STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

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

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

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

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in charging the jury on the "hand of one, hand of all" theory where there was circumstantial evidence from which the jury could have inferred that Appellant and her co-defendant worked together to murder Victim.

II. Whether the trial court erred in admitting Appellant's statement to police where she mentioned retaining an attorney prior to her arrest, prior to her custodial interrogation, and in an ambiguous and equivocal way.

III. Whether the trial court's error in refusing to charge voluntary manslaughter was harmless.

IV. Whether the trial court erred in excluding evidence that Appellant's co-defendant previously shot and killed her dogs pursuant to Rule 608(b), SCRE because that evidence was cumulative.

RESPONDENT'S STATEMENT OF THE CASE

A Newberry County Grand Jury indicted Appellant, Mandy Lenore Smith, in August 2011 for the murder of John Henry Mayers (R. pp. 1103–04), for possession of a weapon during the commission of a violent crime (R. pp. 1109–10), and for desecration of human remains (R. pp. 1106–07).

On October 7, 2013, Appellant's case was called to trial before the Honorable R. Knox McMahon. (R. p. 1). Appellant was represented by Public Defender Charles Verner during the trial. (R. p. 1). Solicitor David Stumbo and Assistant Solicitor Dale Scott represented the State. (R. p. 1). On October 12, 2013, the jury returned verdicts of guilty as to murder and desecration of human remains and not guilty as to possession of a weapon during the commission of a violent crime. (R. p. 1052, lines 13–22).

In a separate proceeding held on October 14, 2013, Judge McMahon sentenced Appellant to forty (40) years imprisonment for murder and to ten (10) years imprisonment for desecration of human remains, to run consecutively. (R. p. 1077).

Appellant filed a timely notice of appeal. (R. pp. 1101–02).

RESPONDENT'S STATEMENT OF FACTS

The State's Theory of the Case

The State argued at trial that Appellant killed John Henry Mayers (Victim) in a deserted area off Judy B. Road in Newberry County. (R. p. 1016, lines 13–15). However, the State did not argue that Appellant definitely acted on her own in murdering Victim; the evidence proved that there was another person out on Judy B. Road the night Victim was shot and killed, a man named Timothy Wise, and the State argued that it was up to the jury to decide whether Wise "knew what was going to happen that night" or whether "he was [just] the perfect fall guy . . . ." (R. p. 1018, lines 5–9). Though Wise was not on trial with Appellant, the State noted, "his day is coming." (R. p. 1021, lines 1–3). In closing arguments, the State asked the jury to focus on Appellant's conduct, and if they were "firmly convinced that Mandy Smith had a hand in the death of [Victim,]" to find her guilty. (R. p. 1021, lines 3–6). The jury found appellant guilty of murder and of desecration of human remains. (R. p. 1052, lines 13–22).

Appellant's Relationship With Victim

Appellant met Victim when she was a teenager, and he was in his twenties. (R. p. 806, line 12–p. 807, line 8; R. p. 925, line 12–p. 927, line 13). Appellant had run away from home and Victim's family took her in. (R. p. 807, line 17–p. 809, line 10). Appellant and Victim began a relationship and "were on and off with each other until [she] was almost 18." (R. p. 808, lines 24–25). When they were together, Appellant and Victim frequently smoked crack cocaine together. (R. p. 808, lines 18–25). Appellant testified that she was "in love with [Victim her] whole life[,]" (R. p. 810, line 7), but she

also testified that he was physically abusive to her when he was high, (R. p. 814, line 23–p. 815, line 16).

At age eighteen Victim moved out of state, but around 2004 she came back to South Carolina and lived in the Lake Murray area. (R. p. 817, line 8–p. 820, line 21). She resumed her relationship with Victim but was also seeing another man—according to Appellant, she would see Victim during the week and the other man on the weekends. (R. p. 820, line 22–p. 821, line 18). Eventually Appellant married the other man so that she could move to Germany with him. (R. p. 822, lines 5–10). While in Germany, Appellant met a man named Don Buford through the internet, and, once Appellant and her husband divorced, she began a relationship with Buford and moved in with him in Sumter, South Carolina. (R. p. 928, line 6–p. 929, line 15). Buford began to support Appellant and continued supporting her up until the time she was jailed for murder. (R. p. 929, lines 13–21). However, at some point, she left Sumter and began living alone at a property on Wheeland School Road. (R. p. 826, line 7–p. 827, line 11). Sometime after that, she met Timothy Wise through Craigslist, and, though their relationship was sexual at first, it became a close friendship after. (R. p. 828, line 15–p. 829, line 22). According to Appellant, "[Wise] loved [her] as a sister . . . ." (R. p. 829, line 23–p. 830, line 2). Appellant and Wise would see each other almost every day. (R. p. 831, lines 6–24).

