(5)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMETRISS GLENN,

APPELLANT,

Appellate Case No. 2013-002444.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in refusing to instruct the jury on involuntary manslaughter where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?

II. Did the trial judge err in refusing to instruct the jury on defense of others and the right to act on appearances where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in refusing to charge the jury as to involuntary manslaughter where the evidence showed Appellant knew his co-defendants were planning to rob the victim before Appellant entered the victim's home and hit the victim over the head and where it was not reasonable to infer that Appellant was unaware of the robbery plans.

II. Whether the trial court erred in in refusing to charge the jury as to defense of others and the right to act on appearances where the evidence showed Appellant knew his co-defendants were planning to rob the victim before Appellant entered the victim's home and hit the victim over the head and where it was not reasonable to infer that Appellant was unaware of the robbery plans.

RESPONDENT'S STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant, Demetriss Glenn, in November 2011 for murder and first degree burglary. (Indictment Numbers 2011-GS-32-3198 & -3199). The Grand Jury indicted Appellant in October 2013 for armed robbery. (Indictment Number 2013-GS-32-3101). New indictments for murder and first degree burglary were presented to the Lexington County Grand Jury in October 2013, (Indictment Numbers 2013-GS-32-3351 & -3352), and Appellant was indicted on both charges.

On November 4, 2013, Appellant's case was called to trial before the Honorable Thomas A. Russo. (Tr. p. 1). Appellant was represented by Casey Cornwell and Andrew Sims Radeker during the four-day trial. (Tr. p. 1). Assistant Solicitors Shawn Graham and Rick Hubbard represented the State. (Tr. p. 1). On November 7, 2013, the jury returned a verdict of guilty of all counts as charged. (Tr. p. 547, lines 4–25). Judge Russo sentenced Appellant to life imprisonment for murder, to life imprisonment for burglary in the first degree, and to imprisonment for thirty (30) years for armed robbery, the sentences to run concurrently. (Tr. p. 563, lines 10–22).

Thereafter, Appellant served a timely notice of appeal, which he filed with the South Carolina Court of Appeals on November 15, 2013. (Notice of Appeal).

RESPONDENT'S STATEMENT OF THE FACTS

The State's Case

Timothy Tice (Victim) was found face down in a pool of blood in his kitchen on June 26, 2011. (Tr. p. 126, line 24–p. 131, line 5). He had been beaten and had died as a result of blunt force injuries to his head. (Tr. p. 441, lines 3–6). At Appellant's trial the State presented evidence that three people were present at the time Victim was killed—Kenneth Walters, Margaret Marie Driggers,[1] and Appellant.[2] And though none of those individuals testified at Appellant's trial, the jury heard testimony from two witnesses who Appellant had spoken to about what happened that night.

Charles Plumley, who had been Appellant's roommate at the detention center, testified that Appellant told him multiple stories about what happened the night of Victim's murder. (Tr. p. 370, line 10–p. 388, line 3). Appellant first told Plumley "that he was involved—he was with some people that went on a robbery, and his co-defendant killed somebody." (Tr. p. 375, line 19–p. 376, line 2). According to Plumley, Appellant identified Kenneth Walters and Margaret Driggers as the two people he was with. (Tr. p. 376, lines 3–p. 377, line 7). Over time, Appellant told Plumley more about that night, and Plumley testified to the following as the final story from Appellant:

> That him, Margaret Driggers, Kenneth Walters was at a bar called Shaggy's in West Columbia. They was drinking and partying, and Marie got a call from the victim, Timothy Tice. She knew the victim because she used to work Backpage and she's a prostitute.
>
> And Marie and Kenneth planned the robbery, that the plan was that she was go [sic] inside. Soon as the man feel [sic] asleep, she was going to test Walters to come inside and rob the man. But the man wasn't

[1] Driggers was also called "Roxie." (Tr. p. 277, lines 7–13; Tr. p. 389, line 10–p. 390, line 3).

[2] Appellant was also called "Shawn." (Tr. p. 399, lines 13–25).

