STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Diane Schafer Goodstein, Circuit Court Judge

The State, Respondent,

v.

Don-Survi Chisolm, Appellant.

Appellate Case No. 2011-200186

INITIAL BRIEF OF RESPONDENT

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(FBOA, p. 1-2).

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1.

Whether the trial judge abused her discretion in admitting limited and brief evidence of prior drug sales through the testimony of Thomas Simonelli in proof of material facts directly related to the instant murder, namely possible motive, and as the context of the murder cleanup efforts immediately thereafter?

2.

Whether the trial judge abused her discretion in admitting into evidence the gun pulled from the river based on the co-defendant's information to officers as to where the murder weapon was discarded, especially where the weapon pulled from the river was consistent with the description of the murder weapon by the co-defendant, the weapon was consistent with the caliber of bullet recovered from the victim's body at autopsy, and the weapon was properly identified as the weapon pulled from the river and secured for ballistic testing and subsequent submission at trial?

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STATEMENT OF THE CASE

A Dorchester County grand jury indicted Appellant, Don-Survi Chisolm, in January 2008 for the murder of Craig Michael Canady, Jr. (R. pp. *). John Loy, Esq., initially represented Appellant on the charge. On February 11, 2011, Appellant moved to dismiss counsel and requested to represent himself. The Honorable Diane Schafer Goodstein, after inquiry on the waiver of the right to counsel, granted the request. (Feb. 2011 transcript, p. 33, line 15 – p. 36, line 6).

Appellant's case was originally called to trial on August 22-23, 2011, before the Honorable Edgar W. Dickson. Appellant represented himself. Mr. Loy was standby counsel. (August 2011 Tr. p. 1[cover page]). Appellant moved for a mistrial based on an answer received from a prosecution witness during cross-examination, which was ultimately granted. (Aug. 2011 Tr. p. 173, line 3 – p. 188, line 16).

Another jury trial was scheduled and held September 13-19, 2011, before Judge Goodstein. Appellant again represented himself and Mr. Loy was, again, present as standby counsel. The jury convicted as charged. (Tr. p. 794, lines 10-14). Judge Goodstein sentenced Appellant to life imprisonment. (Tr. p. 804, lines 4-6). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On Saturday, September 15, 2007, a hunter came across a body in a ditch along Clubhouse Road. (Tr. p. 143, lines 11-22). Officers recovered store cards from the body that were registered to Tamekka Williams, who in turn identified the individual as her boyfriend, Craig Michael Canady, Jr. (Tr. p. 153, line 11 – p. 154, line 18). While officers were standing outside of Ms. Williams' home, Appellant approached and volunteered that he had seen the victim (known as "Red") and David White (known as "Scully") that prior "Tuesday or Wednesday." Appellant also stated he had dropped-off victim at Haven Oaks (where both the victim and Appellant lived) at approximately 4:00 am, and last saw the victim go across a ditch toward nearby Azalea Apartments. (Tr. p. 155, line 8 – p. 156, line 8; p. 646, line 21 – p. 647, line 1). Appellant remained very interested in the ongoing investigation, offering information, observing the officers investigation and approached at least one individual that the officers spoke to directly after the officers left. (Tr. p. 646, line 21 – p. 648, line 8). Appellant voluntarily gave another statement that he was actually with the victim late Wednesday to the early morning hours of Thursday, which was corroborated by cell phone records. (Tr. p. 159, line 7 – p. 160, line 24). He also admitted the victim was riding in Appellant's front passenger seat with Scully in the back. (Tr. p. 161, lines 15-21).

David "Scully" White testified at trial that on September 12, 2007 (Wednesday), at approximately 5:00 in the afternoon, Appellant picked him up in Appellant's Dodge Durango to see the birth of Scully's fiance's daughter's child. (Tr. p. 260, line 3 – p. 263, line 17). Scully and Appellant, however, ending up using poweder cocaine, and, instead of going to the hospital, they "just rode around and got high." (Tr. p. 265, lines 10-15).

About 10:00 that night, they called a girl, later met her and stayed with her until midnight. (Tr. p. 265, line 17- p. 266, line 17). Appellant then took Scully to a store for a beer and cigarettes, then took Scully back to Scully's home. (Tr. p. 266, line 19 – p. 267, line 21). Appellant called later, sometime after 1:00 am in the early morning hours of September 13, 2007, and asked Scully to go with him to get more cocaine. (Tr. p. 269, lines 2-9). When Appellant picked-up Scully in the Durango, "Red" was in the passenger seat, and Scully got in the back. (Tr. p. 270, line 15 – p. 271, line 19). According to Scully, Appellant asked "about get a lick," *i.e.* to commit an armed robbery, but Scully stated he was "not dressed for that," having left the house in slippers. (Tr. p. 272, lines 1-13). Appellant began to ride around to look for someone in Azalea Park, then "pull[ed] out the gun and shot Red in the head." (Tr. p. 274, lines 14-15). Scully testified "there wasn't no discussion. No argument. I couldn't tell you why he even shot my man for." (Tr. p. 274, line 23 – p. 275, line 1). Scully protested, Appellant cursed and kept talking (though Scully could not focus on what was being said after having seen the unprovoked shooting), and victim quickly slumped over and took his last breath. (Tr. p. 274, line 17 – p. 275, line 20; p. 292, lines 3-5). Scully testified the gun was "a 22 long, long on the muzzle." (Tr. p. 275, lines 23-25). Scully testified Appellant then placed the gun on the center console. (Tr. p. 276, lines 19-21). Appellant started to dump the body nearby, but Scully advised to go further out to avoid being seen. (Tr. p. 278, line 17 – p. 279, line 8). They eventually turned on Clubhouse Road where they "pulled to the side of the road, and throwed Red's body in the ditch." (Tr. p. 279, lines 17-22). Scully testified Appellant called his wife and "told her that he just got finished putting Red's body in the ditch." (Tr. p. 280, lines 18-25). Appellant instructed Scully the "story" would be they

"rode around, got high. He took me home, him and Ray left and went back towards the high school... Azalea Park, Haven Oaks area." (Tr. p. 281, lines 5-17). Before Appellant took Scully home, he stopped at Bacon Bridge Road and "tossed the gun out over the bridge." (Tr. p. 281, lines 20-23). He also used victim's phone to call "Sike's number trying to make it seem like it was Red calling him." Scully knew Sike as the boyfriend of his girlfriend's daughter, (Tr. p. 260, lines 3-19), and could recognize Sike's voice as he answered and repeated hello several times, (Tr. p. 285, line 19 – p. 286, line 5). When Scully exited the car at his house at approximately 5:00 am, he could see "a big spot of blood" on the passenger side seat of Appellant's Durango. (Tr. p. 286, line 6 – p. 287, line 15). The next day, in the afternoon, Appellant talked to Scully "about he was trying to find a seat for the truck," and showed Scully "the hole he cut out the seat" in the Durango, and saw the big blood stain had been cut out. (Tr. p. 288, line 3- p. 289, line 9). Scully also noticed the seat belt on that side had been cut off. (Tr. p. 290, lines 6-11). Appellant instructed Scully "to be quiet, ain't nothing going to happen." (Tr. p. 290, lines 12-16). Scully testified he maintained his exculpatory story out of fear of Appellant until Appellant was arrested: "... when I found out they caught him, I call my attorney" to tell what really happened. (Tr. p. 292, lines 1-2). (See also Tr. p. 291, lines 21-24; p. 307, lines 20-21; p. 350 line 24-p. 351, line 1). After two dive attempts in the river, officers located a gun matching the description at the location as Scully described. (Tr. p. 469, line 2 – p. 470, line 4).