Also while Appellant lived on Wheeland School Road, she and Victim began seeing each other again, and she would have him over to her house if Buford was not there. (R. p. 838, lines 7–20). However, about a month before Victim was killed, Appellant got a restraining order against Victim after he attacked her one night. (R. p. 841, line 12–p. 843, line 23). Wise and another friend of Appellant's, a man named Kris

Hansen, helped her get the restraining order. (R. p. 842, lines 18–25). Wise testified that he gave Appellant a gun for protection at her request after she got the restraining order.[1] (R. p. 390, line 4–p. 391, line 10). Nevertheless, approximately three days after the restraining order was issued, Appellant and Victim resumed their relationship—seeing each other at least three or four times a week the month before Victim was murdered. (R. p. 844, lines 6–25). Victim would usually come to Appellant's house to see her, but if Buford was at the house, then they would go somewhere else, usually to Judy B. Road. (R. p. 844, line 24–p. 845, line 13). According to Appellant, they went to Judy B. Road "quite a lot . . . . [W]e could stay out there all night and nobody would mess with us." (R. p. 845, lines 10–13).

The Events of May 7, 2011

On Saturday, May 7, 2011, Appellant, Buford, and Wise began moving Appellant's things from her house on Wheeland School Road to a shed behind Wise's parents' house. (R. p. 840, line 9–p. 841, line 8). Appellant had been evicted from the Wheeland School Road property because she had been late on her light bill a couple of times, but Wise offered to let her move to his parents' property, and Buford paid for a shed for her to live in with her pets—nine dogs, fish, rats, guinea pigs, spiders, snakes, and an iguana. (R. p. 725, line 23–p. 726, line 2; R. p. 840, line 18–p. 841, line 5). According to Appellant, Victim knew she was moving and was not happy about it because she was moving to the other side of the county. (R. p. 845, line 17–p. 846, line 884). Appellant called Victim from Wise's parents' home the afternoon of the move and planned to meet him at Mr. J's, a convenience store close to where Victim lived. (R. p.

[1] At trial, Appellant denied that Wise ever gave her a gun because of the restraining order. (R. p. 843, line 24–p. 844, line 1).

846, line 17–p. 847, line 5; R. p. 850, lines 6–20). They met around 4:00 or 4:30 p.m., but Victim, who Appellant thought had been smoking crack, left with a man nicknamed Pee Wee. (R. p. 847, lines 2–14; R. p. 850, line 24–p. 851, line 8). Appellant then went to the Wheeland School Road property and helped Buford move one more load to her new home. (R. p. 851, lines 9–13). They finished around 8:30 or 9:00 p.m. that night. (R. p. 851, lines 14–16). At that point, there was still a lot of stuff to move, and Appellant's animals were still at her Wheeland School Road property. (R. p. 851, line 17–p. 852, line 7).

The night of May 7, 2011, Appellant, Wise, and Victim all went to Judy B. Road. There, Victim was shot and killed, but his body was not discovered by police until two and a half weeks later.

The Investigation Into Victim's Disappearance

Victim was reported missing by his family on May 10, 2011, a few days after he failed to show up to his parents' house on Mother's Day, Sunday, May 8th. (R. p. 161, line 5–p. 162, line 18; R. p. 196, line 15–p. 197, line 25; R. p. 1088). Victim's absence was particularly odd since he cooked his family a Sunday meal every week. (R. p. 161, lines 16–24). Victim's family advised police that Appellant may have information about Victim's whereabouts. (R. p. 200, lines 4–13).

Police tracked Appellant down and found her living at the residence of Timothy Wise in Newberry County. (R. p. 202, line 10–p. 204, line 25). Police first made contact with Appellant on May 16, 2011, and she told them to check out Elvis Hill (a.k.a. Pee Wee), but police could not find anything when they followed up with that lead. (R. p.

263, lines 5–23). On May 17, 2011, police again met with Appellant, but she was not particularly forthcoming with information about Victim.[2] (R. p. 205, lines 1–21).

