minutes later, stating that he was not going to bother her anymore and that she would feel safe. Wise said they then got into their separate vehicles and left. State's Ex. 32 (Wise May 26, 2011 Statement); Tr. 621, l. 13 – 622, l. 16.

Wise also told the officers that on May 19, 2011, he and Appellant returned to the end of Judy B. Road where Appellant removed the skull from Mayers' body and then drove

to the Tyger River landing on Maybinton Road where she threw a bucket containing the head into the river. State's Ex. 32 (Wise May 26, 2011 Statement); Tr. 622, l. 17 – 623, l. 7. After he gave this statement, Captain Dennis drove Wise out to the river where the additional remains of Mayers were recovered. Tr. 623, l. 8 – 626, l. 9.

Captain Dennis also spoke to Appellant on May 26, 2011. Her interview was conducted after Wise gave his final statement. Tr. 626, l. 15 – 627, l. 14. In this statement, Appellant advised Captain Dennis of her abusive and drug dependent relationship with Mayers. On the night of May 7, 2011, she and Mayers were together but they began having an argument about her moving from her Wheeland School Road residence. Captain Dennis said Appellant told him that she tried to calm Mayers down but that she then snapped. She said the gun she used was a gun she received from Wise after she had obtained a restraining order against Mayers. She did not remember a portion of what happened. She blacked out after Mayers hit her numerous times and when she “came out of blackness,” she was holding the gun and Mayers was lifeless on the ground in front of her. Appellant said that Wise had no knowledge of what had happened until it was done and then Wise freaked out and left. Appellant said she went back a week later and removed Mayers' head and took it to the river. State's Ex. 19 (Appellant May 26, 2011 Statement); Tr. 632, l. 9 – 636, l. 21.

Captain Dennis spoke with Appellant again on June 10, 2011 after she wrote a letter asking to revise her statement. Tr. 638, ll. 5 – 22. Appellant told Captain Dennis that everything she said about her abusive relationship and drug use with Mayers was true. Tr. 639, ll. 19-21.

Appellant then said that on May 7, 2011, she texted Wise around 10:00 p.m. to call Mayers so he would come hang out with Appellant. She picked Mayers up at a house about

an hour and a half later. She texted Wise and let him know where she was going because she always let Wise know where she was. When she and Mayers arrived at their destination, Wise was already there. Appellant asked Wise why he was there and he said he had a feeling of need to be there. Appellant thought Wise was being protective. The three talked for a while. Mayers was behind Appellant holding her when she was suddenly pushed to the ground. She heard a shot and when she looked up, Mayers and Wise were struggling with each other. Appellant screamed at Wise. Mayers took off running. Wise chased him, and Appellant heard a second shot. Appellant went to look at Mayers, and Wise grabbed her and pulled her away from Mayers. Wise told Appellant that he would kill her and her animals if she told anyone. She said Wise forced her to later return with him and remove Mayers' head. Appellant said Wise tossed it in the river. State's Ex. 20 (Appellant June 10, 2011 Statement); Tr. 640, l. 10 – 642, l. 19.

Dr. Janice Ross conducted an autopsy on the body of Mayers on May 26, 2011. Tr. 364, l. 23 – 365, l. 4. The body was brought to her for analysis and the head was brought in separately for her to analyze. She also went out to the scene and observed the body as it was found at the Sumter National Forest. She testified that the body was lying face down with the arms outstretched above where the head would be located. Tr. 365, l. 10 – 366, l. 14.

During the autopsy, Dr. Ross found two bullets underneath the skin of the back. One bullet was located in the right midback and the other was close to the left shoulder, again in the back underneath the skin. Tr. 367, ll. 7-10. Dr. Ross found a hole defect in the fourth rib on the right which she testified was consistent with an entry wound which meant that at least one bullet went from front to back. Tr. 370, ll. 15 – 23. Her opinion was that Mayers' cause of death was the gunshot wounds to the chest. Tr. 372, ll. 21-24.

At trial, Wise testified against Appellant. He confirmed that he met her in 2009 on the internet and that they had sex when they first met. Tr. 423, ll. 5 – 20. Wise testified that they only had sex the one time and then became friends after that. Tr. 424, ll. 2-7.

Wise said that he only met Mayers twice through Appellant. Tr. 424, ll. 18-23. Wise helped Appellant to obtain the restraining order against Mayers. Tr. 584, ll. 21-23. Wise claimed that after Appellant obtained a restraining order against Mayers, she asked Wise if she could borrow a gun for her protection and to protect her animals. Wise testified that he gave Appellant a gun that belonged to his father. Tr. 429, ll. 4-14.

Wise testified that Appellant was living at the Wheeland School Road residence but she had fallen behind on her utility bill so the landlord told her she would need to find somewhere else to live. Tr. 431, ll. 18-25. The first week of May 2011, Wise helped Appellant move out of this property. Wise also helped Appellant obtain a utility building that Wise's father said she could place on his property. Appellant was planning to move all of her possessions into this utility building. She was also going to live in this building, to which Wise ran electricity and installed an air conditioner, until she could find a permanent place. Tr. 432, l. 1 – 433, l. 16.

