ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Pickens County
Robin B. Stilwell, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

TAVISH DOMINIQUE YEARGIN,

APPELLANT

APPELLATE CASE NO. 2013-002508

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**FINAL BRIEF OF APPELLANT**

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II. Did the trial court err in refusing to charge the jury on involuntary manslaughter in light of evidence that Appellant Tavish Yeargin reasonably believed it was necessary for him to draw a weapon due to a physical altercation posing a risk of serious bodily harm, but may not have intended to fire the weapon?

III. Did the trial court err in admitting into evidence letters Yeargin attempted to send to a witness concerning the witness's testimony at trial, where such letters did not contain any unlawful threats or solicit false testimony and were never received by the witness?

## STATEMENT OF THE CASE

Appellant Tavish Yeargin was indicted by a Pickens County Grand Jury for Murder and Grand Larceny, along with two co-defendants, Kayla Williams and Nyia Utsey. On November 18-20, 2013, a jury trial was held before the Honorable Robin B. Stilwell on the charges against Yeargin. Williams and Utsey testified for the State at Yeargin's trial. At the close of the evidence, Judge Stilwell sent the case to the jury after denying defense motions to charge the jury on the law of defense of others and involuntary manslaughter. (R. p. 315, line 13 – p. 318, line 17; p. 330, lines 5-13.) Yeargin was convicted on both counts and sentenced to 60 years on the Murder count. Williams and Utsey eventually pled guilty to reduced charges. This direct appeal is taken from Yeargin's convictions. He seeks a new trial.

## STATEMENT OF FACTS

On Saturday, September 17, 2011, Sean Dinneen was shot in the parking lot of the Crosswell Baptist Church in Easley, South Carolina. The shooting allegedly arose out of an altercation involving Dinneen, Williams, Utsey and Yeargin. Dinneen died from the single gunshot wound he received that evening. (R. p. 296, line 20 – p. 298, line 25.) Four days later, Williams, Utsey and Yeargin were located and arrested at a hotel in Asheville, NC, and each was charged with murder and grand larceny. (R. p. 94, lines 3-11; p. 130, line 24 – p. 132, line 16.) Yeargin's case went to trial first, and he exercised his right not to testify.

There were no witnesses to the immediate sequence of events that led to Dinneen's death other than Williams and Utsey. Both were facing murder charges at the time they testified for the State at Yeargin's trial. After the testimony was given, and Yeargin was convicted, Williams and Utsey were permitted to plead to lesser charges, receiving sentences that were a small fraction of what Yeargin received. *State v. Williams*, No. M521464; *State v. Utsey*, No. M521463, Pickens County General Sessions Court. Consequently, the evidence submitted to the jury, and the foregoing Statement of Facts, derives almost entirely from the highly self-interested testimony of State's witnesses Williams and Utsey.

In September 2011, Williams was in an intimate relationship with Utsey, and they were living together with Utsey's three-year old son. (R. p. 137, lines 16-25; p. 201, line 25 – p. 202, line 14.) Neither was working, and their sole means of transportation was a blue Ford Mustang that belonged to Williams' grandfather. (R. p. 138, lines 14-15; p. 204, lines 5-7.) Williams' right to use the vehicle was disputed, and other members of her family were attempting to get it back. (R. p. 203, line 21 – p. 204, line 11.) Williams wanted to get rid

of the Mustang as soon as possible because she was concerned that her family would report it stolen and the police would be looking for it. (R. p. 243, line 20 – p. 244, line 4.) Williams had a telephone conversation with Yeargin, who is Utsey's brother. (R. p. 204, lines 11-25.) Williams and Yeargin discussed the possibility of getting a vehicle from Yeargin's former roommate Dinneen, who was trying to sell two cars. (Id.)

On Friday, September 16, 2011, Williams drove to Dinneen's home in Easley with Utsey in the passenger seat and Yeargin in the back seat. (R. p. 208, line 22 – p. 209, line 8.) However, Dinneen was not home. (R. p. 210, line 24 – p. 211, line 2.) Williams, Utsey and Yeargin looked at Dinneen's vehicles, which were parked outside. (R. p. 210, lines 17-19.) When Williams saw a 2006 Pontiac Grand Prix parked outside Dinneen's residence, she exclaimed "ooh, ooh, I want that car, I want that car." (R. p. 210, lines 20-21; p. 242, lines 12-21.)