Police went back to the Wise property on May 20, 2011, to speak with Appellant, but Wise's mother informed police that Appellant and Wise were at Wal-Mart. (R. p. 207, line 23–p. 208, line 15; R. p. 263, line 24–p. 264, line 7). The officers left briefly to check Wal-Mart, and, when they returned, Wise was at his home, but Appellant was not. (R. p. 208, line 13–p. 209, line 2). Wise told the officers that Appellant had gotten in a car with some people at Wal-Mart and had left town. (R. p. 209, lines 1–9). The officers then called Appellant's cell phone numerous times and left messages. (R. p. 209, lines 10–19). Appellant called them back and told them she was about an hour outside of town but that she would come to the Newberry County Sheriff's Department and meet with them when she returned in about two hours. (R. p. 209, lines 14–19). However, Appellant did not meet them at the sheriff's office that day. (R. p. 210, lines 7–15; R. p. 265, lines 1–3).

Wise gave a statement to police on May 20, 2011. (R. p. 416, lines 1–24; R. pp. 1089–91). According to that statement, he had provided a 9 mm handgun to Appellant after she had a restraining order issued against Victim. (R. pp. 1089–91). Wise stated that Appellant had returned that gun to him the Wednesday after Mother's Day and that the gun had a spent shell case lodged in the chamber when she returned it. (R. pp. 1089–

[2] That surprised then-Officer Billy Derrenbacher, who testified, "A person that would have that type of relationship with another individual, intimate relationships to me, I feel like that they would have, they should have more information that what they provided." (R. p. 205, lines 17–21). Derrenbacher also noted that one of Appellant's statements during that conversation—"I keep thinking that every time I turn the corner I am going to see him, I keep thinking I am going to see him"—was odd because police were only investigating a missing person case at that point. (R. p. 205, line 22–p. 207, line 5).

91). According to Wise, Appellant "ha[d] been increasingly agitated and paranoid . . . and it is my opinion that she has something to do with [Victim's] disappearance." (R. pp. 1089–91). Wise denied having anything to do with Victim's disappearance. (R. pp. 1089–91). Regarding Wise's May 20th statement, Derrenbacher surmised "that [Wise] probably knew something but he didn't want to really implicate himself." (R. p. 210, lines 20–22). Police obtained the gun from Wise on May 20th. (R. p. 558, line 9–p. 561, line 2).

Over the next few days, police tried to locate Appellant by tracking her cell phone. (R. p. 265, lines 4–19). On Sunday, May 22, 2011, Appellant called Major Wesley Boland and told him that she was going to turn herself in the next day, but she did not. (R. p. 269, line 22–p. 270, line 14). Ultimately, they located her at her mother's house in Greenville, South Carolina, and they arrested[3] her there on the night of May 24, 2011. (R. p. 266, lines 5–17; R. p. 270, lines 15–20). They transported her back to Newberry, arriving sometime around 2 a.m. on May 25, 2011. (R. p. 266, line 20–p. 268, line 7).

Police Find Victim's Body

Police asked Wise to come back in to talk to them on May 25, 2011. (R. p. 563, lines 11–23). They asked Wise if he knew of any place that Appellant would have gone with Victim, and he responded Judy B. Road. (R. p. 564, lines 15–24). Police then took Wise out to Judy B. Road. (R. p. 565, line 17–p. 567, line 9). Once they got on Judy B.

[3] Police actually arrested Appellant on a forgery charge for selling Victim's car to a scrapyard a couple weeks prior to Victim's murder. (R. p. 274, line 24–p. 277, line 5). Apparently, the signature on the bill of sale documents had been forged, and Victim's family had informed police that Victim never would have gotten rid of his car and that Victim had been trying to get money to get it fixed. (R. p. 276, lines 2–8).

Road, the officers rolled their windows down believing if Victim was dead "there would be some type of decomposition to the body and we would be able to smell that." (R. p. 567, lines 10–21). And, indeed, the officers did smell the decomposition and were able to locate Victim's body. (R. p. 567, line 22–p. 568, line 7). When police located Victim's body, it was missing the head. (R. p. 568, line 8–p. 570, line 2). Police recovered a 9 mm cartridge casing[4] and a cigarette butt[5] in the area where the body was found. (R. p. 570, lines 3–11).

After they located Victim's body, police gave Wise his *Miranda* warnings and then transported him back to the sheriff's office. (R. p. 575, line 12–p. 577, line 13). Wise then gave police another written statement in which he told police that Appellant had texted him and asked him to call Victim on May 7th. (R. p. 577, line 5–p. 578, line 11; R. p. 1092-1093). Wise told police that he did so and that he additionally "informed [Victim] that [Appellant] was moving from Wheeland School Road, and that she no longer wanted anything to do with him. [Wise] told [Victim] that she was going to be safe and that she would be happy." (R. pp. 1092–93). According to Wise's May 25th statement, he received a text from Appellant around 1 a.m. on May 8, 2011, asking him for directions to I-26 from Brasselman's Bridge Road. (R. pp. 1092–93). Wise further stated that he learned the following Monday that Victim had gone missing and that he began to suspect Appellant because she became paranoid. (R. pp. 1092–93). Police retrieved Wise's phone on May 25th, but they were unable to recover the texts that had

[4] A firearms and tool mark identification expert from the South Carolina Law Enforcement Division (SLED) testified that the shell casing found at Judy B. Road was shot from the gun that police recovered from Wise on May 20th. (R. p. 353, line 18–p. 380, line 23).