> asleep, that she thought he was asleep when she texted him. The man seen Walters in the house, jumped on him and started beating him real bad.
>
> And Shawn was out in the car, and she ran out there screaming for him to come help—for him to come help his friend because the victim was killing him. And he went inside and tried to pull the man off of him. The man wouldn't get off of him.
>
> And he hit the man, and then he left. He didn't know what happened. After he left, Marie came out of the house—Marie and Walters came out of the house with something wrapped in a sheet, and it was two rifles.

(Tr. p. 378, line 22–p. 379, line 20). Plumley learned from Appellant that those rifles "went to somebody named Ty." (Tr. p. 379, lines 21–23).

Tyrone Williams, the man who Appellant gave one of Victim's rifles to,[3] also testified at Petitioner's trial. (Tr. p. 396, line 2–p. 423, line 19). Williams was best friends with Appellant's cousin, and Appellant called Williams "uncle." (Tr. p. 399, line 13–p. 400, line 10). Williams testified that Appellant called him one day to meet at a motel and told him "he had to bust somebody in the head" the night before. (Tr. p. 403, line 21–p. 406, line 1). Appellant later told Williams more details, explaining what happened the night he killed Victim:

> [T]his particular guy called repeatedly while he was at the club, him and the girl Roxie, and another guy who I don't know. And I think maybe the third or fourth time they finally went. And he was asleep in the car. That's what he tells me, now. And Roxie supposedly went in and left the door open or unlocked or whatever.
>
> . . . .
>
> The little dude went in and said he was asleep, and Roxie was already in and left the door open. The little dude went in. And I don't know how much time it was, but Roxie ended up coming outside banging on the

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[3] Victim's brother identified the rifle that police retrieved from Williams's home as one that belonged to his brother. (Tr. p. 245, line 3–p. 247, line 9; Tr. p. 297, line 7–p. 301, line 10).

> window to get him, yelling she'd been calling him or something or texting him or whatever. And when he got out, she said he was beating the little dude down.
>
> . . . .
>
> He got out and went in to confront him, and they got into a tussle.
>
> . . . .
>
> When he jumped on him, he said he was a tough cracker. He said the more he hit him, the more he kept coming. And he grabbed either a wine bottle or a liquor bottle and hit him in the head. It dazed him a little bit, but he kept coming.
>
> He said he grabbed a stool or either a chair. He said he repeatedly hit him, and he finally fell. He said he blacked out and he couldn't stop.

(Tr. p. 406, line 9–p. 407, line 24).

A day or two after that conversation, Appellant came over to Williams's home and put a rifle and a Crown Royal bag, which Williams believed had silver in it, in a back room of Williams's house. (Tr. p. 408, line 6–p. 409, line 24). Appellant had wrapped the gun in a sheet, so Williams could not see it, but he knew what it was. (Tr. p. 408, lines 6–23). Appellant told Williams, "'If you find somebody that wants to get it, give me a call.'" (Tr. p. 408, line 25–p. 409, line 1).

The next day, Williams was in a car with Appellant and Driggers and heard an argument between them where Driggers asked Appellant why he had sent that "little boy" in when Appellant was supposed to have come in with him. Appellant responded, "'Shut the fuck up. I handled it, didn't I?'" (Tr. p. 412, line 5–p. 416, line 14).

The forensic evidence presented at trial corroborated the testimony of both Plumley and Williams about what happened the night of Victim's murder. The forensic pathologist testified that Victim had multiple bruises and abrasions to his face, and he had

blunt force injuries—including abrasions and lacerations—to other parts of his head. (Tr. p. 433, lines 3–p. 435, line 25). The forensic pathologist testified that some of Victim's injuries were consistent with having been hit by either a stool or a wine bottle. (Tr. p. 436, line 6–p. 437, line 6). Police recovered a broken wine bottle and a stool from the crime scene—both items tested positive for Victim's blood. (Tr. p. 254, line 8–p. 256, line 9; Tr. p. 270, lines 2–21). Police also found both Walters's and Driggers's DNA at the scene.[4] (Tr. p. 261, line 14–p. 262, line 15; Tr. p. 267, line 17–p. 272, line 7).