The following night, Saturday, September 17, 2011, Williams again drove to Dinneen's house, this time with Utsey in the passenger seat and Yeargin and his brother Charles in the back seat. (R. p. 151, lines 2-9; p. 153, lines 12-18.) They planned to tell Dinneen they wished to test-drive the vehicles, and then to take them. (R. p. 153, line 22 – p. 154, line 12.) Dinneen was not at home when they got to his house, but he arrived shortly thereafter. (R. p. 157, lines 6-19.)

Williams and Utsey talked to Dinneen while Yeargin stayed in the back seat of the Mustang. (Id.) Charles initially got out of the car but then began walking away from the conversation. (R. p. 157, lines 19-23.) He became uncomfortable with the idea of stealing the cars and did not want to be involved. (R. p. 157, line 23 – p. 158, line 5.) Apparently realizing that Charles might jeopardize their plans, Williams and Utsey then told Dinneen

they would need to use the restroom at a nearby gas station and return in a few minutes. (R. p. 221, lines 11-17.) When they got to the gas station they left Charles there and returned to Dinneen's house. (Id.)

When Williams, Utsey and Yeargin returned to Dinneen's house, Williams and Utsey again approached Dinneen about taking a test drive. Dinneen started the Grand Prix and got into the back, with Williams driving and Utsey in the passenger seat. (R. p. 224, line 16 – p. 225, line 8.) By all accounts, Dinneen was heavily intoxicated and brought with him a bottle of malt liquor. (R. p. 8, lines 22-25; p. 163, line 21 – p. 164, line 6; p. 225, lines 9-14; p. 302, lines 13-17.) Williams began driving the Grand Prix, with Yeargin following in Williams' grandfather's blue Mustang. (R. p. 225, lines 5-25.) Williams claims she was continuously looking back to Yeargin and following his turn signals. (R. p. 164, line 24 – p. 165, line 7.) However, Williams eventually decided to stop following Yeargin's directions and pulled into the Crosswell Baptist Church parking lot. (R. p. 165, lines 11-17; p. 226, lines 1-5.) Yeargin, in the Mustang, pulled in behind the Grand Prix. (R. p. 226, lines 11-18.)

Utsey got out of the Grand Prix and walked back to where Yeargin was parked in the Mustang. (R. p. 226, lines 19-21.) Utsey claims Yeargin told her that Williams should get back on the road and keep driving. (R. p. 226, line 22; p. 257, lines 8-11.) Utsey then returned to the Grand Prix and Williams got out and walked back to talk with Yeargin. (R. p. 166, line 21.) According to Williams, Yeargin told her to get back in the Grand Prix. (R. p. 167, lines 14-17; p. 193, lines 20-23.) During this time, Dinneen got out of the back seat and began making his way to the driver's side of the Grand Prix, stumbling due to his intoxication. (R. p. 167, lines 2-10; p. 227, lines 21-24.) When Williams saw Dinneen

move toward the driver's side, she ran back to the Grand Prix. (R. p. 167, lines 18-19; p. 228, lines 1-2.)

Williams and Dinneen each attempted to get into the driver's side of the Grand Prix before the other. Williams got in first and Dinneen jumped on top of her. (R. p. 167, lines 18-25; p. 228, lines 4-14.) They began to fight over control of the car. (Id.) Dinneen was on top of Williams and was grabbing her arm forcefully enough to cause bruising. (R. p. 167, line 24 – p. 168, line 7; p. 194, lines 2-21.) As Utsey later told the police, it appeared that Dinneen was trying to hurt or even rape Williams. (R. p. 255, line 12 – p. 256, line 3.) During the struggle, Williams managed to get the car moving, with the lower half of Dinneen's body hanging out the driver's side. (R. p. 169, lines 9-14; p. 194, line 22 – p. 195, line 8; p. 228, lines 23-25.) At some point during the struggle, Dinneen's shoe came off and he threw the glass bottle, smashing it on the pavement. (R. p. 126, line 22 – p. 127, line 7; p. 228, lines 15-25.)