[5] The cigarette butt was sent to the SLED for DNA testing, but SLED was unable to obtain any DNA from the cigarette butt. (R. p. 571, lines 11–19).

been sent between Wise and Appellant on May 7th and 8th. (R. p. 578, line 15–p. 579, line 24).

Police took Wise into custody on May 25th, and the next day they spoke with him again. (R. p. 580, line 5–p. 581, line 10). At that time, Wise "broke down" and told police that he was there on Judy B. Road when Victim was shot. (R. p. 581, lines 11–18). Wise then provided the following statement to police:

> On May 6th, 2011, I took [Appellant] to Judy B. Rd. near Maybinton. I took her back to my house, where she retrieved the truck she was driving. She left and returned to her residence on Wheeland School Rd. She texted me and asked me to call [Victim], and tell him that she was going to Mr. J's on 76 outside Chapin. She texted me back and said that she was headed home, that [Victim] had gone with somebody else. Later that evening, she texted me again and asked me to call [Victim], and tell him she was going to be at the stop sign beside Mr. J's. I called him and told him and sat down to play cards on the computer. Around 1130 pm, she texted me again and said that he was in the truck with her, and to meet them at the end of Judy B. I left my house at 1145 pm and went out to the end of Judy B. Rd. and waited approximately 25 minutes. They arrived and we stood around talking for about 30 minutes. At that point, [Victim] walked away from us towards the woods, [Appellant] pulled out the gun I had loaned her, and fired, hitting [Victim] in the right shoulder area. He ran from her and tried to get away into the woods. She followed and fired one more time and emerged from the woods a couple minutes later, stating that he wasn't going to bother her anymore, that she could feel safe now. She took a bag of crack off [Victim] and proceeded to light a pipe. I told her that we needed to go, so after she stopped smoking, we both got into our vehicles and left with her leading the way. When we got to the end of Brasselmans Brdg. Rd., I texted her and told her to get on I-26. She texted back and asked which way to go and then turned in the right direction. I texted her and told her to let me know when she got home she texted me whe [sic] she made it home and I didn't hear from her again until around noon the following day when she and Jeff arrived with a truck load of her stuff. We didn't discuss what had happened, but she became increasingly paranoid since a deputy lives next door to me. I believe she told another person, named Kris in St. Stephens. On May 19th, 2011, we returned to the end of Judy B., where [Appellant] removed the skull from [Victim's] body and then drove to the Tyger River landing on Maybinton Rd., where she threw it and the bucket she had put it in, into the river. After we left, she stated that it wasn't going to do any good, because [Victim] was

> wearing pants with his name in them. We returned to my house and didn't discuss it again . . . .

(R. pp. 1094–96 (errors in original)). After giving his statement, Wise took police to the area where he and Appellant had disposed of Victim's head. (R. p. 581, line 11–p. 584, line 22). And police were eventually able to locate Victim's remains there. (R. p. 586, line 25–p.587, line 14).

Later on May 26, 2011, police spoke with Appellant about what happened the night of May 7, 2011. (R. p. 587, line 22–p. 588, line 16). She started to tell police that the last time she had seen Victim, he was getting in a car with Hill, but the officers stopped her and told her that they "had already found the body of [Victim]. And that [they] had [Wise] in custody and that [they] kn[e]w part of the truth. And it was time for her to clear her conscious and give [them] her side." (R. p. 592, line 19–p. 593, line 9). Appellant then began telling them about her tumultuous relationship with Victim, particularly about their drug use. (R. p. 593, lines 9–18). She told them on the night of May 7, 2011, she had Wise call Victim, and she went and picked Victim up. (R. p. 593, line 19–p. 594, line 5). According to Appellant's first statement to police, once they were in the woods, Victim became abusive, fussing about her moving and claiming she was cheating on him. (R. p. 594, lines 4–7). Appellant claimed that she tried to calm Victim down. (R. p. 594, lines 8–10). When police asked her what happened at the turnaround of Judy B. Road, Appellant

> stated that she thought she pretty much snapped. That she had been outside the truck and that she had the gun with her because she had it for protection after a restraining order. And she told that after she shot him for the first time Tim freaked. And Tim got in his truck and left. I asked her what happened. She said she was in the woods whenever she shot him first and that John came at her and she shot him again.