The State introduced records of cellphone calls placing Appellant's phone at approximately the same places and times as described in Scully's testimony. (See Tr. p. 379, line 11 – p. 382, line 12). In further corroboration, the forensic pathologist opined

the "gunshot wound ... entered the left side of [victim's] head" and the bullet continued back and "slightly up" to the other side. She opined this was consistent with being shot from someone from the driver's seat if the victim had been in the passenger seat. (Tr. p. 394, line 5 – p. 395, line 21). Additionally, the doctor testified the decomposition evidence was consistent with the body being in the weather for three days. (Tr. p. 395, line 22- p. 397, line 3).

Shaquanda White, Sike's girlfriend's (one of Scully's girlfriend's daughters), testified that she recalled September 12, 2007 as she was going to see a new-born neice. She testified she recalled seeing Appellant's Durango pulling-up at approximately 3:00 am, and Red was in the passenger seat. Scully came out and they all left together in the Durango. (Tr. p. 240, line 19 - p. 243, line 21). She also testified she had ridden in Appellant's Durango approximately a week before, in the passenger seat. Ms. White testified the passenger seat "[n]ormal condition," did not need to be replaced, and the "[s]eat belt was fine." (Tr. p. 239, line 14- p. 240, line 11).

Shakara Rose, a neighbor who knew the victim, testified that when the victim was missing, she recalled (though admittedly somewhat vaguely and less forcefully on cross-examination) that she heard Appellant make reference to being "in the ditch stinking" while talking with others near her front porch. (Tr. p. 231, line 11 – p. 234, line 7).

The investigation showed that Appellant replaced the passenger seat in his Dodge Durango directly after the murder. Richard Johns and George Gallardo from LKQ Auto Parts testified that on September 14, 2007, Appellant contacted them and requested a passenger side seat for the Durango and a seatbelt, which they pulled from a junk Durango at that time. (Tr. p. 423, line 8 – p. 426, line 21; p. 432, line 1 – p. 433, line 9).

The serial number found on the passenger seat of Appellant's Durango matched those of the junk Durango at LKQ. (Tr. p. 638, lines 5-24). In spite of these cleanup efforts, two areas in Appellant's Durango – on the center console – still tested positive for blood, however, the amount was insufficient to run a DNA test. (Tr. p. p. 592, line 11 – p. 594, line 25; p. 623, lines 8-18). The seatbelt on the passenger side was completely missing, "cut all the way down to the retractor." (Tr. p. 502, line 3 – p. 505, line 16).

Detective Zensen testified, from review of the victim's body when found, the victim had blood down his back, and such blood would likely transfer to a seat if he was seating in the seat at the time. (Tr. p. 511, lines 3-10).

Officers determined that in November 2007, Appellant "withdrew his children from school and re-enrolled them in a Florida school district..." (Tr. p. 655, lines 2 – 14). Officers enlisted the help of the United States Marshals Service and the Jacksonville Sheriff's Office to ultimately locate Appellant. (Tr. p. 655, line 18 – p. 656, line 6).

Appellant did not testify at trial. However, he presented one witness, his sister Ejuhavna Chisolm. Ms. Chisolm testified Appellant purchased the Durgango from her. She testified that it was in fair condition, but had "burn spots on the passenger side...." (Tr. p. 720, line 13 – p. 721, line 22). She testified that she had previously cut out the passenger side seat belt (though she could not recall when or how) as she had been "in an abusive relationship" and wanted to ensure she could escape the car if necessary. (Tr. p. 722, line 1 – p. 724, line 10). She testified Appellant had moved to Florida with her (was there at the time of arrest), and testified that was to help with her abusive relationship and her children. (Tr. p. 722, line 16 – p. 723, line 4).

ARGUMENT

I.

The trial judge did not abuse her discretion in admitting limited and brief evidence of prior drug sales through the testimony of Thomas Simonelli in proof of material facts directly related to the instant murder, namely possible motive, and as the context of the murder cleanup efforts immediately thereafter.

Relevant Facts:

During a break in the trial proceedings, and outside the presence of the jury, the State advised the trial judge it would offer the testimony of Thomas Simonelli:

> ... The gist of Mr. Simonelli's testimony is that around September - - it would have been the 14th, that Friday, he received calls from Mr. Chisolm in reference to Mr. Simonelli paying LKQ automotive for the car seat. The payment arrangement for that seat was that Mr. Chisolm was going to pay him twice the amount in cocaine in exchange for him putting the seat on his credit card. ... Also, the testimony by Mr. Simonelli would be that he knows the defendant because that was his cocaine supplier.

(Tr. p. 411, lines 2-15). (See also Tr. p. 415, lines 10-19).

The State argued the testimony was admissible in two ways: "under Rule 404(b) to show motive," specifically, "that defendant was selling drugs in the Haven Oaks area, [and] the victim was selling drugs in the Haven Oaks area," and also to show he was "trading cocaine [in a straw-man purchase] to pay for a seat the day after a murder." (Tr. p. 411, lines 16-24; p. 413, lines 15-22). The State noted Tamekka Williams' testimony that the victim had just recently begun seilling drugs in their area and argued "that would be quite a good reason for Mr. Chisolm to want to take out a fellow drug dealer that's cutting into his territory." (Tr. p. 413, line 23 – p. 414, line 10). (See also Tr. p. 227, line 20- p. 228, line 1). The State also noted that "the payment arrangement was going to be twice as much cocaine as the value of the seat," (Tr. p. 415, lines 20-25).

Appellant asserted such was "pure speculation and it is highly prejudicial... remote in time ... not res gestae... not subjection of conviction, its purely unrelated and unsubstantiated conjecture." (Tr. p. 414, lines 11-14). (See also Tr. p. 417, lines 5-24).

The trial judge found the testimony relevant as to the purchase and payment by cocaine, and would allow the argument on motive, "though motive is not an element of the offense...." (Tr. p. 417, line 25 - p. 418, line 15). The trial judge considered the prejudicial effect compared to the probative value. She found cocaine to be a major part of the testimony already given, "what brought them together," and reasoned the case was not a similar drug offense which may increase the prejudicial value, but does not in this case. (Tr. p. 419, lines 3-16). She allowed the testimony. (Tr. p. 419, lines 17-20).

Mr. Simonelli testified he knew Appellant because Appellant sold him drugs. (Tr. p. 446, lines 21-24). Apellant objected to the testimony on the grounds argued previously. (Tr. p. 447, lines 1-4). Mr. Simonelli continued and explained he had a flexible payment arrangement, essentially Appellant would trust him for payment. He testified in exchange for purchasing the replacement seat as requested, he could cancel some of his drug debt to Appellant: "... I owed him some money, so I said we'll squash the bill ... and trade some more cocaine or something like that." (Tr. p. 448, line 25– p. 449, line 4)

On appeal, Appellant argues the testimony was improper for a number of reasons: 1) remote in time; 2) irrelevant to murder; 3) irrelevant to prove motive; and 4) probative value sustabitial outweighed by unfair prejudice. (FBOA, p. 7). He argues the evidence of "prior drug dealing was highly prejudicial, failed to establish any logical motive based on the evidence presented, and was extremely destructive to appellant's character and credibility." (FBOA, p. 10).

Discussion:

"The [a]dmission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 - 248 (2000) (*citing State v. Huggins,* 325 S.C. 103, 481 S.E.2d 114 (1997)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law," *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013) (*citing State v. Washington,* 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)), or when the ruling lacks factual support in the record, *Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010). *See also State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 609 (Ct. App. 2012) (same).

Appellant essentially argues the trial judge erred in admitting the evidence of prior drug dealing when the prior the State failed to show a "logical motive" based on the evidence. (See FBOA, p. 10). Appellant's argument the evidence was mere character evidence fails in light of the record.