As the heavily intoxicated Dinneen was on top of Williams, fighting with her in a manner Utsey perceived to be a possible rape attempt, Yeargin, driving the Mustang, pulled alongside the passenger door of the Grand Prix, opened the door of the Mustang, and shouted at Dinneen to get off of Williams. (R. p. 230, lines 3-4; p. 258, line 13 – p. 259, line 21.) Dinneen refused, and Yeargin pointed a gun out the open car door of the Mustang toward Dinneen. (R. p. 169, lines 1-7; p. 230, lines 3-7.) Dinneen continued struggling with Williams and told Yeargin to go ahead and shoot. (R. p. 169, line 7; p. 230, lines 5-6.) A shot was fired, striking Dinneen in the shoulder. (R. p. 57, line 18; p. 169, lines 8, 17-19; p. 230, lines 17-22; p. 296, line 20 – p. 297, line 2.) Williams immediately threw Dinneen out

into the parking lot and quickly drove away by herself in the Grand Prix. (R. p. 170, lines 5-16; p. 230, line 23 – p. 231, line 3.)

Eventually, Yeargin and Utsey caught up with Williams and they switched vehicles, with Williams and Utsey returning home in Williams' grandfather's Mustang and Yeargin driving the Grand Prix. (R. p. 170, line 17 – p. 171, line 8; p. 231, line 22 – p. 232, line 8.) By the following day, news accounts disclosed that Dinneen had died. (R. p. 234, line 24 – p. 235, line 5.) Williams and Utsey retrieved their security deposit at the InTown Suites where they had been living and left the Greenville area with Yeargin in the Mustang, abandoning the Grand Prix. (R. p. 175, lines 4-12; p. 236, line 12 – p. 237, line 5.) They were nearly apprehended at a Wal-Mart in Travelers Rest, South Carolina, but Williams, driving the Mustang, was able to evade law enforcement. (R. p. 239, line 4 – p. 240, line 12; p. 262, line 16 – p. 263, line 14.) On the evening of September 21, 2011, all three were located at a hotel in Asheville, where Williams and Utsey were staying in one room and Yeargin in another. (R. p. 94, lines 3-11; p. 130, line 24 – p. 132, line 16; p. 181, line 9 – p. 182, line 6; p. 240, line 16 – p. 241, line 14.) Williams and Utsey gave statements to the police and all three were later charged with murder and grand larceny. (R. p. 96, lines 1-9.)

## ARGUMENT

**I. The trial court erred in refusing to charge the jury on "defense of others" in light of testimony that at the time of the shooting the deceased was heavily intoxicated and was in the driver's seat of a moving vehicle on top of a woman, grabbing her arm firmly enough to cause bruising and struggling with her in a manner suggesting a rape attempt.**

### a. Standard of Review

The law to be charged is determined from the evidence presented at trial. *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial. *Fairchild v. S. Carolina Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012).

### b. A "Defense of Others" Charge Was Warranted

The evidence at trial supported a jury charge on defense of others. "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). To establish self-defense, a defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. *Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997); *State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 451 (1996).

The touchstone of a defense of others claim is the requirement that the defendant reasonably believe another person is in imminent danger of sustaining serious injury. It is not necessary that other witnesses have such belief or that, viewing the evidence after the fact, the defendant's belief turns out to have been correct. *Maye v. State*, 49 So.3d 1124, 1132 (Miss. 2010) (defendant is entitled to act based on "the facts of the case as they reasonably appeared to him"); *State v. McNeil*, 109 P.3d 1125, 1128 (Idaho Ct. App. 2005) (defendant may act "under the reasonable belief that a third person is in imminent danger of violent injury"); *State v. Augustin*, 63 P.3d 1097, 1098 (Hawaii 2002) (it is error to evaluate the reasonableness of a defendant's viewpoint based on circumstances "shown in the evidence" but of which the defendant was not aware).

The decision to stop in the parking lot of the Crosswell Baptist Church was not made by Yeargin. (R. p. 165, lines 11-17; p. 226, lines 1-5.) He specifically told both Utsey and Williams to get back in the Grand Prix and keep driving. (R. p. 167, lines 14-17; p. 193, lines 20-23; p. 226, line 22; p. 257, lines 8-11.) He took no steps to identify himself to Dinneen, confront Dinneen or forcibly remove Dinneen from the Grand Prix. In short, the evidence strongly indicates that Yeargin's intention was to avoid a confrontation in the church parking lot. These circumstances are clearly adequate to establish a jury question as to whether Yeargin was "without fault in bringing on the difficulty."[1] *State v. Frazier*, 401

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[1] While it is true that Williams and Utsey blame Yeargin for planning the theft of the Grand Prix and bringing the gun, such testimony must be viewed with considerable skepticism in light of Williams' and Utsey's motive to minimize their roles and exaggerate Yeargin's. Moreover, a defendant can arm himself lawfully even if he is unlawfully in possession of a firearm. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). Even if Yeargin had an ulterior motive for following the Grand Prix, and even if he unlawfully brought a loaded gun with him, he still could have acted lawfully in arming himself when subsequent events required that he act in defense of others. *Id.*

S.C. 224, 235, 736 S.E.2d 301, 307 (Ct. App. 2013) (self-defense charge should have been given where "there is evidence in the record from which a jury could find [defendant's] conduct was not reasonably calculated to bring on the difficulty").