(R. p. 594, lines 10–19). Appellant told cops that she removed Victim's head after talking with the cops because she was scared. (R. p. 594, line 19–p. 595, line 2). After giving her statement, Appellant reduced the statement to writing. (R. p. 593, line 19–p. 597, line 19; R. pp. 1080–83).

On June 10, 2011, Appellant again spoke with the police about the events surrounding Victim's death. (R. p. 599, line 5–p. 605, line 13). On that date, she recanted her earlier statement and gave the following statement:

> May 7th, 2011 I Mandy Smith texted Tim Wise around 10 pm to call John Mayers so he would come hang out with me. I picked John up about a hour and half later. I texted Tim and let him know where I was going. I always let Tim know where I was going. Always!! When John and I got there Tim was there. I asked Tim why he was there and he said he had a feeling of a need to be there. I just thought he was being protective. John, Tim and I talked and laughed for awhile John and I was standing together John was behind me holding on to me and we was talking and looking up at the night sky. From out of nowhere I was pushed and I fell to the ground and I heard a shot when I looked up John and Tim was struggling with each other. I screamed out to Tim "No TC NO". John took off running. He went between the trucks and down the road. I got to my feet and ran after them Tim chased him down. when I came past the trucks there was a second shot. I seen Tim in the woods. I ran to where Tim was and seen John on the ground laying on his back. I went to where John was on the ground. I was so scared and cring and screaming. Tim grabbed me and pulled me away from John. I tried to go back to John but Tim wouldn't let me. He kept pulling me away. Tim pulled me to Don's truck and told me to get in. I was so scared and in shock. Tim closed the door of the truck and went back to where John was. I don't know what he did when he went back. When Tim came back to the truck Tim told me that he would kill me and my kids (animals) if I told anyone and that I had to be ready to sleep in the shed at his house by Sunday night. Tim followed me out of that place and I am sure he followed me home. I had given Tim the gun back a couple of weeks before the 7th of May. I have never shot that gun before. Around the 18th of May or so Tim took me for a ride which ended up back at the place where John was and he made me get his head and put it in a bucket then went to a river and Tim tossed it in. Tim was not suppose to be there that night. Was suppose to be just John and I. I love John and yes he was a mean mean person most of the time but he did not deserve to die by Tim's hand. This whole situation has caused me a lot mental harm. This past week I found out that Tim is "in love" with

> me and has been working at destroying my life over the past 3–4 months. He destroyed my relationship with my landlord, my boyfriend (Kris), my relationship with Don and he hated John. When Tim first met my mom he took her out for breakfast and asked as if almost drilled her for information about me and my past. My mom told him many things about my past such as my moms dad sexually abusing me and the trouble I went thur with that she told Tim about me being in Epworth Children's home and the struggle with that. I feel as though Tim has preyed on my mental status when it comes to men and he "played" me. I never knew he was in love with me. If I would have I would not of been so close of friends with him. Tim used me for some sick twisted game.

(R. pp. 1084–87 (errors in original)).

At trial, Appellant's testimony was substantially similar to her June 10th statement. However, she provided additional information about her actions immediately following Victim's death. Appellant testified that after Victim was shot she and Wise both got in their cars and left. (R. p. 874, line 7–p. 875, line 22). Neither of them went to the police about what happened that night—Appellant testified that Wise threatened her family and her pets if she told, and Wise testified he did not report the murder because he "was in shock" and scared of what might happen. (R. p. 407, line 11–p. 408, line 11; R. p. 874, line 22–p. 875, line 5). According to Appellant, Wise followed her home, but Wise testified that he went back to his parents' home. (R. p. 407, line 4–p. 408, line 18; R. p. 875, lines 6–22). Appellant spent the night at her home on Wheeland School Road with Buford[6] and her pets. (R. p. 875, line 17–p. 877, line 23). The next morning she continued moving to Wise's property. (R. p. 877, line 10–p. 879, line 7).