Wise and two friends of Appellant, Don Buford and Drew, helped Appellant move her possessions. Wise used his black pickup truck, Buford used his white pickup truck, and Drew used his car to help move Appellant's possessions. On Saturday, May 7, 2011, Appellant, Wise, and Buford were continuing to help Appellant move. Appellant wanted to let Mayers know that she was moving that day. Because she did not have any minutes on her phone, she asked Wise to call Mayers to tell Mayers that if he wanted to see Appellant that day, she would be in Chapin that afternoon. Wise called Mayers and told him that

Appellant was going to be at Mr. J's gas station and Mayers responded "all right." This was around 3:30 in the afternoon. Wise said he stayed at home. Tr. 435, l. 13 – 437, l. 11.

Wise testified that later that evening, Appellant and Buford brought another truck load over to his house and after that Appellant had Wise call Mayers. Apparently, Appellant went to Mr. J's that afternoon, but Mayers left in a vehicle with someone else. Wise said he called Mayers for Appellant, and Appellant and Buford left his house. Later in the evening, Wise said Appellant texted him and asked if he wanted to come hang out with her and Mayers at Judy B. Road. He told her he would be out there in a little while. Tr. 437, l. 16 – 439, l. 19.

Wise said he got to Judy B. Road first. Then, approximately twenty-five minutes later, Appellant and Mayers showed up, around ten minutes before midnight. They drove up in Buford's white pickup truck which Appellant had borrowed from Buford. Wise said the three of them sat around and talked for about twenty-five to thirty minutes. His black pickup truck was parked side by side with the white pickup truck. Tr. 441, l. 11 – 442, l. 19. Mayers and Appellant were hugging on each other. Tr. 443, ll. 2-3. Eventually Appellant and Mayers walked off to smoke crack. Tr. 443, ll. 16-19. They walked about forty-five to fifty feet away. Tr. 444, ll. 2-3.

Wise testified that the next thing that happened was he heard a gun go off and then Appellant and Mayers came running past him. Wise said he could see that Mayers had been shot in the upper right shoulder. He said he was in shock, and Mayers was screaming. He said Appellant was screaming too. Wise testified that Mayers ran into the woods, and Appellant followed him. Wise then heard another gunshot. He claimed that Appellant then came out of the woods holding the gun and lit up a crack pipe. Wise also alleged that

Appellant said she felt safe and that Mayers would not bother her anymore. Wise left and went back to his house. He did not get the gun back at that time. Tr. 444, l. 12 – 446, l. 24.

Wise testified that he saw Appellant the next day around noon when she and Buford brought another truck load to his house. Tr. 447, ll. 19-25. Wise claimed that, later that week when helped Appellant finish moving, he found the gun in one of the boxes. He took it, wrapped it in some cloth, and put it in the console of his truck. Tr. 448, l. 15 – 449, l. 1; 511, l. 5 – 512, l. 2.

Wise then claimed that after law enforcement had come by to talk to Appellant, she told Wise she had to go back out to Judy B. Road. Wise drove her out there, alleging he did not know what she was planning to do. He said Appellant put on some latex gloves and removed Mayers' head and put it in a bucket that had been in Wise's truck. Wise said he then took Appellant down the road to the Tyger River, into which she threw the remains. Tr. 449, l. 2 – 451, l. 24; 528, ll. 5-15.

Wise contended that while he had a part in the desecration of the remains, he had no part in the initial shooting. Tr. 459, ll. 13-24. He was also adamant that he and Appellant did not commit the crime together. Tr. 556, ll. 22-24. Wise was charged with murder on May 27, 2011. Tr. 461, ll. 1-3. The charges were still pending against Wise during Appellant's trial. Tr. 461, ll. 4-8. He admitted he was hoping for leniency in exchange for his testimony against Appellant. Tr. 552, ll. 5-7.

Wise admitted that he had owned a concealed weapons permit that expired in 2011 after Mayers' death. Tr. 468, l. 19 – 469, l. 1. Wise also admitted telling Appellant's mother that he loved Appellant and that she was like a big sister to him. He would not admit

that he was jealous of her relationships with other men, including Mayers. Tr. 476, l. 3 – 478, l. 13. He did say that Appellant was his best friend. Tr. 577, l. 17.

Samantha Wright was a friend of Appellant's and had known her for about two years. Tr. 736, l. 3 – 737, l. 13. She never saw Appellant carry a gun. She saw Appellant about a week before Mayers was killed and did not see Appellant carrying a gun then. Tr. 741, l. 23 – 742, l. 14. Wright also testified that while she never saw Mayers hit Appellant, she went over to Appellant's house one day and Appellant had a black eye. Appellant told Wright that Mayers had punched her in the face. Tr. 746, ll. 7-15.