Prior crimes and bad acts may be admissible to show motive, intent, the absence of mistake or accident, common scheme or plan, or the identity of the perpetrator of the crime at bar. Rule 404 (b), SCRE. "Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). A material fact is "[a] fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009). Even were admissible as evidence of a material fact, "the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejuidice or misleading the jury." *Id.*

Reference to prior drug use or drug transactions should not be admitted where there is no testimony that drug use or a drug transaction was part of the circumstances of the crime. *State v. Coleman*, 301 S.C. 57, 389 S.E.2d 659 (1990). To avoid being merely improper character evidence, "the drug use must have some relevant connection to the crime charged." *State v. Dickerson*, 341 S.C. 391, 397, 535 S.E.2d 119, 122 (2000) (*citing State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused.")). Here, the State offered the evidence both as evidence of motive and as part and parcel of the clean-up attempt after the murder. The evidence was material and admissible.

The reference to Appellant selling drugs to Mr. Simonelli explained the details of the request Appellant made, *i.e.* holding out a significant carrot to obtain in short order the replacement passenger seat he had requested after the murder, and enticing Mr. Simonelli with more drugs to buy the replacement seat immediately. Thus, the prior drug transactions – which were referenced only briefly and without collateral details, see Tr. p. 446, lines 24 – were part and parcel of Appellant's request to Mr. Simonelli. Moreover, Mr. Simonelli explained part of the deal was to forgive the past debt and "trade some more cocaine or something like that." (Tr. p. 447, line 17 – p. 449, line 4). Appellant does not complain that contemporaneous offer to "trade some more cocaine" was improperly admitted. This weaves an even stronger connection to the possible drug turf war theory than the past sales alone. As the trial judge noted, the evidence demonstrated "an undeniable connection" in the precise area (in and round Haven Oaks), and testimony the victim had only just recently begun selling drugs in that area. This allows a

reasonable inference of motive. (See Tr. p. 418, lines 16-24). Even so, the past sales show an existing relationship which strengths and gives context to the request to purchase the replacement seat where the victim was shot. In short, the testimony was admissible to establish material facts – 1) possible motive; and 2), the fact the seat was replaced due to the victim's blood being in the seat, not mere cosmetic reasons as offered by appellant. *Johnson, supra.*

Further, as the trial judge properly reasoned, the possibility of unfair prejudice did not outweigh the great probative force of the evidence. Cocaine use was already a part of the narrative – Scully testified that he and Appellant used cocaine, and was searching for cocaine the night of the murder. (See Tr. p. 265, lines 10-15; p. 269, lines 2-9). In fact, Scully testified that the cover story was to be that they "rode around, got high." (Tr. p. 281, lines 5-17). Further still, the trial judge reasoned that this was a crime with violence not a similarly situated drug charge, which tended to reduce the danger of unfair prejudice. *See, e.g., State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) ("When ... the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.").

Additionally, Respondent notes Scully's testimony that Appellant also suggested they commit an armed robbery was admitted without objection, and would also bear negatively on character. It is likewise part of the context of the crime, admissible, and is evidence of Appellant then having a gun.

Similarly, because the past drug transactions explain the attempt to pay a current drug debt by helping Appellant to purchase the seat the evidence is admissible as *res gestae*. *Dickerson*, 341 S.C. at 400-401, 535 S.E.2d at 124. *See also State v. King*, 334

S.C. at 512, 514 S.E.2d at 582 ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.").[1]

Even so, had the evidence been admitted in error, it could only be harmless for two distinct reasons. First, the connection to drug use was already a part of the record with Scully's testimony. In this sense, the additional drug testimony was harmlessly cumulative. *See State v. Price*, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (appellant unable to show prejudice where inadmissible hearsay merely cumulative). Second, the record shows overwhelming evidence of guilt, not the least of which is Scully's eyewitness account of the shooting and dumping of the body and gun – testimony that was systematically cooroborated by the forensic and investigative evidence. There is also the fact Appellant replaced the passenger seat, cut out the passenger side seatbelt, and blood was found on the center console dispite the clean up efforts. The evidence is solid, and supportive of guilt; thus, if error in admitting the instant testimony, it could only be harmless. *See Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 589 (2010) ("In order for this Court to reverse petitioner's convictions and sentences, however, we must find that the trial court's error prejudiced petitioner. Since Murdaugh was merely one of six eye witnesses to identify petitioner as the shooter, there were other witnesses whose testimony was consistent with that of the identifying witnesses, and physical evidence linked petitioner in the murder, her testimony was

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[1] This theory requires "the temporal proximity of the prior bad act ... be closely related to the charged crime." *State v. McGee*, 408 S.C. 278, 288, 758 S.E.2d 730, 736 (Ct. App. 2014). Respondent notes Mr. Simonelli testified that he had an existing relationship with Appellant as his drug dealer at the time of Appellant's request. (Tr. p. 448, lines 20-25). This would satisfy the temporal requirement.

merely cumulative to other overwhelming evidence of guilt. As such, reversal is not warranted here.").

However, the record shows the trial judge did not abuse her discretion in allowing the evidence in proof of material facts. Appellant is not entitled to any relief.

II.

The trial judge did not abuse her discretion in admitting into evidence the gun pulled from the river based on the co-defendant's information to officers as to where the murder weapon was discarded, especially where the weapon pulled from the river was consistent with the description of the murder weapon by the co-defendant, the weapon was consistent with the caliber of bullet recovered from the victim's body at autopsy, and the weapon was properly identified as the weapon pulled from the river and secured for ballistic testing and subsequent submission at trial.

Relevant Facts:

Co-defendant David "Scully" White testified Appellant shot the victim in the head while the victim sat in the passenger seat of Appellant's Durango. (Tr. p. 274, line 14- p. 275, line 1). Scully testified the gun was "a 22 long, long on the muzzle." (Tr. p. 275, lines 23-25). Before Appellant took Scully home on the night of the murder, and after he had dumped the victim's body in a ditch, Scully testified Appellant stopped at Bacon Bridge Road and "tossed the gun out over the bridge." (Tr. p. 281, lines 20-23). Scully testified he maintained his exculpatory story out of fear of Appellant until Appellant was arrested: "... when I found out they caught him, I call my attorney" to tell what really happened. (Tr. p. 292, lines 1-2). (See also Tr. p. 291, lines 21-24; p. 307, lines 20-21; p. 350 line 24-p. 351, line 1). This included describing where the gun was disgarded. (Tr. p. 468, lines 16-21). After two dive attempts in the river, officers located a gun matching the description at the location as Scully described. (Tr. p. 469, line 2 – p. 470, line 4). Scully testified at trial that it appeared to be the same gun used in the murder. (Tr. p. 276, lines 17-18). After the trial judge sustained an objection on foundation, specifically as to chain of custody, (see Tr. p. 473, line 1 – p. 476, line 2), the State elicited specific testimony from Detective Greer of how the gun was recovered, its distinctive neon green sight and gold trigger, the beginning of corrosion and a missing

magazine, and how it was transported in a cooler of water to preserve the condition. (Tr. p. 476, line 23 – p. 479, line 25). Detective Zensen then testified he secured the cooler and transported the cooler to SLED. (Tr. p. 512, line 13 – p. 514, line 25). The State again offered the gun into evidence. The trial judge admitted the gun as State's Exhibit 14 over Appellant's same objection to foundation. (Tr. p. 514, lines 18-23).

Ira Parnell, a firearm and tool mark examiner for SLED, testified he received the weapon from officers, extracted it from the cooler, cleaned and examined the weapon. The bullet retrieved from autopsy was too badly damaged to match; however, it was consistent with a twenty-two which was consistent with the ammunition the recovered gun required. (Tr. p. 393, lines 8-18; p. 702, line 22- p. 704, line 11).

On appeal, Appellant complains the trial judge erred in admitting the weapn as the evidence did not show the weapon was the actual weapon used in the murder. (FBOA, p. 14).