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[6] Buford confirmed at trial that he and Appellant spent the night together at her Wheeland School Road home. (R. p. 758, line 17–p. 761, line 16). He and Appellant got into an argument that night, and he attempted to leave, but she stopped him and said, "[D]on't leave, I need you now more than ever." (R. p. 759, line 8–p. 760, line 11). When asked if Appellant seemed emotional when she got back that night, Buford responded, "Mandy has many emotions sometimes. It is hard to figure out which emotion she has. But she

Appellant and Wise gave contradictory testimony about the circumstances under which Appellant removed Victim's head. On May 19, 2011, after Appellant had already spoken to the police twice, Appellant and Wise returned to Victim's body, and Appellant removed his head. (R. p. 885, line 5–p. 898, line 4). Appellant testified that Wise forced her at gunpoint to remove Victim's head. (R. p. 891, line 12–p. 893, line 5). Wise, on the other hand, testified that he took Appellant out to the body to "help[] a friend" and that Appellant "said [removing Victim's head] would make it difficult for anyone to identify it." (R. p. 411 line 21–p. 412, line 15). Appellant left town the next day. (R. p. 899, line 6–p. 903, line 23).

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didn't seem, the only thing that was out of the ordinary of that whole sequence that I just said was her coming, running out to me and stopping me." (R. p. 760, lines 19–24).

ARGUMENT

I. The trial court did not err in charging the jury on the "hand of one is the hand of all" theory where there was circumstantial evidence from which the jury could have inferred that Appellant and Wise worked together to murder Victim.

Introduction

The trial court did not err in charging the jury on the "hand of one is the hand of all" theory because there was evidence—both of Appellant's and Wise's actions beforehand and of Appellant's and Wise's actions afterwards—from which the jury could have inferred that Victim's murder was executed as part of a common plan between the pair.

How the Issue Was Raised at Trial

During trial, the State requested that the court charge "[t]he hand of one, the hand of all." (R. p. 549, line 20–p. 550, line 15). Appellant requested a "mere presence" charge, and the trial court responded, "If I charge hand of one, hand of all I charge mere presence[,]" and the trial court indicated that it was planning to charge "hand of one, the hand of all." (R. p. 552, line 19–p. 553, line 4). At that point, the State had not yet finished presenting its case in chief. (R. p. 549, line 20–p. 554, line 1).

After the State rested its case, Appellant asserted "there has been no testimony, no direct evidence that I have seen of any kind that there was accomplice liability, that they were acting in concert and I would ask the Court to strike that line, the murder on that basis." (R. p. 689, line 10–p. 691, line 6). The trial court denied the motion finding there was evidence of acts of preparation, particularly that Appellant had texted Wise and invited him to Judy B. Road. (R. p. 691, line 7–p. 692, line 11).

After the trial court charged the jury, Appellant renewed the objection to the "hand of one, hand of all" charge. (R. p. 1021, line 21–p. 1039, line 23). The trial court ruled as follows:

> Well, I would renew my trial ruling. I think that in reviewing the evidence the text itself makes no common sense to me that someone is out for the evening to potentially have sex all night and text a third party saying this is where I am going. I think that can be interpreted as a conspiracy. And then him meeting them there. Mr. Wise also assisted her along with Mr. Hansen of the restraining order. Mr. Wise also testified that he gave her a weapon. So I would respectfully deny your motion.

(R. p. 1039, line 24–p. 1040, line 8).

The trial court recharged the "hand of one, hand of all" charge after receiving a note from the jury requesting that they be recharged on that section. (R. p. 1041, line 12–p. 1045, line 7). When the jury sent out a second note, the trial court, again, discussed "hand of one, hand of all" with the jury. (R. p. 1046, line 2–p. 1048, line 4). After the trial court sent the jury to resume their deliberations, Appellant expressed a concern that the trial court's instruction improperly emphasized the murder charge, asserting that accomplice liability could apply to the other two charges, as well. (R. p. 1048, line 10–p. 1049, line 21). The trial court then brought the jury back in and explained to them that "hand of one, hand of all" would apply to possession of a weapon, as well.[7]

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

[7] Because the jury's note only mentioned the shooting, and not the desecration of remains, the trial court did not address that crime in its follow-up comments. (R. p. 1050, lines 21–24).

> circuit court should grant the request. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

State v. Niles, 400 S.C. 527, 533, 735 S.E.2d 240, 243 (Ct. App. 2012), *overruled on other grounds by* App. Case No. 2012-213592, 2015 WL 1325887 (S.C. Mar. 25, 2015). "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 hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). The evidence presented at trial, as described above, supported a reasonable inference that Appellant and Wise conspired to murder Victim. *See State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) (noting the State need not show a "formal expressed agreement" to prove that parties agreed and combined to achieve an illegal purpose, but may prove the agreement "by circumstantial evidence and the conduct of the parties" (citing *State v. Condrey*, 349 S.C. 184, 193, 562 S.E.2d 320, 324 (Ct. App. 2002))).