How These Issues Were Raised at Trial

The trial court conducted a charge conference at the end of the day on Wednesday, November 6, 2013—both sides had rested their cases at that point. (Tr. p. 442, line 17–p. 463, line 6). Unfortunately, the charge conference was not recorded.[5] (Tr. p. 462, lines 21–23). However, from the recorded discussions the next day, it appears that the trial court was originally considering charging the jury with involuntary manslaughter but that the court ultimately decided not to give such a charge, and the trial court emailed both sides on Wednesday night to let them know about its decision. (Tr. p. 466, line 22–p. 467, line 8). The State did not object to the charge, which the trial court had also emailed. (Tr. p. 467, lines 9–23). However, the defense argued that there was evidence in the record that entitled Appellant to a charge on involuntary manslaughter and on defense of others and the right to act on appearances. (Tr. p. 468, line 1–p. 470, line 24).

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[4] Appellant told Williams that his DNA would not be in Victim's house because "he cleaned up everything." (Tr. p. 416, line 21–p. 417, line 15).

[5] Respondent's counsel confirmed with the court reporter in January 2015 that the charge conference was not transcribed and the tapes of the trial were destroyed consistent with Rule 607(i), SCACR.

There was testimony at trial that Walters and Driggers discussed the robbery on the way to Victim's house. There was also testimony that Appellant passed out in the car on the way to Victim's house. Defense counsel recalled that Plumley had testified "that he did not know when it was that Mr. Glenn became aware of the fact that Ms. Driggers and Mr. Walters were planning the robbery in the front seat of the car on the way to the scene." (Tr. p. 469, lines 1–6). Though defense counsel believed that the State had objected to that testimony by Plumley and that the trial court had sustained the objection, defense counsel thought that the answer was still in the record because the State had not moved to strike that testimony. (Tr. p. 468, line 20–p. 470, line 24). Neither the trial court nor the State remembered the testimony as defense counsel did. (Tr. p. 470, line 25–p. 473, line 6). The trial court stated,

> We're going to need to go back and look at Plumley's testimony, because I don't recall Plumley ever saying that. That was the issue for me, was that your question was, is it possible that because he fell—and this isn't verbatim, because I don't remember the verbatim language.
>
> But it was something along the lines of Plumley's testimony the whole time was that he knew about the robbery, they were going there to effectuate that purpose, and that he fell asleep.
>
> And then the question was something along these lines, "Would it be possible because he fell asleep to believe that maybe he didn't know?" And he said like maybe "I guess" or something of that nature. So there was no testimony from Plumley that he may not have known.

(Tr. p. 470, line 25–p. 471, line 15).

After listening to Plumley's testimony again, the trial court made a more detailed ruling regarding his denial of Appellant's requests to charge, stating

> Just to explain a little further, the Court's ruling is—and I'll be candid. When I initially left here yesterday, I thought that where I would probably fall on this thing was to charge involuntary manslaughter but not voluntary manslaughter.

> But when I got to the house and I started looking at case law and looking at this case, it's just such a basic fundamental process regarding charging juries, and that is that the charge has to follow and be supported by the evidence.
>
> And in looking at this case and looking at the evidence that's in this record, there was just nothing in the record that would support the charge of either involuntary or voluntary manslaughter, at least in my opinion, and reviewing the testimony in my mind. I didn't have the benefit of the replay we just heard. But it does seem to support my recollection.
>
> And so that's the reason that the Court has declined to charge those two things, because I just think it would be an improper charge if it's a charge that's not supported by the evidence in the case.
>
> And what had me leaning toward the possibility of thinking that involuntary may be appropriate was my conversation in my head about, "Well, you know what, what if the jury doesn't believe the State's witnesses that he knew prior?"
>
> Well, that's not a luxury the Court has. I'm not allowed to speculate as to what will a jury decide or what could a jury decide. A jury could decide to discard everything the State presented and acquit. So it's not about what could a jury do or what can a jury do, what might a jury do.
>
> The charge is about being supported by the evidence in the record. And how the jury treats that evidence is their provence [sic]. It's up to them how they treat that evidence. So that is the basis for the denial of charging the involuntary and the voluntary manslaughter.