Discussion:

Again, "[t]he [a]dmission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 - 248 (2000) (*citing State v. Huggins,* 325 S.C. 103, 481 S.E.2d 114 (1997)). Appellant argues the judge abused her discretion in admitting the recovered twenty-two caliber long gun because "no *reliable* evidence connect[ed]" the gun to the murder. (FBOA, p. 16) (emphasis added). As a first matter, the argument concedes there was evidence connecting the gun to the murder. Credibility differs from the presence of evidence. Even so, the issue is barred from appellate review as it differs from the objection made below and the ruling on same.

It is well-settled that to preserve an issue for review, the issue must be raised to and ruled upon by the trial judge. *See, e.g., State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003). Here, Appellant argued lack of foundation, specifically chain of custody:

> Your Honor, there's nothing particularly unique about this weapon. How can she be so sure that that's the same weapon we're talking about. I object. No foundation.

(Tr. p. 473, lines 1-4).

The trial judge considered lack of foundation, specifically chain of custody:

> ... I would have no concern if there was a serial number identified at the scene where it was found ... I'm a little bit concerned about that. O course, there hadn't been any kind of chain of custody. I don't even know where it's been kept.

(Tr. p. 474, lines 9-16).

Appellate argued a failure in the chain of custody. He also argued the evidence from David "Scully" White was insufficient as "he was hight on cocaine, freaked out, he was in a dark car" and added the divers had "found another gun inside the lake as well" which was not connected to the case. (Tr. p. 475, lines 1-12). (See also Tr. p. 469, lines 17-24). Detective Greer confirmed her testimony was it appeared to be the gun recovered on the second dive. (Tr. p. 475, lines 22-23). The trial judge ruled, "I need more foundation." (Tr. p. 475, line 24). Thus, the objection and the ruling was based upon sufficient of the evidence in proof of the chain of custody as to the gun recovered on the scond dive. There was no argument or objection to relevance as in connection to the murder. (See also Tr. p. 514, lines 18-23, trial judge admitted the gun over Appellant's same objection to foundation). Consequently, Appellant's present argument on connection to the murder is procedurally barred. At any rate, the State presented ample

evidence of the connection to the crime. Appellant's reliance on *State v. Elders*, 386 S.C. 474, 688 S.E.2d 857 (Ct.App. 2010), highlights the flaw in his argument.

The weapon at issue in *Elders* was a distinctive knife described by one of the victim as having "a 'little hump' on it and a blade that was about six to eight inches long. *Elders*, 386 S.C. at 478, 688 S.E.2d at 859. Two days after the carjacking, kidnapping, armed robbery and assault crimes occurred, officers found three pocket knives and a switchblade with bears on the handle in Elders belongs at a friend's home. No witness ever testified any of the knives were similar to the knife used in the crime. This Court noted that "there is considerable evidence in the record demonstrating that the knives were not used in the commission of the crimes," including a negative test for blood. 286 S.C. at 486, 688 S.E.2d at 863 and n. 9.

In contrast, in *State v. Bellue*, the Supreme Court of South Carolina found admissibility of a "gun as one that was in the possession of defendant and one that was the type that could have caused the injury described by the doctor was not error." *State v. Bellue*, 259 S.C. 487, 123,193 S.E.2d 121, 493 (1972). The court reviewed the facts that from the autopsy, it was determined the murder weapon was of small caliber, likely a twenty-two caliber; Bellue was last known person to see murder victim alive; a witness, Kimbrell, testified that Bellue had "a little black pistol" and forced her to drive her car to same area where the victim was found; officers found the pistol in the car Kimbrell abandoned to escape; and an officer who recovered the gun testified the gun admitted was the one recovered from the Kimbrell car. 259 S.C. at 492, 193 S.E.2d at 122. Bellue was arrested in the murder victim's car, which had a missing pin similar to that missing from the recovered gun, and a twenty-two caliber shell. *Id.* Bellue argued the State failed to

connect the specific gun admitted to the murder and the gun was improperly admitted. 259 S.C. at 491, 193 S.E.2d at 122. The Court disagreed:

> It is recognized without citing authority that evidence may be of two kinds, direct and circumstantial. In this case, there was no direct evidence as to the pistol being the murder weapon. The case is based on a chain of circumstantial evidence. ...
>
> ...
>
> The introduction of the gun as one that was in the possession of defendant and one that was the type that could have caused the injury described by the doctor was not error. The circumstances hereinabove described correctly connected the gun to the crime and were for the jury to weigh.

259 S.C. at 492-493, 193 S.E.2d at 122-123.

Likewise, here, the State presented testimony of the witness to the murder, David "Scully" White. He testified that Appellant shot victim with a twenty-two long gun. He was also with Appellant when Appellant threw the murder weapon into the river from Bacon Bridge. The weapon admitted was recovered from that site and shared the same caliber – the caliber having been determined from the bullet retrieved at autopsy. Though Appellant argues that the evidence was not reliable, he merely makes a credibility argument, not an admissibility argument. Moreover, the recovery of the gun at the bridge tends to corroborate the witness testimony. But, at any rate, the weapon was specifically identified as being similar to the one actually used in the shooting. There is no question a gun was used and that the gun used was a twenty-two caliber gun. The mere admission of the gun did not in and of itself cause any unfair prejudice. The fact that because of damage to the bullet, the recovered gun could not be confirmed as the gun used in the murder could just as easily weigh against the State's case. At any rate, evidence that Appellant had a similar gun to that used to kill the victim would be admissible regardless of whether the actual gun used in the murder is recovered. *See State v. Gillian*, 373 S.C.

601, 610, 646 S.E.2d 872, 877 (2007) ("The burglary evidence was presented in an effort to show the identity of the perpetrator by showing that petitioner was in possession of a stolen gun that was consistent with the type of weapon used to kill the victim."); *State v. Pruitt*, 260 S.C. 396, 401, 196 S.E.2d 107, 109 (1973) ("The murder weapon was never discovered but there was evidence to the effect that appellant had upon him the night of the murder a pistol other than the one he gave the law enforcement officers; that on the afternoon before the murder he had obtained by purchase a package of bullets, which did not fit the gun he gave to the officers, but which were similar to the one offered in evidence, and scientific tests showed that the composition of the bullet offered in evidence was similar to the composition of the slugs found in the bodies of the two victims.").

Further, the jury was well aware of the limitations of the forensic evidence, *i.e.* the inability to specifically connect the gun to the bullet due to the condition of the bullet. Thus, like the weapon in *Bellue*, "[t]he circumstances hereinabove described correctly connected the gun to the crime and were for the jury to weigh." 259 S.C. at 493, 193 S.E.2d at 123. However, should this Court find error in the admission of the weapon, it could only be harmless given the fact that Scully had previously identified, without objection, State's Exhibit 18 as appearing to be the weapon used. He testified about the caliber and characteristics. If nothing else, the gun sufficed as a demonstrative aid to the testimony. Thus, any prejudice was minimal. Moreover, the evidence is overwhelming and any error harmless. This would include the eyewitness account of the shooting, description of the specific gun used, and his testimony concerning the dumping of the body and gun – testimony that was systematically cooroborated by the forensic and

investigative evidence. There is also the fact Appellant replaced the passenger seat, cut out the passenger side seatbelt, and blood was found on the center console dispite the clean up efforts. The evidence is solid, and supportive of guilt; thus, if error in admitting the instant testimony, it could only be harmless. *See Wilder v. State*, *supra.*

However, the record fully and fairly supports that the issue presented is different than the issue raised below and is procedurally barred from review. *Dunbar, supra.* Even so, the trial judge did not abuse her discretion in admitting the gun. Appellant is not entitled to any relief.

III.

The trial judge did not abuse her discretion in denying Appellant's motion to suppress based on incorrect information in the search warrant where Appellant's only actual argument of incorrect fact in regard to the assertion of a purchase was simply an incorrect date. Appellant's argument that the facts of purchase of a replacement seat as supported by the witness statements were ultimately not supported by documentation as invalidating the warrant is against precedent.