The trial court focused on the circumstantial evidence before the murder on which the jury could have found that Appellant and Wise planned to shoot Victim. And there was some evidence from which the jury could have drawn that conclusion. In particular, there was evidence of the following: (1) that Victim had a history of being abusive to Appellant, (2) that Wise was Appellant's best friend and loved her like a sister, (3) that Wise helped Appellant get a restraining order against Victim, (4) that Wise gave Appellant a gun after she got the restraining order, (5) that Appellant texted Wise and

invited him to Judy B. Road on May 7, 2011, and (6) that Victim was shot with the gun Wise had given to Appellant. Certainly, such evidence suffices as "any evidence" necessitating the "hand of one, hand of all" charge that the State requested. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) ("It is well-settled the law to be charged is determined from the evidence presented at trial, and if *any* evidence exists to support a charge, it should be given." (emphasis added)). Appellant asserts in her brief that "[t]his scant evidence relied upon by the Trial Court is not sufficient to support a theory of accomplice liability." (Initial Br. of Appellant, p. 29). However, that statement effectively admits that the charge was proper as even "scant" evidence qualifies as "any" evidence, thus requiring the trial court to charge "hand of one, hand of all" in Appellant's case. *Cf. Gibson*, 390 S.C. at 354–55, 701 S.E.2d at 770 (finding circumstantial evidence "infer[red appellant] and [co-defendant] may have acted in concert" where the State did not contend appellant fired the fatal shot but maintained "(1) [appellant] called [co-defendant] to the scene; (2) when [co-defendant] arrived he went inside the bar and [appellant] pointed out the group of Winnsboro men, rather than leaving straight away; (3) [a witness] testified [appellant] approached [co-defendant's] white sedan in the parking lot and retrieved a gun moments before the shooting; and (4) although separately, the two men fled the scene after the shooting).

Though the trial court focused on the evidence prior to the crime that would support a "hand of one, hand of all" charge, Respondent submits that Appellant's and Wise's actions after the crimes are perhaps even more compelling to support such a theory. For example, there was evidence presented at trial of the following: (1) Appellant and Wise left the crime scene in separate vehicles; (2) they both went to their own homes

(which were across the county from each other); (3) neither went to the police; (4) Appellant, in particular, returned to her home where Buford, Appellant's good friend and benefactor, was staying and where her pets were; (5) after police made contact with Appellant multiple times, she and Wise returned to the crime scene, removed Victim's head, and disposed of it in another location. Respondent submits that Appellant's and Wise's actions after-the-fact are supportive of the theory that they had a common plan to murder Victim.

Appellant's argument seems to depend on the idea that the jury had to accept, in whole, either Appellant's story or Wise's story about what happened on May 7, 2011. But that is not so. The case *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000), which bears a striking similarity to this case, shows that even where an appellant denies a murder plan, a jury may find that other parts of the appellant's testimony indicate such a plan existed. The facts of *Dickman* are as follows:

> On October 19, 1997, a badly decomposed body was found in a wooded area of Beaufort County. The body was later identified as Richard Mandeville (Victim) who lived with appellant and John Seals. Victim had been shot in the back of the head. When questioned by police, appellant and Seals both said Victim had gone to California. Eventually, however, Seals told police that appellant had shot Victim.
>
> Seals testified at trial that appellant shot Victim while the three of them were in appellant's car. Seals was driving, Victim was in the passenger seat, and appellant was in the backseat behind Victim. After shooting Victim, appellant directed Seals to drive to a remote area where they removed the body from the car and dragged it into the woods. Seals emptied Victim's pockets and threw Victim's wallet into the river on the way home. The next day, appellant cleaned the blood from the inside of the car.
>
> Appellant gave a statement to police. After initially indicating Seals was the shooter, appellant told police he had shot Victim. At trial, appellant recanted this statement and testified that Seals was the shooter.

341 S.C. at 294, 534 S.E.2d at 268. At trial, Dickman and Seals were pointing fingers at each other as to who was responsible for the victim's death. *Id.* On whether the "hand of one, hand of all" charge was appropriate, the Court found "[t]he critical question [to be] whether there [was] any evidence appellant and Seals were acting together at the time of the killing if Seals was the shooter as appellant claimed." *Id.* at 295–96, 534 S.E.2d at 269. Dickman denied that he and Seals planned to kill Victim that day, but the Court found there was some evidence of such a plan based on Dickman's own testimony, and, thus, the Court concluded that there was some evidence to support the "hand of one, hand of all" charge in that case. *Id.* at 296, 534 S.E.2d at 269.