When the confrontation did occur, Yeargin did not immediately insert himself into it. Rather, he acted only after seeing a violent and dangerous struggle develop between Dinneen and Williams. Witness testimony established that Dinneen was heavily intoxicated and was on top of Williams, behaving as though he was trying to hurt or rape her. (R. p. 255, line 12 – p. 256, line 3.) Dinneen was holding a 40-ounce bottle (which he then threw at some point during the altercation), was attempting to throw Williams out of the moving vehicle, and was grabbing her arm hard enough to cause bruising. (R. p. 167, line 24 – p. 168, line 7; p. 194, lines 2-21; p. 228, lines 15-21; p. 229, lines 23-24.) The physical evidence demonstrated that Dinneen's shoe came off during the struggle and that the vehicle traveled more than 40 feet further, based on the location of Dinneen's body. (R. p. 110, lines 14-20; p. 228, lines 23-24.) This suggests that the vehicle must have been moving both before and after the shoe came off. Thus, by the time Yeargin pulled up alongside the the passenger side of the Grand Prix, there were numerous circumstances suggesting a risk of serious injury or death to Williams.

Despite the imminent danger, Yeargin had the presence of mind to shout to Dinneen to get off of Williams. (R. p. 230, lines 3-4; p. 258, line 13 – p. 259, line 21.) Notably, he did not order Dinneen to "get out of the car," as he presumably would have if his only interest were to steal the car. Rather, his instruction to Dinneen merely to get off of Williams suggested his immediate concern was to prevent injury to Williams rather than eject Dinneen from the vehicle.

Only when Dinneen flatly refused to discontinue his struggle with Williams did Yeargin fire the gun. He fired a single shot at Dinneen's shoulder. (R. p. 57, line 18; p. 259, lines 22-24.) Once again, if Yeargin was firing the weapon to kill Dinneen and facilitate the theft of the Grand Prix, it is unlikely he would have fired only once or shot at Dinneen's shoulder rather than his head or chest. It is also far more likely Yeargin would have shot Dinneen when Dinneen was outside the vehicle, which would have offered a clearer shot, avoided the risk of injury to others in the vehicle, and avoided the possibility of damage to the vehicle.

In short, there is ample evidence to suggest that Yeargin did not have any plan or intent to shoot Dinneen, but did so only when it became apparent, based on the violent struggle between Dinneen and Williams, that Williams might be severely injured or killed. The jury should have had the benefit of an accurate instruction on the law of defense of others so as to properly resolve this issue.

By failing to instruct the jury on defense of others, the trial court deprived Yeargin of a critical defense strategy. The evidence in this case reflected that whatever the ultimate plan may have been with respect to Dinneen's vehicle, and whatever role (if any) Yeargin might have had in formulating that plan, things went off course very quickly in the church parking lot. There is no evidence that Yeargin planned to initiate a deadly assault on Dinneen by shooting into the Grand Prix. Thus, the jury's task in this case was, in large part, to determine Yeargin's culpability for his actions in response to events that he had not planned. Refusing to charge the legal standard for defense of others, especially combined with the charge that the jury could infer malice from the fact that the shooting occurred in connection with the commission of a felony, was the

functional equivalent of telling the jury that Yeargin could be found guilty of murder even if all he was doing was trying to prevent serious injury to Williams. Based on the charge it received, the jury could very well have believed that if Yeargin participated in a plan to steal the vehicle, he was criminally responsible for whatever happened in the church parking lot no matter what his reason may have been for firing the gun.