(Tr. p. 473, line 19–p. 475, line 9). Defense counsel apologized for his "imperfect memory" and then argued,

> [E]ven without any response from Mr. Plumley to those questions that we believe that looking at the evidence that a jury could conclude because Mr. Glenn was asleep during the conversation that's supposed to be the planning conversation that there's evidence for this jury that he didn't know, thus opening the doors to the manslaughter charges.

(Tr. p. 475, line 20–p. 476, line 9).

The trial court did not instruct the jury as to either involuntary manslaughter or defense of others and the right to act on appearances. (Tr. p. 522, line 9–p. 542, line 25).

ARGUMENT

I.

The trial court did not err by refusing to charge the jury as to involuntary manslaughter where the evidence showed Appellant knew his co-defendants were planning to rob Victim before Appellant entered Victim's home and hit Victim over the head and where it cannot be reasonably inferred that Appellant was unaware of the robbery plans.

Introduction

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

Standard of Review

> A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Burriss*, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999). An appellate court will not reverse the trial judge's decision absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Id.* The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 390, 529 S.E.2d at 539. The law to be charged must be determined from the evidence presented at trial.

State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2008).

Analysis

Appellant asserts in his brief that he was entitled to a jury charge on involuntary manslaughter based on the evidence presented at trial.

> Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.

Pittman, 373 S.C. at 571, 647 S.E.2d at 167. Appellant asserts that, viewing the evidence in the light most favorable to him, he was entitled to an involuntary manslaughter charge because he could have been found guilty under the second description of involuntary manslaughter—that he "unintentionally killed the victim without malice while engaged in the lawful activity of defending his friend, although in the end he acted with reckless disregard for the victim's safety by being criminally negligent and responding too violently." (Initial Br. of Appellant, p. 13).

Appellant's argument that he was entitled to an involuntary manslaughter charge hinges on a perceived ambiguity in Plumley's testimony regarding when Appellant became aware of the plan to rob Victim. However, while Appellant tries to read ambiguity into the evidence, Plumley's testimony is not ambiguous on that point. Even in the first story Plumley heard from Appellant (where Appellant identified Walters as the one who had killed Victim), Plumley testified that Appellant knew about the robbery beforehand. (Tr. p. 378, lines 8–16). Appellant's final story to Plumley was even more detailed and included the information that Driggers had received a call from Victim while she, Appellant, and Walters were at a club and that Driggers and Walters planned the robbery. (Tr. p. 378, line 20–p. 379, line 20). Apparently, Driggers and Walters discussed the plan on the way to Victim's house, and Appellant "knew, but he didn't want nothing to do with it." (Tr. p. 380, lines 8–16).

On cross-examination, Plumley confirmed "that Marie and Walters planned this robbery, and they were discussing the robbery while they were in the car on the way to Tice's house" and "that [Appellant] passed out in the back seat during that ride over to Tice's house." (Tr. p. 385, lines 17–25). However, there was no testimony that

Appellant learned of the plan to rob Victim after-the-fact.[6] (Tr. p. 385, line 10–p. 387, line 22). Indeed, when asked point blank, both Plumley and Williams were clear about the fact that Appellant knew about the plan beforehand. (Tr. p. 378, line 8–p. 379, line 20; Tr. p. 419, lines 12–21). During direct examination, Williams testified as follows:

> Q . . . The story that Shawn told you, did he tell you that he did or did not know before he got up to go help the guy in the house that he knew that there was an armed robbery and burglary going on?
>
> A One hundred percent sure, yes.
>
> Q Sorry?
>
> A Yes, one hundred percent sure, yes.
>
> Q He said that?
>
> A Yes.

(Tr. p. 419, lines 12–21).