Don Buford had been a good friend of Appellant's for over ten years and had been romantically involved with her at one time. Tr. 760, l. 4 – 762, l. 3. Appellant owned many rescue dogs and loved them like they were her children. Tr. 763, l. 14 – 764, l. 13. Wise shot and killed one of her dogs because that particular dog was not "adapting well" with the others. Tr. 771, l. 21 – 773, l. 5.

Buford had never seen Appellant shoot any kind of gun or rifle. Tr. 773, ll. 22-25. He had never seen Appellant carry the gun that was retrieved from the console of Wise's truck. Tr. 774, ll. 3-4. Buford testified that he had seen Wise carry a gun, usually tucked into his belt or in his jacket. Wise seemed to have an interest in guns. Tr. 774, l. 9 – 775, l. 20. During Buford's testimony, photographs of Wise holding a gun were admitted as evidence. Tr. 776, l. 1 – 784, l. 16; Defendant's Exs. 7 and 8 (Photographs).

Buford further testified that when he was helping Appellant move in May 2011, he never saw any gun or her carrying a gun. Tr. 791, l. 19 – 795, l. 3. Buford was there on May 7, 2011 when Appellant left that night. When Appellant returned after midnight on May 8, 2011, Buford did not see her with a gun. Tr. 796, l. 4 – 798, l. 18.

After Appellant had moved into the place behind Wise's house, Wise remained constantly in her presence. Around May 15, 2011, Wise told Buford that he was no longer welcome to visit. Tr. 801, l. 6 – 802, l. 20.

Appellant testified in her defense at trial. She testified that Wise carried a gun and a holster on his side quite often. Tr. 872, ll. 2-5. Wise had never given her a gun because of the restraining order against Mayers, and the only gun he had ever given her was something that looked like a little play gun with a plastic handle that was barely hanging on. It sat on her table and was just a conversation piece. Tr. 874, l. 8 – 875, l. 25; 881, l. 24 – 882, l. 1.

On May 7, 2011, she was in the process of moving from Wheeland School Road to a shed behind Wise's house because she was late paying her light bills. Tr. 878, ll. 9-25. Wheeland School Road was fairly close to where Mayers lived. She was moving to the other side of the county, and Mayers was not really happy about her move. Tr. 883, l. 17 – 884, l. 5.

Wise and Buford helped her move that day. At some point that afternoon, Appellant called Mayers from Wise's house and she was supposed to meet up with Mayers at Mr. J's but by the time she got there, Mayers had already been smoking crack and wanted to go off with his friends. Tr. 884, l. 6 – 885, l. 8.

Later that evening, Appellant used Wise's phone to call Mayers and asked Mayers if he wanted to meet up later. Wise was right there when Appellant called Mayers. Mayers agreed to meet Appellant. Appellant left in Buford's white pickup truck around 10:30 or 11:00 to go meet Mayers. Tr. 890, ll. 4 – 22. Appellant's intention for meeting Mayers that night was to have a sexual encounter. Appellant had told Mayers that she would pick him up around 9:30 that night at Mr. J's but she was running late. She texted Wise and asked

him to call Mayers to let him know that she would be late picking him up. Tr. 892, l. 10 – 893, l. 11.

Appellant picked up Mayers and drove to Judy B. Road. Appellant said that Wise knew she was going out to Judy B. Road. When Appellant and Mayers arrived, Wise was already out there. Appellant testified that she did not invite Wise out to Judy B. Road, that he and Mayers were not buddies, that Wise did not tell her beforehand that he was coming out there, and that she did not expect to see Wise out there that night. Tr. 894, l. 3 – 895, l. 23. The lights of Wise's black pickup truck were not on when she and Mayers drove up. Tr. 895, l. 23 – 896, l. 4.

Mayers wondered why Wise was out there, and Appellant told him that she did not know. Tr. 896, ll. 5-10. Appellant asked Wise why he was out there and he responded that he just felt the need to be there. Appellant believed Wise was just probably lonely, that he would probably hang out for an hour and then leave. She did not think too much of it. Tr. 898, l. 20 – 899, l. 4.

Appellant and Mayers got out of the truck. Mayers stood in front of Appellant, and she had her arms wrapped around him. The three of them talked for about forty-five minutes. Then Wise went over to his truck and was texting on his phone. Appellant and Mayers kind of wandered off to talk to each other alone. Mayers had his arms around Appellant, and the next thing she knew, she was pushed to the ground and there was a gunshot. She did not know where Mayers was hit. Tr. 899, l. 12 – 20; 904, l. 5 – 906, l. 3.