The trial court's failure to charge defense of others is especially prejudicial to Yeargin because the State would have borne the burden of proof on that issue. The State bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). When a self-defense charge is warranted, the charge must include language making clear that the State bears this burden. *State v. Burkhart*, 350 S.C. 252, 260-64, 565 S.E.2d 298, 302-04 (2002); *State v. Addison,* 343 S.C. 290, 293, 540 S.E.2d 449, 451 (2000). Given that defense of others is an outgrowth of self-defense, the State should likewise bear the burden to disprove defense of others beyond a reasonable doubt. Although there is no authority directly on point in South Carolina, this appears to be the rule elsewhere. *See, e.g., Duckett v. State*, 966 P.2d 941, 948 (Wyo. 1998) (prosecution must disprove defense of others beyond a reasonable doubt where the defense is raised and reasonably supported by the evidence); *State v. Acosta*, 939 P.2d 1081, 1087-88 (N.M. Ct. App. 1997) (same); *Barone v. State*, 858 P.2d 27, 29 (Nev. 1993) (same); *Commonwealth v. Monico*, 373 Mass. 298, 304, 366 N.E.2d 1241, 1244 (1977) (same). Failure to charge defense of others was clearly prejudicial.

**II. The trial court erred in refusing to charge the jury on involuntary manslaughter in light of evidence that Appellant Tavish Yeargin reasonably believed it was necessary for him to draw a weapon due to a physical altercation posing a risk of serious bodily harm, but may not have intended to fire the weapon.**

**a. Standard of Review**

A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. *State v. Chatman*, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). If there is any evidence from which the jury could infer the defendant committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense. *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004).

"Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010) (emphasis in original; citations omitted). When a defendant is being tried for murder, and there is any evidence warranting a charge on involuntary manslaughter, the charge must be given. *State v. Wharton,* 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). *See also, State v. Battle*, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (Ct. App. 2014) ("our jurisprudence makes clear that when determining whether a charge on involuntary manslaughter is proper, the trial court must look to the presence of evidence, not its weight").

**b. An Involuntary Manslaughter Charge Was Warranted**

Involuntary manslaughter is defined as: (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. *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); *State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). For purposes of the second prong of this standard, a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

In this case, there is evidence supporting a reasonable inference that the shooting was not intentional but at worst the product of reckless disregard for the safety of others. *See, State v. Crosby*, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003) (involuntary manslaughter must be based on "a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others"). Yeargin did not make the decision to stop at the church parking lot. He told both Utsey and Williams to get back in the Grand Prix and keep driving (R. p. 167, lines 14-17; p. 193, lines 20-23; p. 226, line 22; p. 257, lines 8-11), most likely in an effort to avoid precisely the confrontation that occurred. There is evidence that Yeargin took steps to avoid the altercation and that assaulting Dinneen was never his intention, but was instead the product of his hasty reaction to the struggle between Williams and Dinneen. This is distinct from the majority of cases involving the denial of an involuntary murder charge as a lesser included offense, which typically involve evidence of the defendant's prior intention to use a weapon to injure the victim. *See, e.g., State v. Cabrera–Pena*, 361 S.C. 372, 383–84, 605 S.E.2d 522, 528 (2004) (appellant not entitled to involuntary manslaughter charge where he armed himself with a deadly weapon and waited to confront victim); *State v. Hinson*, No. 2014-UP-113, 2014 WL 2582763, at *4 (S.C. Ct. App. Mar.

19, 2014) (denying involuntary manslaughter charge where "[e]arlier on the day of the shooting, Appellant exchanged murderous threats with Victim in front of Victim's house"). The evidence concerning the events leading to the shooting in this case establishes that Yeargin did not want to confront Dinneen in the church parking lot (or anywhere else) and that he tried to convince Utsey and Williams to drive away before a confrontation took place.

Yeargin did not draw a weapon until after the altercation between Dinneen and Williams had reached the point of creating a risk of serious bodily harm. Specifically, from Yeargin's perspective, the following events had occurred immediately before he pulled the Mustang alongside the Grand Prix and drew his weapon:

(1) Dinneen, heavily intoxicated, had jumped on top of Williams (R. p. 167, lines 18-25; p. 228, lines 4-14);

(2) Dinneen was struggling with Williams, grabbing her arm forcefully enough to cause bruising (R. p. 167, line 24 – p. 168, line 7; p. 194, lines 2-21);

(3) it appeared Dinneen may have been attempting to rape Williams (R. p. 255, line 12 – p. 256, line 3);

(4) at some point in the course of the struggle, Dinneen brandished and then threw a glass beer bottle (R. p. 126, line 22 – p. 127, line 7; p. 228, lines 15-21);

(5) the Grand Prix was moving despite the open driver's side door and the fact that either Dinneen or Williams could have been ejected from the vehicle at any moment (R. p. 167, line 21 – p. 168, line 7); and

(6) Dinneen's body was hanging out the door and was most likely being dragged, leading to the loss of his shoe (R. p. 110, lines 14-20; p. 228, lines 23-24).