Relevant Facts:

Appellant's Dodge Durango was searched pursuant to a warrant on September 27, 2007. (Tr. p. 497, lines 4-9). At that time, investigators were awared that Appellant had switched out the passenger seat; however, the car was still searched for any other evidence of the murder. (Tr. p. 499, lines 9-12). Detective Jamie Zensen testified that he determined that the passenger side seat belt had been cut and removed. (Tr. p. 502, lines 5-11). She was not able to process the passenger seat for evidence of the murder because the seat had been replaced. (Tr. p. 504, lines 17-21). Similarly, she was not able to process the seat belt as it had been completedly removed "cut all the way down to the retractor." (Tr. p. 504, line 22 – 505, line 2). Detective Zensen testified, from review of the victim's body when found, the victim had blood down his back, and such blood would likely transfer to a seat if he was seating in the seat at the time. (Tr. p. 511, lines 3-10). Nine swabs were ultimately taken, two tested positive for blood. (Tr. p. 592, lines 12-20). The two swabs tested as blood were from the center counsel. (Tr. p. 623, lines 8-18). However, the amount was insufficient to perform DNA testing. (Tr. p. 592, lines 14-18).

Officers had originally obtained a warrant and searched the vehicle on September 17, 2007. No evidence was noted at that time. However, upon further investigation,

Detective Giglio determined that Appellant had called various auto parts and auto services businesses on September 14, 2007, the day after the murder. (Tr. p. 636, lines 3-10). This included a call to LKQ Automotive. (Tr. p. 637, lines 10-15). With the additional information about the replacement seat, Detective Giglio obtained the second warrant. (Tr. p. 644, lines 7-22). When notified of the second search warrant, Appellant reacted – and interrupted the reading of the warrant – upon learning about the information concerning a purchased replacement seat shortly after the murder. (Tr. p. 646, lines 6-8). When asked if he wanted to explain, Appellant declined to speak with the officer. (Tr. p. 646, lines 18-20). Detective Giglio testified at trial that he was then able to match the serial number of the replacement seat to the passenger seat in Appellant's vehicle. (Tr. p. 638, lines 11-24).

In pre-trial motions, Appellant moved to suppress the evidence from the September 26, 2007 search arguing the assertion, "Officers obtained verbal and written statements that Donsurvi Chisolm purchased a passenger side front seat for a Dodge Durango on 9/14/07," was false. (Tr. p. 81, line 10- p. 83, line 5). Detective Giglio testified officers had "received a sales quote form the LKQ Auto Parts" and a "written statement from a Mr. Richard Johns on 9/26/2007, who stated [Appellant] came in to purchase the seat and the next day you came back and paid cash." (Tr. p. 86, line 23- p. 87, line 1; p. 94, lines 6-16). Another statement of George Gallardo of LKQ, also taken September 26, 2007, reflected he "pulled" the requested replacement seat for Appellant on Friday, September 14, 2007. (Tr. p. 88, lines 9-23). However, upon further investigation, officers "weren't able to confirm a lawful purchase had occurred," though the attempt was noted on September 15, 2007. (Tr. p. 95, line 16-p. 96, line 8; p. 100,

lines 12-14). Dectective Giglio testified that the "original thought" after talking to LKQ personnel was that Appellant had purchased the seat; however, there was some later confusion whether it was purchased or stolen. (Tr. p. 105, lines 2-13; p. 107, lines 6-17). Even so, the detective acknowledged the initial request for the part on the 14th did not result in a "final purchase," nor did the credit card attempt (which was declined) on the 15th and to that extent, the affidavit reflects a clerical error. (Tr. p. 109, lines 2-12).

The trial judge found the allegations in the affidavit support probable cause for the warrant. She specifically found the officers did not act "in bad faith or recklessly," but relied upon information from interviews with LKQ personnel. (Tr. p. 112, lines 14-21). Whether purchase or theft, "the officers were intending to tell the magistrate ... that based on their interviews they had probable cause" to search the vehicle again based upon the information on the replacement seat, though the information received ultimately lacked clarity as to the actual purchase. (Tr. p. 112, line 24 – p. 113, line 10). She denied the motion to suppress. (Tr. p. 113, lines 11-15).

Appellant argues the trial judge abused her discretion in failing to grant the motion to suppress where the facts support "[i]t is likely Detective Giglio either intentionally or recklessly made the statement that appellant purchases a new front passenger seat on September 14, 2007, when he knew or should have known through investigation tha the information was false." (FBOA, p. 21).

Discussion:

Appellant suggests a position rejected in 1975 in *State v. Sachs*: "Mere error in the facts relied upon does not offend the protection sought to be achieved by the warrant requirement." *State v. Sachs*, 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975). The Court

eschewed the notion to the contrary reasoning "[h]indsight invalidation of the warrant would be incompatible with the legitmate demands of law enforcement." *Id.*

Detective Giglio in the pre-trial hearing reviewed the statements supporting the affidavit in detail. In particular, he reviewed the statement of Mr. Johns who indicated an attempt was made on the 14th when a card was decline, and "customer came back the next day and paid cash." (Tr. p. 94, lines 6-16). The second statement indicated that nothing was actually purchased. (Tr. p. 94, lines 17-20). However, Detective Giglio did not know there was a "clerical" error concerning the dates 9/14 and 9/15, (Tr. p. 100, lines 8-24; 108, line 24 – p. 109, line 4); and had confirmation from a photograph from the first search that the seat – whether purchased or obtained otherwise – was in Appellant's vehicle, (Tr. p. 109, lines 21 – p. 110, line 16). The fact the first statement by Mr. Johns was factually inaccurate as to actual purchase falls specifically in line with the caution in *Sachs* that the eventual disproof of the facts does not invalidate the warrant. The facts neither show an intentional assertion of a known false fact nor recklessness in making such assertion. At any rate, the probable cause was not the purchase (or theft) of the seat but possession of the seat. That was a fact that Appellant could not deny. The actual method of possession was never fully uncovered, but, again, the actual possession was firmly established.[2] Thus, probable cause is shown. *See generally State v. Sullivan*, 267

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[2] The evidence certainly supports the trial judge's ruling that the officers acted in good faith. They depended on statements from LKQ personnel, the pulled parts from the junk Durango, and cell phone records to confirm contact between Appellant and LKQ. (See Tr. p. 86, line 23 – p. 88, line 23; p. 94, lines 6-16; p. 637, line 10- p. 638, line 10). *See Davis v. United States,* ___ U.S. ___, 131 S.Ct. 2419, 2427 -2428 (2011) (affirming continued application of "good faith exception," reasoning: "When the 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 ... But when the police act with an objectively 'reasonable good-faith belief' that their conduct is

S.C. 610, 617, 230 S.E.2d 621, 624 (1976) ("Search warrants are constitutionally preferred and in determining whether they should issue, magistrates are concerned with probabilities and not certainties. .... specific [information] by a reliable citizen viewed in a common sense fashion establishes probable cause for the issuance of the warrant.").

Appellant is not entitled to any relief.

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lawful, ... or when their conduct involves only simple, 'isolated' negligence, ..., the ' " deterrence rationale loses much of its force," ' and exclusion cannot 'pay its way.'"). This Court has also underscored: "the court may not order suppression simply because the officer made a false statement in, or omitted key facts from, an affidavit supporting a search warrant" rather, the appellant must show the statements were material and affected the finding of probable cause. *State v. Robinson*, 408 S.C. 268, 274, 758 S.E.2d 725, 728 (Ct.App. 2014). Again, the officers relied on information received from the auto parts personnel which support probable cause. Further, the key fact is Appellant's looking for and obtaining, by whatever means, the replacement seat shortly after the murder. The date of purchase, if any, is less important than the fact of looking for and obtaining the replacement seat. If anything, Petitioner points to a incorrect fact of no consequence. Again, he is not entitled to any relief.