Appellant testified that when she was pushed to the ground, she landed forward on her right knee. She had previously broken both of her ankles and therefore could not run fast or well at all. When she was on the ground, she looked back and saw Mayers and

Wise together towards where the white pickup truck was parked. Appellant said it looked like Mayers was struggling to get the gun away from Wise. Mayers yelled at Appellant to run, and Mayers ran in the opposite direction. Wise chased Mayers. Appellant struggled to get up, and she heard the gun again. Appellant finally got to Mayers and he was lying on his back. Wise grabbed her and pulled her back to the white pickup truck. She and Wise stayed at the scene for about ten minutes later. She was sitting in the truck, crying and trying to figure out what just happened. Tr. 907, l. 2 – 912, l. 12.

Appellant denied forming any agreement with Wise to harm Mayers that night. She was not aware that Wise had intended to harm Mayers. Tr. 912, ll. 13-18.

Appellant drove back to her Wheeland School Road residence. She spent the next day moving. Appellant later asked Wise why he did what he did and he told her that she would never be away from Mayers any other way. Appellant did not feel like she could call the police because Wise never left her side and stayed with her all the time. Tr. 912, l. 19 – 917, l. 25. Whenever she opened the door to the shed she was living in, Wise would be right there. Tr. 918, ll. 1-6. Wise also threatened her and stressed that if she told anyone, he could kill her animals and her family. Tr. 918, ll. 7 – 16.

After the police had visited them, around lunchtime on May 19, 2011, Wise wanted to return to the Judy B. Road area. As they were driving out there, Appellant asked Wise what they were doing and he told her “you will see.” When they got to the end of Judy B. Road, Wise pulled her out of the truck and took her to the body. He stood next to her with a gun, made her put on a pair of gloves, and forced her remove the head with a knife that he gave her. Wise told her if she did not do it, he would kill her dogs and family. Appellant

put the head in a bag which Wise put in a bucket. Wise then drove to the river and threw the bag in the river. He threw the bucket in the woods. Tr. 923, l. 5 – 935, l. 6.

When she was brought in by law enforcement and gave her first statement on May 26, 2011 where she said that she had killed Mayers, she only made that statement because she thought Wise was not in jail and would harm her family and animals if she told the truth. Tr. 955, l. 19 – 956, l. 4. Once she learned that Wise was being detained at the Newberry County Detention Center, she recanted her May 26, 2011 statement and made her June 10, 2011 statement asserting Wise had shot Mayers. Tr. 958, l. 1 – 962, l. 10.

## ARGUMENT

- I. The Trial Court erred in charging the jury on the “hand of one is the hand of all” theory of accomplice liability where the State did not present any evidence of a common plan or design between Appellant and her alleged accomplice to commit murder and where the evidence established that it was either one or the other who committed the murder alone.**

At the close of the State’s case, Appellant argued to the Trial Court that any charge on accomplice liability would be improper where there was no evidence that Appellant and Wise were acting in concert as to the murder of Mayers. Appellant pointed out that the State’s theory of the case was that Appellant was the shooter while Appellant’s theory of the case was that Wise was the shooter. There was no evidence that the two were acting together when Mayers was shot. Tr. 729, l. 22 – 730, l. 6.

The Trial Court denied the motion, finding texts from Appellant to Wise letting him know that she and Mayers were going to hang out and Wise’s testimony that Appellant invited him to join them were sufficient to show “acts of preparation.” The Trial Court additionally opined that Appellant, who had alleged physical and mental abuse by Mayers for years, may have wanted another adult male with her that night when she was with Mayers. The Trial Court believed the jury could infer from that evidence that the two were acting together such that the doctrine of “the hand of one is the hand of all” would apply. Tr. 730, l. 7 – 731, l. 11.

Prior to closing arguments and the Trial Court’s charge to the jury, the Trial Court again advised the parties that he would be charging accomplice liability. Tr. 995, ll. 20-23.

The Trial Court charged the jury:

Hand of one, the hand of all. If a crime is committed by two or more people who are acting together in committing a crime the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable and natural consequence of the acts done in carrying out the common plan and purpose.

For example. If two people set out to rob a convenient [sic] store and one goes in the store with the gun and the other stays outside as the lookout. There may be just one in there with the gun, armed robbery, the other may be outside as the lookout. But as the natural and probable consequence the hand of one is the hand of all and both are guilty of the crime of the armed robbery although only one robber went into the convenient [sic] store.

If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all or as it is said under our law sometimes, the hand of one is the hand of all. Prior knowledge that a crime is going to be committed, without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict a defendant as the principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal.

The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. A principal in a crime is the one who either actually commits the crime or who is present aiding, abetting or assisting in the commission of the crime. When a person does an act in the presence of and with the assistance of another the act is done by both. Where two or more people acting with a common plan or intent are present at the commission of a crime it does not matter who actually commits the crime, all are guilty. Again, the hand of one is the hand of all.

Presence at the commission of a crime means to be sufficiently near to aid, abet and assist in the commission of the crime. However, mere presence at the scene of the crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element. For there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurred, not accidentally or involuntary intent. Intent may be shown by acts and conducts of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

Tr. 1071, l. 1 – 1073, l. 3.