The combination of these factors during a very short period of time would have created a confusing and disorienting picture. Yeargin, having arrived alone in the Mustang, did not have the benefit of knowing what was being said or what Dinneen might do next.

While there is no direct evidence as to Yeargin's intent, the record reflects that he fired only one shot, and that he made no attempt to fire again after hitting Dinneen in the shoulder, which would normally be expected to result in a non-fatal injury. In other words, Yeargin took no action suggesting he meant to kill Dinneen. *Cf. State v. Tucker,* 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996) (denying involuntary manslaughter charge where "[e]ven if the first shooting was unintentional, the same cannot be said of the second"); *State v. Thompson,* 278 S.C. 1, 7, 292 S.E.2d 581, 585 (1982) (involuntary manslaughter charge not warranted "when at least one of the two shots was fired deliberately"), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Murray*, 404 S.C. 300, 303-04, 744 S.E.2d 607, 609-10 (Ct. App. 2013) (denying involuntary murder charge where even if first two shots were unintentional, all evidence showed third shot was intentional). A single shot to the shoulder, with no attempt by Yeargin to inflict any further injury, points toward involuntary manslaughter.

The evidence also creates a jury question as to whether Yeargin meant to fire the gun at all. An involuntary manslaughter charge can be appropriate even if the defendant's own testimony suggests a voluntary pulling of the trigger. *See State v. Crosby*, 355 S.C. 47, 53, 584 S.E.2d 110, 112 (2003) (reversing denial of involuntary manslaughter charge despite defendant's confession to police that "I closed my eyes and pulled the trigger"); *State v. Burriss*, 334 S.C. 256, 267, 513 S.E.2d 104, 110 (1999) (reversing denial of involuntary manslaughter charge despite finding that "[w]ith regard to the [fatal] shot, appellant . . . stated his own 'hand was on the trigger. The trigger was pulled or whatever.'"). There is at least a question for the jury as to whether under the circumstances – attempting to confront the aggressor in a violent struggle inside a

moving vehicle with the potential for serious injury to either combatant – Yeargin intended to fire the weapon. It is entirely plausible that the gun discharged without his specific intention to shoot.

While it may have been reckless for Yeargin to have inserted a loaded weapon into an already dangerous situation, there is evidence to support the view that it was merely reckless – that Yeargin drew his weapon in a misguided effort to ensure the altercation between Dinneen and Williams did not end in someone getting thrown out of a moving car, hit or cut with a broken bottle or otherwise severely injured. The jury should not have been denied the opportunity to be instructed on and apply the law of involuntary manslaughter.

It is particularly important to observe the "any evidence" standard for an involuntary manslaughter charge in the context of this case, in which the only witness testimony concerning the shooting was provided by co-defendants who were highly motivated to cooperate in the State's effort to characterize this as a murder case. Most involuntary manslaughter arguments are based on defendants' self-interested testimony concerning their intent. Here, however, the available evidence comes from sources hostile to the defense. Thus, it was especially inappropriate for the trial court to ignore the circumstantial evidence suggesting the possibility of an unintentional shooting.

The failure to charge involuntary manslaughter constitutes reversible error because, without it, the charge as a whole gave an incomplete picture of the applicable law. *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) (failure to give requested jury instructions is prejudicial error where the instructions given, on the whole, do not adequately cover the law). This was a case in which the vast majority of the most important testimony was provided by two co-defendants testifying for the State as they awaited

disposition of their own murder charges. Utsey and Williams had powerful motives to minimize their own involvement and exaggerate Yeargin's culpability. Their willingness to do so was critical to the State's case: although an independent witness testified that Williams and Utsey drove away with Dinneen in his Grand Prix just moments before his death (R. p. 9, lines 12-21), no independent witnesses could place Yeargin anywhere near the stolen vehicle or the scene of Dinneen's death on the evening in question.

Inasmuch as the jury heard about the events of September 17, 2011, entirely through the highly self-interested testimony of Utsey and Williams, it was essential that the jury instructions fairly advise the jury of its option to reach a verdict short of the murder conviction the State was seeking and Utsey and Williams were peddling on the witness stand. By refusing to charge on involuntary manslaughter, the trial court deprived the jury of any means of expressing any reasonable doubts it might have had about Utsey's and Williams' testimony, and in particular their implausible insistence that Yeargin was the shadowy mastermind behind everything that occurred. Under the circumstances of this case, the denial of an involuntary manslaughter charge was highly prejudicial.