IV.

The trial judge did not abuse her discretion in disallowing cross-examination concerning testing of a gun in another matter that could not have been the murder weapon in this case given there was neither a nexus to the crime nor proper point of impeachment to be made based on same.

Relevant Facts:

Detective Zensen testified that she worked as a crime scene technician in the case. On cross-examination, Appellant asked about multiple items submitted for DNA testing, particularly questioning the detective at length concerning samples taken from Appellant's Durango. (See Tr. p. 588, line 11 – p. 596, line 13; p. 600, line 2 – p. 605, line 25). Appellant then asked about a January 7, 2008 request for testing on a .25 automatic handgun. (Tr. p. 606, lines 3-5). The detective originally began to answer concerning the .22 handgun recovered from the river, but Appellant corrected the witness to focus on a question about another weapon, "a 25 automatic handgun found on another person...." (Tr. p. 606, line 25 – p. 607, line 1). The State objected as to relevance and the trial judge heard argument outside the presence of the jury.

The trial judge reviewed the SLED report relied upon by Applicant to suggest that the detective had anwered incorrectly – that there was in fact another gun submitted to be tested for the victim's DNA. However, the report did not support that assertion. The trial judge found the report did not support any connection to the instant case – the report reflected a separate SLED case number, and the gun tested was a different caliber "semi-automatic pistol which could not fire the bullet that was removed from the body of this alleged victim." She declined to allow impeachment finding, "I don't know what the relevance is." (Tr. p. 611, line 8 – p. 619, line 4).

Appellant argues the trial court erred in not allowing him to address the inaccurate statement that another weapon was not submitted when investigators actually had submitted another weapon "as being involved in the murder." (FBOA, p. 26). Further, he argues "[t]he fact that law enforcement was investigating a second weapon indicated that officers from the Dorchester County Sheriff's Office were not firmly convinced that the gun recovered from the Ashley River was the murder weapon and that the officers considered that someone else may have been involved in the murder." (FBOA, p. 26).

Discussion:

"The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers." *State v. Aleksey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000). However, " 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.' " *Id*, 343 S.C. at 34, 538 S.E.2d at 255 (*quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). "An appellate court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Johnson*, 338 S.C. 114, 124-125, 525 S.E.2d 519, 524 (2000).

"Although the Confrontation Clause 'tips the scales' in favor of permitting cross-examination if it could reasonably be expected to have an effect on the jury, a court may prohibit cross-examination for impeachment purposes when the probative value of the

evidence that the defendant seeks to elicit is substantially outweighed by the risk of prejudice." *State v. Boiter*, 302 S.C. 381, 383, 396 S.E.2d 364, 365 (1990). "A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." *State v. Gillian*, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004).

As a first matter, Appellant fails to show a false statement to correct. Detective Zensen testified concerning the weapon that was recovered and was tested in regard to the bullet recovered from autopsy, but not that it was "sent in" for some type of DNA testing to the victim. (Tr. p. 606, lines 13-17). Her focus was rightfully on the instant case. (See also Tr. p. 605, lines 12-25). As the trial judge found, the separate gun Appellant wanted to question the detective about was not submitted with the same SLED case number, could not have involved in the murder as it was a different caliber, and Appellant failed to show any connection in investigation or personal knowledge for the request. (Tr. p. 611, line 8 – p. 612, line 24; p. 613, line 21 – p. 614, line 25; p. 617, line 24-p. 619, line 4). The trial judge reasonably found on these facts that Appellant's inquiry simply did not reflect fair impeachment. (Tr. p. 613, line 21-p. 614, line 16). Thus, there was neither an incorrect fact nor a basis to show bias or impartial – the general points to impeach a witness upon. *See Gillian*, 360 S.C. at 450, 602 S.E.2d at 71 ("On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.").

As to the argument there is a defense to be offered because investigators continued to investigate matters related to the victim, that does not show some fact of bias or dishonesty necessitating cross-examination on same. *See State v. Saltz*, 346 S.C. 114, 132, 551 S.E.2d 240, 250 (2001) ("Appellant sought to ask Mengedoht what she would do 'if she had to make a choice between being loyal to her friend and ***protecting*** her son.' This question did not seek to elicit a **fact** tending to show bias.") (emphasis in original). It certainly would not constitute proper third party guilt evidence. *See State v. Gregory,* 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) ("[E]vidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." (internal quotation marks omitted)). Further, Appellant did not establish that officers, particularly this officer, continued to investigate the murder. (See Tr. p. 614, lines 4-10). It could only work to inject irrelevant and confusing matter into the trial of the case. Thus, the testing of an unrelated gun, that could not have been the murder weapon, in a separate submission with a separate SLED number is too tenuous to constitute necessary cross-examination. The trial judge correctly found same would be inadmissible. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....").

Thus, the trial judge did not abuse her discretion in limiting cross-examination on this irrelevant subject. Appellant is not entitled to any relief.

V.

The record fully and fairly supports the trial judge's finding of a knowing and intelligent waiver of the right to counsel after inquiry on the understanding of the dangers and disadvantages of self-representation.

Relevant Facts:

Appellant requested to represent himself at a February 11, 2011 pre-trial hearing:

> Your Honor, I would like to assert my constitutional right to self-representation. I'm aware of the disadvantages and dangers of that. I am of sound mind. I'm very—I'm—I know clearly the decision I am making.
>
> I don't want to waste the Court's time arguing the conflicts and issues that me and Mr. Loy have together. I would like to proceed pro se as of this day February 11, 2011.

(February 2011 Tr. p. 7, lines 11-19).

The trial judge thereafter questioned Appellant regarding his decision. The trial judge first asked about his charge, which Appellant acknowledged was murder. He also acknowledged a separate murder charge in Berkeley County and that he was also representing himself on that charge. (February 2011, Tr. p. 9, lines 4-11). The trial judge questioned Appellant to ensure he was not seeking to represent himself to interpose a delay. Appellant confirmed his case had not at that time been scheduled for trial, and he was not seeking to delay the trial by the request. (February 2011, Tr. p. 10, lines 3-10).

The trial judge then gathered background and personal information from Appellant, such as Appellant's age which he reported as thirty-one; that he was married with four children; had worked for Sonic before incarceration; had one year of college; had a military background including additional college credits; "Did 10 months in Afghanistan in the army, was trained in fuel and ammo provisions; and stayed in the Army until discharged for injury. (February 2011, Tr. p. 11, line 11 – p. 15, line 25).

Upon release, Appellant worked with "trucks and heavy machinery" including "semi-trucks; Charleston Portable Storage, the pods... Cranes, factories" driving or working on heavy equipment. (February 2011, Tr. p. 16, line 18 – p. 19, line 4). He left because of the work hours which caused him to drive in the early morning hours after a twelve-hour shift and he "could possibly wreck...." (February 2011, Tr. p. 19, lines 8-17). After leaving his job, he was arrested for murder in Dorchester County. (February 2011, Tr. p. 19, lines 22-23). He bonded out and worked in the fast food industry and was then charged with the murder in Berkeley County. (February 2011, Tr. p. 20, line 4 – p. 21, line 6). He did not bond out again. (February 2011 Tr. p. 21, lines 7-10). Judge Goodstein found his work history and education to be "exceptional." (February 2011, Tr. p. 21, lines 11-12). Appellant denied any mental health treat (including specifically post-traumatic stress syndrome), and denied treatment for alcohol or drug abuse. (February 2011, Tr. p. 21, lines 14-18). Judge Goodstein advised not only did Appellant have the constitutional right to counsel but that "there's a benefit to counsel." (February 2011, Tr. p. 21, lines 22-25). She cautioned he was facing murder with a sentence of thirty years to life, and explained in terms of his prior work experience, going to trial without counsel would be akin to having the judge operate a crane with "15,000 and 60, 000 pounds of steel" simply because the judge is reasonably bright. Appellant admitted, "I would go nowhere near you." (February 2011 Tr. p. 22, lines 12-23). The judge noted the danger in both situations: It is the exact same thing. Practice of law is an art.... People go to school and they train ... it takes experience, and there's a langague to it." (February 2011 Tr. p. 23, lines 13-18). She praised then counsel, Mr. Loy, his skill and knowledge, which Appellant acknowledged. (February 2011, Tr. p. 23, line 19-p. 24, line 13; p. 26,