At the conclusion of the Trial Court's charge to the jury, Appellant renewed her objection on the hand of one is the hand of all charge and argued there were no facts presented at trial that would allow a jury to reach the inference that Appellant and Wise were acting together as to the murder of Mayers. The Trial Court affirming its initial ruling, stating that the text message from Appellant telling Wise where she would be that night could be interpreted as a conspiracy. The Trial Court also found that the evidence that Wise assisted Appellant in obtaining a restraining order and gave Appellant a weapon was sufficient to show a conspiracy. Tr. 1077, l. 19 – 1078, l. 8.

After the jury began its deliberations, it submitted a note to the Trial Court asking, "Can we have a copy of the statement regarding the hand of one, hand of all?" Tr. 1079, ll. 12-18; Court's Ex. 3 (Jury Note). The Trial Court then repeated the charge to the jury and then gave the jury a copy of the charge. Tr. 1079, l. 21 – 1084, l. 1.

The jury then sent out another note that asked, "In agreeing that she is guilty, is that saying we think she actually shot [Mayers]?" Tr. 1084, ll. 7-10; Court's Ex. 4 (Jury Note).

The Trial Court again charged the jury:

You can be guilty of murder, either as the individual who fired the shot or under the theory of accomplice liability. Either one of those theories you are guilty as the principal. Two people could be guilty of the charge of murder even though only one weapon was used even though only one round was shot.

Tr. 1084, ll. 19-24.

The Trial Court erred in charging the jury as to the theory of accomplice liability with respect to the charge of murder. "In criminal cases, appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the

trial court abused its discretion.” State v. Miller, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). “An abuse of discretion occurs when the [trial] court’s decision is unsupported by the evidence or controlled by an error of law.” State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

Under the “hand of one is the hand of all” theory of accomplice liability, “one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. . . . Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (internal citations omitted).

“In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal’s criminal conduct. . . . Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. . . . Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.” Id. at 480, 697 S.E.2d at 584 (internal citations omitted).

“To admit evidence under [the accomplice liability] theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown.” State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999).

The State presented no such evidence of a common plan or design between Appellant and Wise to murder Mayers. The State’s theory of the case was that Appellant shot and killed Mayers. Wise, who the State presented and swore to tell the truth, averred that he had no knowledge that Appellant was allegedly planning to shoot Mayers that night.

If this was a lie, the State had no business presenting him. See State v. Wills, 762 S.E.2d 3, 14 (2014) (Beatty, J. dissenting). He testified the only reason he was at Judy B. Road on May 7, 2011 was because Appellant invited him to hang out with her and Mayers. He claimed that the first shot occurred when Appellant and Mayers were about forty-five to fifty feet away from him smoking crack. Wise contended he was in shock after the shooting. Tr. 437, l. 16 – 439, l. 19; 443, ll. 16-19; 444, ll. 2-3; 444, l. 12 – 446, l. 24. Wise, the State's very own witness, testified that he did not commit the murder of Mayes with Appellant. Tr. 556, ll. 22-24

Appellant, on the other hand, maintained at trial that she did not shoot Mayers. The jury likely believed her because they found her not guilty of possession of a weapon during the commission of a violent crime. Tr. 1090, ll. 17-19. Appellant testified that she and Mayers were off talking alone together when she was suddenly pushed to the ground and heard a gunshot. She looked up and saw Mayers was struggling to get the gun away from Wise. Wise then chased Mayers and she heard another gunshot. Tr. 899, l. 12 – 20; 904, l. 5 – 906, l. 3907, l. 2 – 912, l. 12. Appellant asserted that she had no idea that Wise was planning to harm Mayers that night. Tr. 912, ll. 13-18.

The evidence points to either Wise or Appellant shooting or killing Mayers and committing such act alone. Therefore, the theory of accomplice liability is not applicable in this case. See Wilds v. State, 407 S.C. 432, 439-40, 756 S.E.2d 387, 390-91 (Ct. App. 2014) (holding charge of accomplice liability was improper where the only evidence presented was that the defendant was the shooter and the co-defendants jointed in the robbery after the defendant pulled the gun on the victim).

The Trial Court thought that text messages between Appellant and Wise that evening – text messages which were not retrieved by law enforcement – were sufficient to support the charge of accomplice liability. Wise claimed Appellant texted him and invited him to come hang out with Mayers and Appellant at Judy B. Road. Tr. 437, l. 16 – 439, l. 19. Appellant testified that she had planned to meet Mayers at Judy B. Road for a sexual encounter but was running late to pick Mayers up so she texted Wise and asked him to call Mayers to let him know that she would be a little longer. She texted Wise again and asked him to call Mayers to let him know that she was on her way to pick up Mayers. Tr. 890, ll. 8-15; 898, ll. 1 – 11. Appellant further asserted at trial that she never invited Wise out to Judy B. Road and did not expect him to be there when she and Mayers arrived. Tr. 895, ll. 12-23.