**III. The trial court erred in admitting into evidence letters Yeargin attempted to send to a witness concerning the witness's testimony at trial, where such letters did not contain any unlawful threats or solicit false testimony and were never received by the witness.**

**a. Standard of Review**

A trial court's decision to admit or deny evidence is subject to review for abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Such a decision may be reversed on appeal for abuse of discretion or the commission of legal error, resulting in prejudice to the defendant. *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (Ct. App.

2004). To establish that the erroneous admission of evidence was prejudicial, an appellant must show that that "there is a reasonable probability the jury's verdict was influenced by the challenged evidence." *Fields v. Reg'l Med. CR. p. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

**b. Admission of the Letters to Utsey Was Prejudicial Error**

On the morning of the third and final day of trial, the State notified the trial court and defense counsel that it was in possession of notes purportedly given to an employee of the Pickens County Detention Center by Yeargin. (R. p. 265, line 15 – p. 266, line 17.) The notes were supposedly received from Yeargin on the Saturday before the trial started, but for reasons never explained, the Pickens County Detention Center sat on them for several days before turning them over to the Solicitor. (R. p. 265, line 15 – p. 266, line 1.) The State sought to introduce the letters, which Yeargin allegedly had intended to be delivered to Utsey. The letters appear to reflect a request that Utsey testify to a description of events concerning the Dinneen shooting that minimize the role of Yeargin. (R. pp. 336-339.)

Defense counsel objected to the admission of the letters, pursuant to Rule 404(b), South Carolina Rules of Evidence, on the grounds that they were being offered merely as character evidence despite Yeargin not having put his character in issue. (R. p. 266, line 22 – p. 267, line 22; p. 269, lines 3-23; p. 306, lines 22-25.) The trial court overruled the objection. (R. p. 307, lines 1-10.) The trial court concluded that the letters constituted "a request to another Defendant to tell something less than the truth on the stand." (R. p. 268, lines 13-15.) The court found that the content of the letters was relevant to Yeargin's "culpability." R. p. 268, lines 15-18; p. 269, line 25 – p. 270, line 2.

The trial court erred in overruling counsel's Rule 404(b) objection. There is scant authority concerning the admissibility of a non-testifying defendant's written request to a witness to testify in a particular way, where such request never actually reaches the witness and is not accompanied by any threats or attempts to intimidate the witness. However, the authorities that come closest to the facts of this case strongly suggest that the letters were not properly admissible.

In *State v. Edwards*, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007), this Court faced the question whether a defendant's threats against a witness were admissible. Finding little South Carolina law on point, this Court undertook an extensive survey of legal precedents in other jurisdictions. This Court noted that both state and federal courts generally admit evidence of a defendant's threats against witnesses as proof of the defendant's "consciousness of guilt." *Id.* at 238, 644 S.E.2d at 70. Among the authorities this Court cited was *U.S. v. Pina*, 844 F.2d 1, 9 (1st Cir.1988), in which the First Circuit Court of Appeals held that a defendant's threats against an adverse witness showed "that the defendant is willing to go to extreme measures to exclude relevant evidence from trial"). Ultimately, this Court concluded that "[j]ust as conflicting statements and attempts to flee are indicative of 'guilty knowledge and intent,' so too are the threats communicated here." *Edwards*, 373 S.C. 230, 240, 644 S.E.2d 66, 71 (citations omitted).

The South Carolina Supreme Court affirmed this Court's decision, modifying on other grounds but agreeing with this Court that "witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt." *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009). The Supreme Court expressly relied on a concurring opinion in *State v. Goodson*, 225 S.C. 418, 429, 82 S.E.2d 804, 809 (1954),

which had recognized that "[e]vidence that a person charged with [a] crime procured or attempted to procure [the] absence of a witness or to bribe or suppress testimony against him tends to show unrighteousness of defendant's cause and a consciousness of guilt."

The core holding of both *Edwards* opinions and the many authorities cited therein is that "consciousness of guilt" is reflected in the fact that the defendant is attempting to subvert the legal process by impeding the prosecution's presentation of evidence to the jury. To put it simply, the defendants in such cases know they will lose a fair fight, so they are cheating. Such rationale cannot extend to this case, however. Yeargin's letters were not threatening or intimidating. They did not seek to intimidate or coerce Utsey into not testifying, nor did they ask her to lie.