Respondent submits that the trial court did not err in refusing to instruct the jury as to involuntary manslaughter because there was not *any evidence* to support that jury charge. *State v. Niles*, 400 S.C. 527, 533, 735 S.E.2d 240, 243 (Ct. App. 2012), *cert. granted* Feb. 6, 2014 ("If any evidence supports a jury charge, the circuit court should grant the request." (citing *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004))). In this case there was not any evidence that Appellant only learned of the armed robbery after he had bashed Victim on the head. In fact, the only evidence before the

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[6] It appears that defense counsel attempted to elicit testimony to that effect, but he was unsuccessful. Defense counsel asked, "Now, is it possible that he didn't learn about this until after this stuff had taken place[,]" and Plumley started to respond, stating "I believe—" before he was cut off by an objection from the State, which the trial court sustained. (Tr. p. 386, lines 15–20). Defense counsel later attempted a similar question, asking "Now, is it a logical conclusion that the only way he could know that is that he was told after the fact[,]" but the State immediately made an objection, which was sustained. (Tr. p. 387, lines 17–22).

jury was that Appellant knew of Driggers and Walters's plan before he entered Victim's house.

Moreover, the inference that Appellant would have the jury make—that Appellant did not know about the robbery plan beforehand—is not a reasonable inference that can be drawn from the evidence. As this Court has recognized,

> Although an indictment for a higher offense will sustain a conviction for a lesser included offense, a request to charge a lesser included offense is proper only when the evidence could support a reasonable inference that the defendant committed the lesser rather than the greater offense. *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991). A mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge. *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976).

State v. Morris, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991). The inference that Appellant suggests cannot be drawn directly from the evidence in this case.[7] Rather,

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[7] Appellant likens this case to one in which a fight or confrontation resulted in death when the defendant asserted that he was trying to defend himself and did not intend to kill anyone. However, the foundation of this comparison—that Appellant was only defending himself (or Walters)—is faulty as in this case there is a lack of any direct evidence or any evidence from which the jury could reasonably infer that Appellant did not know what was going on when he entered Victim's home.

Consequently, the cases Appellant cites for this proposition are distinguishable from the instant case. *See State v. Mekler*, 379 S.C. 12, 15–17, 664 S.E.2d 477, 479 (2008) (finding multiple pieces of evidence that could support a finding that the petitioner unintentionally shot the victim while negligently handling a shotgun where petitioner made statements that she could not remember pulling the trigger and that her finger must have slipped); *State v. Light*, 378 S.C. 641, 647–48, 664 S.E.2d 465, 468–69 (2008) (finding evidence that a gun fired almost immediately after the petitioner took possession of it to be evidence that petitioner recklessly handled the gun); *Tisdale v. State*, 379 S.C. 122, 125–26, 662 S.E.2d 410, 412 (2008) (finding evidence that there was a struggle over a gun to support submission of an involuntary manslaughter charge); *State v. Burriss*, 334 S.C. 256, 258–59, 264–65, 513 S.E.2d 104, 105–06, 109 (1999) (finding evidence that the petitioner's gun went off as he was getting up from the ground to be sufficient evidence of negligent handling of a gun to support an involuntary manslaughter charge); *cf. State v. Sams*, 410 S.C. 303, 311–16, 764 S.E.2d 511, 515–18 (2014) (finding the petitioner's actions "did not fall within the range of conduct constituting voluntary

it requires taking two pieces of testimony out of context and then drawing an inference that is not supported by the record—namely, that Appellant was wholly unaware that Driggers and Walters planned to rob Victim and that Appellant was passed out for the entirety of the planning (though Driggers received the calls that initiated the plan while Appellant was at a club with her and though Appellant, at some point prior to the robbery, provided Walters with a gun to use in the robbery). The logic gymnastics required to get to the inference drawn by Appellant demonstrate that the inference is simply not one that can be reasonably drawn from the evidence. Accordingly, the trial court did not err in refusing to charge involuntary manslaughter.

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manslaughter in this state" where petitioner maintained a chokehold on the victim for well over ten minutes, even after victim stated he could not breathe and became limp).

II.

> The trial court did not err by refusing to charge the jury as to defense of others and the right to act on appearances where the evidence showed Appellant knew his co-defendants were planning to rob Victim before Appellant entered Victim's home and hit Victim over the head and where it cannot be reasonably inferred that Appellant was unaware of the robbery plans.