These text messages show nothing more than regular, everyday conversations between acquaintances and do not demonstrate that Appellant and Wise intended to join together in a common design to achieve an illegal purpose, namely killing Mayers. That Wise assisted Appellant in the legal act of obtaining a restraining order against Mayers in the weeks before his death likewise does not show that he and Appellant planned to kill Mayers together on the evening of May 7, 2011. Another man, Kris Hansen, also assisted Appellant in obtaining the restraining order and there is no suggestion by the State that he was a part of this supposed common plan or design to kill Mayers. That Wise allegedly gave Appellant a weapon for protection weeks prior to the murder after the restraining order was issued does not show that either knew ahead of time that the other one was planning to kill Mayers on May 7, 2011. This scant evidence relied upon by the Trial Court is not sufficient to support a theory of accomplice liability.

In State v. Dickman, 341 S.C 293, 534 S.E.2d 268 (2000), the Supreme Court held there was sufficient evidence that the defendant and the driver of the car in which the victim was killed were acting pursuant to a plan to kill the victim to support charging the jury on the theory of accomplice liability. The Court stated that the “critical question [was] whether there [was] any evidence [the defendant] and [the driver] were acting together at the time of the killing . . . .” Id. at 296, 534 S.E.2d at 269.

The Court in Dickman determined that the following evidence supported demonstrated that the two were acting pursuant to a plan to kill the victim at the time of the murder: (1) testimony from the defendant that the driver asked him to kill the victim because the victim was always behind on rent; (2) the defendant told another friend that the murder would happen on a Sunday and the murder did in fact occur on a Sunday; (3) on the day of the murder, the driver tried to collect the rent from the victim without success; (4) when the driver subsequently saw the defendant, the driver’s first words to the defendant were “do it;” (5) the defendant testified that he knew what the driver meant by those words; (6) immediately thereafter, the driver called the victim and arranged to pick him up for the fatal ride; (7) while they were driving, the defendant found the gun under a seat where the driver put it; (8) the defendant picked up the gun for the driver to see in the rear view mirror; (8) the defendant lost his nerve to shoot; and (9) the driver eventually shot the victim. Id.

Appellant’s case lacks evidence of any of the type of planning that was present in Dickman. In Dickman, it is clear that the two men were acting together where there was direct evidence that the driver asked the defendant to kill the victim for him, told the defendant it was time to “do it,” and left a gun for the defendant under a seat in the car in which they had picked the victim up for a ride. There is no such evidence in this case.

In State v. Thompson, 374 S.C. 257, 263-64, 647 S.E.2d 702, 706 (2007), this Court held that the State presented sufficient evidence under the “hand of one is the hand of all” theory of accomplice liability to impute acts committed by a co-defendant to the defendant.

The two co-defendants in the Thompson case were both charged with first degree burglary and attempted armed robbery. Id. at 261, 647 S.E.2d at 704. The court found sufficient evidence of defendant Thompson’s guilt under the theory of accomplice liability where Thompson had discussed the robbery with others prior to it occurring, had appeared at the crime scene with his co-defendant, and may have viewed the attempted robbery. Id. at 263, 647 S.E.2d at 705. The court also found that at a minimum, Thompson aided the commission of the crime by driving his co-defendant to the scene and encouraged the crime by setting the events in motion earlier that day through his meetings with others about a potential target for a robbery. Id. at 260, 263, 647 S.E.2d at 704-706.

Unlike the facts in Thompson, the State presented no evidence at trial that Appellant and Wise ever planned or discussed killing Mayers. The only evidence at trial showed that one or the other killed Mayers and the other was simply present at the scene with no knowledge of what was about to occur. Cf. State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007) (holding evidence that defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion positing that there “was insufficient evidence to show that the two defendants were acting in concert”); State v. Condrey, 349 S.C. 184, 194-95, 562 S.E.2d 320, 324-25 (Ct. App. 2002) (concluding evidence supported accomplice liability charge where State presented direct evidence that the defendant and a retail shoe store delivery driver acted together to steal shoes by showing that the defendant

approached the driver about getting some shoes, the two men planned several meetings where the driver unloaded shoes off his truck onto the defendant's vehicle, the defendant paid the driver for the shoes, and the defendant sold the shoes at a flea market).

The Trial Court's charge to the jury on the theory of accomplice liability was not harmless. The jury asked to hear and have written charges on the hand of one is the hand of all. Tr. 1079, ll. 12-18; Court's Ex. 3 (Jury Note). The jury then asked the Trial Court, "In agreeing that she is guilty, is that saying we think she actually shot [Mayers]?" Tr. 1084, ll. 7-10; Court's Ex. 4 (Jury Note). The jury then ultimately found Appellant not guilty of possession of a weapon during the commission of a violent crime, indicating that it most likely believed that Appellant was not the shooter. Tr. 1090, ll. 17-19. Therefore, it is reasonable to infer that the jury convicted Appellant under the theory of accomplice liability.