The letters asked Utsey to testify to a particular set of events. (R. pp. 336-339.) Specifically, they urged Utsey to testify that Yeargin did not take part in the events of September 17, 2011 at all, and that Williams was primarily responsible. (Id.) While this testimony conflicts with the testimony Utsey ultimately gave, and with Williams' testimony, it was not inconsistent with the physical evidence. No other witness placed Yeargin anywhere near Dinneen's residence or the church parking lot on the night in question. The weapon used to shoot Dinneen has never been located, and no forensic evidence was offered to identify Yeargin as the shooter or show that he was in either the Grand Prix or the blue Mustang on September 17, 2011. Although Williams and Utsey testified that Utsey's brother Charles rode with them to Dinneen's house, neither Charles nor any other disinterested witness was called to testify about Yeargin's involvement.

For the trial court to characterize Yeargin's letters as "a request to another Defendant to tell something less than the truth on the stand" is to make a factual determination that

Utsey and Williams must have been telling the truth and Yeargin's contrary description of events in the letters must have been a lie. This is not a judge's role in a jury trial. It amounted to pre-judging the case and punishing Yeargin for sending a private communication stating a view of the facts different from that of the State's witnesses.

The testimony the letters asked Utsey to give may have differed from the testimony she eventually gave, from the State's theory of the case, and even from the jury's verdict. That does not mean the trial court could pre-emptively declare the letters "a request to another Defendant to tell something less than the truth on the stand" and admit them as proof of "culpability." Barring some clear, objective proof that the version of events the letters posited was false, the trial court erred in construing the letters as evidence of "consciousness of guilt" comparable to threatening witnesses, flight or giving conflicting statements.

The prejudice caused by this error was especially acute given that Yeargin did not put his character in issue and exercised his Constitutional right not to testify. As such, it was not appropriate for the State to impeach Yeargin's credibility. In *State v. Sloan*, our Supreme Court disapproved of using evidence of a criminal defendant's interaction with witnesses as evidence of bad character against a non-testifying defendant:

> Appellant next contends the trial court erred in admitting evidence that appellant had at one time threatened a State's witness.
>
> . . .
>
> Appellant had not testified and his character was not at issue. . . . [T]he evidence was not relevant to any issue conceivably before the jury. The testimony should not have been admitted.

*State v. Sloan*, 278 S.C. 435, 439, 298 S.E.2d 92, 94 (1982) (internal citations omitted). The principle recognized in *Sloan* is that the State cannot use attacks on a non-testifying criminal defendant's character in place of evidence pertinent to the facts in dispute.

By preemptively concluding that the account of events in Yeargin's letters was false and allowing the letters into evidence on the theory that Yeargin must have been guilty because he tried to ask a witness to lie, the trial court permitted a highly damaging and unanswered assault on Yeargin's character. Without taking the witness stand, Yeargin had no meaningful opportunity to explain to the jury that the letters were not a request that Utsey lie, but rather a request that she tell the truth, resisting the pressure to carry water for the State. The letters became a vehicle for second-guessing Yeargin's exercise of his right not to testify: if he really wasn't involved in the shooting, as his letters claimed, why didn't he take the stand and say so?

The letters did not contain any admissions; they merely reflected a version of events contrary to the State's theory. Contradicting the State's theory cannot fairly be conflated with lying. Offered for no purpose other than to establish "culpability" by painting Yeargin as a liar, there is every reason to believe the letters had their intended effect. They served as a powerful distraction from the salient question whether the State proved its case beyond a reasonable doubt and offered the jury an improper shortcut via character evidence. The admission of the letters was highly prejudicial and provides an independent basis for granting Yeargin a new trial.

## CONCLUSION

Yeargin respectfully submits that he is entitled to a new trial due to the errors described above, namely, the failure to charge the jury on the law of defense of others, the failure to charge the jury on the law of involuntary manslaughter, and the erroneous and prejudicial admission of letters to Utsey. Taken independently or cumulatively, such errors warrant reversal and remand for a new trial.

Respectfully submitted,

By: _____

Jeffrey P. Dunlaevy

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 28th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Pickens County

Robin B. Stilwell, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

TAVISH DOMINIQUE YEARGIN,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of July, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of July, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.