line 12 – p. 27, line 12). The trial judge then cautioned that he would need to develop defenses, and "you've got to have somebody who has the capacity to do that ... which is another reason why it's important and - - and why you put yourself in danger by not having a lawyer represent you." (Tr. p. 28, lines 11-18). Judge Goodstein noted, without going into facts or the "relationship between the Berkeley County allegations and the Dorchester County allegations," that she could advise "that having two allegations and – and two murders in two counties is not helpful." (February 2011, Tr. p. 29, lines 1-8). She plainly advised "I know that the overlay of that's not good" and he was at "risk in representing yourself with regard to one murder charge, having two of them has got to make tht even more risky and even more problematic exponentially. It's got to." (February 2011, Tr. p. 29, lines 11-21). She advised him he would have to comply with the rules of evidence and the court rules. (February 2011, Tr. p. 32, lines 11-18). The trial judge found:

> You're obviously very bright. You're obviously highly educated. Your work background is superior. I mean there's—as I go through my notes and I go through the case law, unfortunately, I...would really like to say, 'I'm sorry, Mr. Chisolm, but you can't represent yourself.'...Because I know what kind of risk you put yourself in. But our constitution gives you that right."

(February 2011, Tr. p. 33, line 15-p. 34, line 1).

She stated, after reviewing again his understanding of the charges, his work history and Army experience:

> ... I must tell you...I'm convinced that you are aware of it. I—I think that your waiver is being made understanding what—what you're doing.
>
> You know, I wouldn't say it's not been intelligently made, but you're an intelligent man and you're making the decision. And I think you're doing that with your eyes open.

> I don't think I understand the "why" part of it. I think I don't like it. But that—the judge's pleasure with it is—doesn't get to be factored in...
>
> I think you're knowing—you know what you're doing. You're intelligent. There isn't any evidence of any kind of mental illness or any sort of incompetency at all on your part. I –I can find no reason to disallow you to—to self-represent yourself....

(February 2011 Tr. p. 35, lines 3-18).

The judge also advised that if he changes his mind, he should not hesitate to file a motion to appoint counsel. (February 2011 Tr. p. 36, lines 16-22). He apparently requested Mr. Loy to remain as standby counsel. (Februar 2011 Tr. p. 37, lines 10-11).

On July 14, 2011, Appellant appeared before Judge Goodstein again in pre-trial. Mr. Loy was present as standby counsel. (July 14, 2011 Tr. p. 1[cover page]). The judge heard the State's discovery procedures for the *pro se* defendant, and Appellant requested "the disc file" so he could use a computer for review in addition to print outs. (July 14, 2011 Tr. p. 12, line 8 – p. 15, line 21). He requested helps in issuing subpoenas, and the trial judge assured him he would have the necessary subpoenas for trial. (July 14, 2011, Tr. p. 19, line 11 – p. 21, line 21). At the conclusion of the discovery discussion, the trial judge reminding Appellant discovery was then on-going, and encourage him to utilize Mr. Loy when he "need[ed] to get messges around...." (July 14, 2011 Tr. p. 37, lines 14-23).

On July 22, 2011, Appellant appeared again before Judge Goodstein and reported his subpoena issue had been solved. (July 22, 2001 Tr. p. 4, line 3 – p. 5, line 10). The parties discussed additional discovery at that time.

Appellant's case was originally called to trial on August 22-23, 2011, before the Honorable Edgar W. Dickson. Appellant represented himself. Mr. Loy was standby

counsel. (August 2011 Tr. p. 1[cover page]). Appellant moved for a mistrial based on an answer received from a prosecution witness during cross-examination, which was ultimately granted. (Aug. 2011 Tr. p. 173, line 3 – p. 188, line 16).

Prior to the mistrial, he had moved and argued to suppress evidence from the search warrant. (August 2011 Tr. p. 11, line 7 – p. 19, line 13). He questioned Dectective Giglio *in camera* on same. (August 2011 Tr. p. 21, line 16 – p. 33, line 6). He also participated in selection of the jury, requested specific *voir dire*, and expressed concern over "potential media coverage of my case" as having "a profound affect on the jury's ability to presume innocence." (August 2011 Tr. p. 54, lines 21-23; p. 62, line 23 – p. 63, line 24). He also presented an opening statement, (August 2011 Tr. p. 133, line 25 – p. 136, line 18).

Appellant complains, however, his waiver was not knowing and voluntary as he was only vaguely advised of the dangers and disadvantages of self-representation. (FBOA, p. 29). He further complains that though the judge referenced the rules of evidence, there were not concrete examples of same. (FBOA, p. 30). He suggests the trial judge should have explored the "friction" between Appellant and Mr. Loy. (FBOA, p. 30). Lastly, he suggest that the trial judge did not advise the murder conviction could be used to establish an aggravating circumstance to seek the death pending in his other pending murder case. (FBOA, p. 30).

Discussion:

It is has long been established that a defendant may choose to waive his right to counsel and represent himself, as long as the waiver is "knowingly and intelligently" made. *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525 (1975) (*citing Johnson v.*

Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.")). "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open." *Id*, 422 U.S. at 835 (citations omitted). "[I]t is the trial judge's responsibility to determine whether there is or is not an intelligent and competent waiver." *State v. Dixon,* 269 S.C. 107, 236 S.E.2d 419 (1977) (*citing Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1938)). Only "[i]f the trial judge ***fails*** to address the disadvantages of appearing *pro se,* as required by the second prong of *Faretta,*" will the reviewing court "look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Gardner v. State*, 351 S.C. 407, 411, 570 S.E.2d 184, 186 (2002) (*quoting Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990)(emphasis added)). *See also Stevenson v. State*, 337 S.C. 23, 26, 522 S.E.2d 343, 344 (1999)(noting before reviewing record as a whole that "no one specifically informed petitioner of the dangers and disadvantages of proceeding *pro se.*"); *Salley v. State*, 306 S.C. 213, 215-216, 410 S.E.2d 921, 922 (1991)("Because the hearing judge posed no specific questions to determine whether petitioner was aware of the dangers of self-representation, we have reviewed the record to ascertain whether petitioner had sufficient background or was apprised of her rights by some other source so as to be aware of the dangers of self-representation."); *Wroten v. State*, 301 S.C. 293, 294-295, 391 S.E.2d 575, 576 (1990)("trial judge made no specific inquiry to determine whether petitioner made his choice to proceed *pro se* 'with eyes open.' We therefore look

to the record"); *Ex parte Jackson*, 381 S.C. 253, 260, 672 S.E.2d 585, 588 (Ct. App. 2009)("If the trial court fails to address the disadvantages of appearing pro se, this Court will examine the record to determine whether the accused had sufficient background or was apprised of his rights by some other source."); *State v. Bryant*, 383 S.C. 410, 415, 680 S.E.2d 11, 13 (Ct. App. 2009)("when the trial court fails to expressly make this inquiry, this court will examine the record to determine whether the accused had sufficient background or was apprised of her rights by some other source.").