The evidence did not support a theory of accomplice liability, and the Trial Court committed a reversible error of law in giving the jury the "hand of one is the hand of all" instruction. The Trial Court's error in giving this jury instruction was not harmless. Accordingly, this Court should reverse the Trial Court's decision to instruct the jury as to the "hand of one is the hand of all" as to the murder charge and remand for a new trial.

**II. Appellant's confession given on May 26, 2011 to police was inadmissible where she had advised investigators that she planned to retain an attorney before she turned herself in and spoke to police and the police interrogated her anyway without an attorney present thereby violating Appellant's rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.**

Major Boland testified that prior to Appellant's arrest, she called him on Sunday, May 22 and advised him that she would turn herself in on Monday but stated that she wanted to retain an attorney to come with her before she turned herself in to the police. Tr. 311, l. 19-313, l. 7; see also Tr. 125, ll. 19-21. However, before she could retain an attorney, Appellant was arrested around midnight on May 24, 2011, told she needed to "come clean" by Major Boland during the trip to the detention center, taken to jail where she was put in a prison jumpsuit and shackles, and then sent in on May 26, 2011 to give a statement to Captain Dennis. Tr. 63, ll. 15-22; 67, ll. 14-16; 80, l. 16-81, l. 19; 125, ll. 22-24; 126, l. 23 – 127, l. 1; 128, l. 18 – 130, l. 13. While Appellant was read her Miranda<sup>1</sup> rights, the investigators never adhered to her previous request for an attorney. Tr. 63, ll. 19-22; 88, ll. 6-19.

Following both the Jackson v. Denno<sup>2</sup> hearing and during trial when the State introduced Appellant's May 26, 2011 statement, Appellant objected to the admissibility of the statement where Appellant had informed police that she wanted a lawyer present before she spoke to them. The Trial Court denied the motion to suppress the May 26, 2011 statement. Tr. 155, l. 9 – 163, l. 9; 627, l. 25 – 629, l. 4.

Law enforcement's interrogation of Appellant after she advised them that she wanted to retain an attorney before she turned herself in and spoke with them and the Trial

---

<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>2</sup> Jackson v. Denno, 378 U.S. 368 (1964).

Court's subsequent refusal to suppress Appellant's May 26, 2011 statement violated long-standing precedent of the United States Supreme Court. In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that where a defendant had invoked his right to have counsel present during custodial interrogation, valid waiver of that right could not be established by showing only that he responded to police-initiated interrogation after being again advised of his rights; thus, use of defendant's confession against him at his trial violated his rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.

In Edwards, the Court observed that "Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'" 451 U.S. at 485 (quoting Miranda, 384 U.S. at 474). In Fare v. Michael C., 442 U.S. 707, 719 (1979), the United States Supreme Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

Edwards stands for the principle once an accused expresses a "desire to deal with the police only through counsel, [the accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, 451 U.S. at 484-85.

In Montejo v. Louisiana, the United State Supreme Court recognized:

The Edwards rule is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights. It does this by presuming his post-assertion statements to be involuntary, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This prophylactic rule thus

protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence.

556 U.S. 778, 787 (2009) (internal citations omitted).

Major Boland confirmed at trial that Appellant advised him that she wanted to retain an attorney before she turned herself in to speak to police. Tr. 312, l. 24 – 313, l. 7. Therefore, under Edwards, the police were prevented from interrogating Appellant without an attorney present. The signing by Appellant of a form waiving her Miranda rights is presumed involuntary. The use of her May 26, 2011 confession against her at her trial violated her rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. The Trial Court erred in refusing to suppress the statement, and Appellant is entitled to a new trial.

**III. The Trial Court erred in refusing to charge voluntary manslaughter where the State presented at evidence at trial that the murder may have occurred after Appellant and the decedent had a heated argument after which he hit her numerous times and then she snapped.**

Counsel for Appellant requested the Trial Court to charge the lesser included offense of voluntary manslaughter, arguing that the statements of Appellant and Wise that the State had introduced as evidence supported the charge of voluntary manslaughter. Tr. 991, ll. 9-19. The solicitor responded that the charge of voluntary manslaughter was inappropriate because the defense had indicated that it was standing on Appellant's second statement that Wise was the shooter. The solicitor argued that Appellant was not entitled to inconsistent defenses. Tr. 991, l. 22 – 992, l. 8.

Counsel for Appellant argued in response that the State, by introducing all the statements, was the party who introduced different theories of how the murder happened and that at least one of the State's theories supported the charge of voluntary manslaughter. Appellant pointed out to the Trial Court that the only issue was whether there was any evidence in the record that would support the voluntary manslaughter charge. Tr. 992, l. 10 – 993, l. 3. The Trial Court, while recognizing that Appellant could present inconsistent defenses, nevertheless ruled that there was neither evidence of sufficient legal provocation nor sudden heat of passion to warrant the charge of voluntary manslaughter. Tr. 994, l. 15 – 995, l. 6.