Introduction

The evidence presented at Appellant's trial did not support a charge of defense of others and the right to act on appearances. Thus, the trial court correctly denied Appellant's request to charge the same.

Standard of Review

As this Court has stated,

> "In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* If any evidence supports a jury charge, the circuit court should grant the request. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

Niles, 400 S.C. at 533, 735 S.E.2d at 243. "An appellate court will not reverse the trial judge's decision absent an abuse of discretion." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2008).

Analysis

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997) (citing *State v. Sales*, 285 S.C. 113, 328

S.E.2d 619 (1985); *State v. Hays*, 121 S.C. 163, 113 S.E. 362 (1922); *State v. Cook*, 78 S.C. 253, 59 S.E. 862 (1906)). In accordance with South Carolina law,

> A person is justified in using deadly force in self-defense when:
>
> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . .; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)). Also, under South Carolina state law, "[a] person has the right to act on appearances, even if the person's belief is ultimately mistaken." *Id.* at 501, 716 S.E.2d at 102 (citing *State v. Fuller*, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989)).

Appellant relies on the same purported ambiguity discussed with regards to Issue I for his claim that he was entitled to a charge on defense of others and the right to act on appearances. Appellant again asserts that he "was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked for reasons that arguably were unknown or uncertain to him." (Initial Br. of Appellant, p. 17). However, Respondent disagrees that it is "arguable" whether Appellant knew about the armed robbery beforehand. As previously discussed, Appellant's conclusion—that it could be inferred that he did not

know about the robbery until after-the-fact—comes from two pieces of testimony by Plumley—first, that Driggers and Walters planned the robbery on the way to Victim's house and, second, that Appellant passed out in the back of the car on the way to Victim's house.[8] (Tr. p. 380, lines 8–16; Tr. p. 385, lines 17–25). But Appellant's conclusion requires taking these two pieces of testimony out of context and viewing them in isolation and then inferring that Appellant was not aware of the robbery that was being planned. Such an inference is not proper in light of the other evidence. Plumley testified that Appellant knew what Driggers and Walters were planning, but he did not want anything to do with the robbery. (Tr. p. 380, lines 12–16). Additionally, Plumley testified that Appellant provided Walters with a gun prior to the robbery. (Tr. p. 381, line 23–p. 382, line 11). There was no direct evidence that Appellant learned of Walters and Driggers's plan after-the-fact, nor is that a reasonable inference to be drawn from the evidence.

Appellant was not entitled to a defense of others instruction because Walters was not entitled to take Victim's life in self-defense as Walters was not without fault in bringing on the difficulty. Rather, he was in the process of burglarizing Victim's home at the time Victim attacked him. "'Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide.'" *State v. Wigington*, 375 S.C. 25, 32, 649 S.E.2d 185, 188 (Ct. App. 2007) (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)). Clearly, Walters would not

[8] Respondent would note that those pieces of testimony are not mutually exclusive. It could be true (and it is likely) both that the robbery was planned during the car ride while Appellant was conscious and that Appellant passed out in the back seat at some point during the car ride.

have been entitled to use self-defense under South Carolina law. And the evidence shows that Appellant knew Walters was at fault in bringing on the difficulty. Accordingly, Appellant was not entitled to a defense of others instruction.

Similarly, Appellant was not entitled to an instruction regarding his right to act on appearances because there was no evidence that when he killed Victim he was merely acting on appearances. The only evidence showed that Appellant was aware of what Walters was doing in Victim's home before he went in to save Walters.

CONCLUSION

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

Respectfully Submitted,

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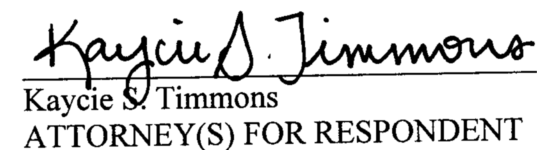

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February 19, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMETRISS GLENN,

APPELLANT,

Appellate Case No. 2013-002444.

PROOF OF SERVICE

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

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

This nineteenth day of February, 2015.

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