Here, the record reflects continuing and lengthy discussions between Judge Goodstein and Appellant, referencing not only the right to counsel, but specifically its value. Judge Goodstein cautioned Appellant about the need for experience and training to grasp the art of representation and to present relevant defenses. In short, Judge Goodstein fully and fairly advised appellant on the dangers and disadvantages of self-representation at the February, 2011 pre-trial hearing. Certainly, "it is the trial judge's responsibility to determine whether there is or is not an intelligent and competent waiver." *State v. Dixon,* 269 S.C. 107, 236 S.E.2d 419 (1977) (*citing Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1938)). Judge Goodstein more than fulfilled her responsibility to determine whether Appellant's waiver was intelligent and competent. Judge Goodstein questioned Appellant, related the danger to his own experiences to underscore the significant risk he ran in chosing self-representation. Further, she advised the danger was increased because of the second murder charge.

Even so, Appellant argues his case is much like the defendant in *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010). (FBOA, p. 31). However, in *Winkler,* the Supreme Court found the request was too late to be effective, certainly not the case here.

See 388 S.C. at 587, 698 S.E.2d at 587. At any rate, by footnote, the Court concluded "the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation." *Id* at n. 6. Appellant's reliance on *Winkler* is misplaced.

To the extent he argues a more formal and structured inquiry is necessary, precedent is against him. Simply, there is no established and required verbatim script which must be followed to adequately advise a defendant of the dangers and disadvantages. Indeed, the United States Supreme Court has determined that there is no constitutionally mandated colloquy that a trial judge must engage in to sufficiently advise a defendant of the dangers of self-representation:

> We have described a waiver of counsel as intelligent when the defendant "knows what he is doing and his choice is made with eyes open." We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.

Iowa v. Tovar, 541 U.S. 77, 88, 124 S.Ct. 1379 (2004)(citations omitted).

Thus, it is well settled, and accepted, that no particular questions must be asked. See Am.Jur. Crim.Law § 1153 ("Where advice or admonition from the court to the defendant is undertaken to establish a valid waiver by the defendant of the right to the assistance of counsel, no particular cautionary instruction or form is required to ensure the validity of the waiver."). *See also Dallio v. Spitzer*, 343 F.3d 553, 563 (2nd Cir. 2003) (noting "our court has strongly endorsed *Faretta* warnings as a factor important to the knowing and intelligent waiver of counsel" but "also rejected rigid waiver formulas or scripted procedures"); *United States v. Davis*, 269 F.3d 514, 519 (5th Cir. 2001) ("we

require no sacrosanct litany for warning defendants against waiving the right to counsel. Depending on the circumstances of the individual case, the district court must exercise its discretion in determining the precise nature of the warning."). The Court, however, did provide some guidance in *Tovar* expressing the "pragmatic approach" that "what purpose a lawyer could serve," and "what assistance he could provide to an accused at" the relevant stage of the trial should be considered to determine the scope of the advice needed. *Tovar*, 541 U.S. at 90. Exact verbiage, though, has never been mandated. *Id.*

Even where a court has devised loose guidelines, such a court specifically sets out that no particular language is necessary. For example, in *United States v. Hayes*, 231 F.3d 1132 (9th Cir. 2000), the Ninth Circuit cautioned before their guidance:

> We do not intend to set forth what would be a minimum explanation to meet the "dangers and disadvantages" demands of *Faretta.* Having said this, we believe that the necessary explanation need not be lengthy or pedantic; it should not be as complex and rigid as is now required in the taking of a guilty plea. There is no required formula. For example, and for the sole purpose of giving guidance to the district courts, we believe that the following illustrative discussion comports with *Faretta*'s requirements.

231 F.3d at 1138.

The Court of Appeals then advised that the following language could be used to sufficiently warn a defendant about the dangers of self-representation:

> The court will now tell you about some of the dangers and disadvantages of representing yourself. You will have to abide by the same rules in court as lawyers do. Even if you make mistakes, you will be given no special privileges or benefits, and the judge will not help you. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what constitutes a permissible opening statement to the jury, what is admissible evidence, what is appropriate direct and cross examination of witnesses, what motions you must make and when to make them during the trial to permit you to make post-trial

> motions and protect your rights on appeal, and what constitutes appropriate closing argument to the jury.

Id at 1138-1139.

The Court then concluded: "we emphasize that the foregoing formula is not required to be used verbatim." *Id* at 1139. *See also State v. Watson*, 900 A.2d 702, 710 - 711 (Me. 2006)(referencing a compilation of other jurisdictions' general guides and rejecting "a rigid formula for determining whether a defendant was adequately informed of the risks of proceeding to trial without representation"). This precedent is consistent with our well-settled notion that "the ultimate test is not the trial judge's advice but rather the defendant's understanding." *Wroten*, 301 S.C. at 294, 391 S.E.2d 575. *See also State v. McLauren*, 349 S.C. 488, 494, 563 S.E.2d 346, 349 (Ct.App. 2002). Thus, the key in review of such advice is whether the dangers and disadvantages of self-representation are explained in such a manner that a defendant may understand.

Here, Judge Goodstein took extra effort to explain the dangers and disadvantages of self-representation in such a manner that Appellant would understand. On two separate occasions during the hearing, she related Appellant's decision to his prior work history and experience in the military. (See February 2011, Tr. p. 22, line 12- p. 23, line 15; p. 30, lines 2-13).

At any rate, if the advice is not sufficient, the reviewing court would look to the record to determine if the waiver was sufficient.[3] *State v. Thompson*, 355 S.C. 255, 262, 584 S.E.2d 131, 135 (Ct. App. 2003) ("If the trial [court] fails to address the disadvantages of appearing pro se, as required by the second prong of Faretta, [the

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[3] Respondent notes again that our courts have only resorted to such analysis if there is an "absolute failure" to inquire of the defendant. *Gardner*, 351 S.C. at 412, 570 S.E.2d at 186. That cannot be fairly argued to be the case here.

reviewing court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." (internal quotation marks omitted)); *State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App.1992) ("Factors the courts have considered in determining if an accused had sufficient background to understand the disadvantages of self-representation include: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.").

In taking the factors in order, there is evidence supportive of finding a sufficient waiver: 1) Respndent was in his thirties with college education and military experience and no evidence of mental or physical ill health; 2) he had been previously involved in the trial that resulted in a mistrial and had also been involved to some extent with representing himself in his other murder charge; 3) he certainly understood he was being tried for murder and knew he faced on this first charge a sentence of thirty years to life; 4) he was represented by Mr. Loy prior to his decision to represent himself and requested

Mr. Loy remain as standby counsel (Appellant's present argument aside, there appeared to be no difficulties evident in record between the two, and Appellant often consulted with Mr. Loy, see for example, Tr. p. 206, line 23; p. 208, line 25; p. 211, line 8; p. 212, line 19); 5) he did no appear to be delaying the proceedings; 6) he not only was appointed standby counsel, but consulted with standby counsel; 7) the judge advised him he would have to abide by the rules of court and he confirmed he understood; 8) he did not discuss legal or factual defenses but was advised that counsel would be charged with presenting defenses, and defense would be important in the representation; 9) the conversation was tailored specifically to Appellant; and 10) there was no evidence of "coercion or mistreatment" prompting the waiver. Thus, should the Court review the record under these facts, the record well and fully supports a knowing and intelligent waiver.

However, the trial judge carefully reviewed the dangers and disadvantages with Appellant. Morevoer, she encouraged him to change his mind and request counsel. He never did so, even while he appeared before the same judge two additional times in pre-trial, and also had a trial run at self-representation in the August trial that resulted in a mistrial. He was given an opportunity to change his mind, and experiences to know what would be expected of him. Appellant stood firm in his choice. Appellant has failed to show error in regard to the waiver. He is not entitled to any relief.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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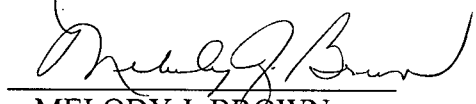
BY: 
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