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no

evidence whatsoever tending to reduce the crime from murder to manslaughter.” Cole, 338 S.C. at 101, 525 S.E.2d at 513.

Manslaughter is defined as “the unlawful killing of another without malice.” S.C. CODE ANN. § 16–3–50. This Court has expounded upon the definition of voluntary manslaughter:

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.

Cole, at 338 S.C. at 101, 525 S.E.2d at 513 (internal citations omitted).

Viewing the evidence in the light most favorable to Appellant, a charge of voluntary manslaughter was warranted in this case. The State introduced both of Appellant’s statements at trial. In her first statement to police made on May 26, 2011, Appellant advised Captain Dennis that on the night of May 7, 2011, she and Mayers were together but they began having an argument about her moving from her Wheeland School Road residence. Appellant stated she tried to calm Mayers down but that she snapped. She said that Mayers hit her numerous times and then she blacked out. When she “came out of blackness,” she was holding the gun and Mayers was lifeless on the ground in front of her. State’s Ex. 19 (Appellant May 26, 2011 Statement); Tr. 632, l. 9 – 636, l. 21.

Were a jury to believe the facts as represented in Appellant’s first statement, then she and Mayers were in a heated encounter and he had hit her numerous times before she shot him. It follows that a charge on voluntary manslaughter was required. See State v. Knoten, 347 S.C. 296, 306, 555 S.E.2d 391, 396 (2001).

In regard to what constitutes sufficient legal provocation, “This Court has previously held that an overt, threatening act or a physical encounter may constitute

sufficient legal provocation.” State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). In her May 26, 2011 statement, Appellant asserted that she and Mayers were in the midst of an argument about her moving and that Mayers hit her numerous times. The physical violence used by Mayers on Appellant constitutes legal provocation.

In regard to what constitutes heat of passion, this Court has held, “The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” Knoten, 347 S.C. at 303, 555 S.E.2d at 395.

In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011), this Court wrote, “In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951).”

According to Appellant’s first statement introduced by the State, Appellant shot Mayers during the course of a heated argument. Mayers had inflicted physical abuse upon Appellant in the past and was hitting her numerous times that night. Per her statement, she “snapped.” This is precisely the types of circumstance that produces the uncontrollable impulse to do violence required for voluntary manslaughter. The

shooting, if a jury believed Appellant's first statement, was done in the heat of passion and not with malice.

Viewing the evidence in the light most favorable to Appellant, there is evidence of both sufficient legal provocation and heat of passion. The Trial Court therefore erred in refusing to charge voluntary manslaughter, and Appellant is entitled to a new trial.

**IV. The Trial Court erred in holding evidence that Appellant's co-defendant Wise had previously shot and killed her dogs without justification was inadmissible under Rule 608 where Appellant did not offer such evidence to impeach her co-defendant's credibility, but rather offered such evidence to show her state of mind after the murder to explain why she feared for her life and why she engaged in certain actions after the murder.**

During both Don Buford's and Appellant's testimony, counsel for Appellant wanted to introduce testimony that Wise had previously shot and killed two or three of Appellant's dogs without any justification. The Trial Court held that the testimony was not admissible under Rule 608, SCRE which prohibits "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility." Tr. 788, l. 10 – 790, l. 23; 902, l. 12 – 903, l. 18.

Appellant argued that she was not offering the evidence to attack the character or credibility of Wise, but rather to show Appellant's state of mind that she had a reasonable fear for her own safety and for her other dogs to explain her actions that occurred after the murder of Mayers on May 7, 2011. Tr. 902, l. 24 – 903, l. 4.

The testimony that Wise had previously shot and killed some of Appellant's dogs was not inadmissible under Rule 608. The United States Court of Appeals for the Fourth Circuit, in interpreting the counterpart federal rule, has recognized that while it is true that extraneous evidence of misconduct cannot be introduced to impeach a witness, United States v. Blackshire, 538 F.2d 569, 572 (4th Cir. 1976), it is equally true that Rule 608(b) should not be read so broadly as to disallow the presentation of extrinsic evidence that is probative of a material issue in the case. United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985). Interfering with the admission of such extrinsic evidence would be inconsistent with "the goal of ascertaining the truth in judicial proceedings." Id.

Rule 608 did not prevent the admissibility of testimony that Wise had previously shot and killed Appellant's dogs where Appellant was not offering such evidence to impeach Wise's credibility. Rather, Appellant intended to use this evidence to explain why she feared Wise and to explain her actions after the murder, including her not going forward to the police, her participation in the desecration of remains for which she was convicted and received a consecutive sentence, and her giving a false confession initially to police. The Trial Court therefore erred in ruling that the evidence was inadmissible under Rule 608, and Appellant is entitled to a new trial.

**CONCLUSION**

For the reasons set forth herein, Appellant Mandy Lenore Smith requests this Court to reverse her convictions for murder and desecration of remains and remand for a new trial.

Respectfully submitted,



---

Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2014.