Unlike in this case, in *Dickman* there was evidence of discussions between Dickman and Seals about killing victim prior to the murder. Here, as laid out above, there is only circumstantial evidence from which the jury could infer that Appellant and Wise killed Victim pursuant to a common scheme. At any rate, that evidence is sufficient to warrant the "hand of one, hand of all" charge that the trial court gave.

II. The trial court properly admitted Appellant's May 26, 2011 confession where she only mentioned retaining an attorney prior to her arrest and her custodial interrogation and where her statement about retaining counsel was not an unequivocal request for counsel.

Introduction

The trial court did not abuse its discretion in admitting the May 26th statement because Appellant's mention of retaining counsel was, at best, an anticipatory attempt to invoke her right to counsel, which falls outside of the *Miranda* framework. Alternatively, Appellant's statement to police about retaining an attorney was not an unambiguous and unequivocal invocation of her rights for *Miranda-Edwards-Davis* purposes.

How The Issue Was Raised at Trial

At the *Jackson v. Denno*[8] hearing prior to Appellant's trial, Captain Robert Dennis testified that he took Appellant's May 26, 2011 statement. (R. p. 26, line 9–p. 37, line 8). Captain Dennis testified that prior to taking her statement, he read Appellant her rights, and Appellant never requested an attorney during that interview. (R. p. 33, line 10–p. 34, line 12). Major Wesley Boland testified at the *Jackson v. Denno* hearing that, on the night he arrested Appellant in Greenville, Appellant's mother was the only person who made a statement about Appellant wanting to turn herself in after she hired an attorney. (R. p. 71, line 10–p. 87, line 19).

Appellant, on the other hand, testified that she spoke to Major Boland earlier in the day on the day she was arrested and that she told him that she and her mother were trying to get a lawyer and that they would be in the next morning to see him. (R. p. 87,

[8] 378 U.S. 368 (1964).

line 24–p. 92, line 21). Appellant also testified that Major Boland read her rights to her after the arrest. (R. p. 89, line 1–p. 92, line 21).

Defense counsel argued that the statement should be excluded as involuntary. (R. p. 122, line 7–p. 124, line 13). Defense counsel also argued, "certainly there was an indication of rights the day before knowing that law enforcement wants to talk to me . . . ." (R. p. 122, lines 15–17; *see also* R. p. 126, line 14–p. 128, line 5). The State, on the other hand, noted the discrepancy between Boland's testimony and Appellant's testimony and argued that based on the totality of the circumstances, Appellant's statements were freely and voluntarily given. (R. p. 124, line 16–p. 126, line 10).

The trial court found Appellant's May 26th statement to be admissible. (R. p. 128, line 6–p. 130, line 8). As to the pre-arrest mention of counsel, the trial court found the following:

> I do not see it as a clear indication as to her right. And even if you say, well, we are looking toward getting a lawyer, that still doesn't mean they want a lawyer. A lot of people look to get a lawyer and end up not getting one. They change their mind.

(R. p. 128, lines 10–15).

During Boland's testimony before the jury, he affirmed that Appellant called him Sunday and said she was going to turn herself in. (R. p. 272, lines 21–23). Boland testified as follows:

> Q. Okay. But in your recollection that it was Mandy that said I want to speak to an attorney or find an attorney to come with me?
>
> A. Yes.

(R. p. 273, lines 4–7). Boland also testified that Appellant ultimately did not turn herself in like she said she would. (R. p. 273, lines 8–19).

When the State sought to introduce Appellant's May 26th statement to the jury, defense counsel objected and pointed out to the court that Boland's testimony before the jury was that Appellant had mentioned getting an attorney and going to speak with police. (R. p. 588, line 17–p. 589, line 14). The trial court ruled as follows:

> It does not change my analysis. I think it is a matter of information that goes before the jury and it is a matter of the testimony of Major Boland. You are making the assumption that it is absolutely correct as to what he testified in front of the jury panel as a position against what he testified in-camera. Still by the preponderance of the evidence and the totality of the circumstances I find that she did not invoke her right to an attorney under State versus Kennedy. State versus Kennedy, as you all well know, the Defendant Kennedy said, what if I asked for an attorney. And that was clear that the person was already under arrest at that time so it does not change the Court's ruling under the State versus Washington and the State versus Kennedy.

(R. p. 589, line 15–p. 590, line 4). Shortly thereafter, the State introduced Appellant's May 26th statement, and it was admitted into evidence. (R. p. 590, line 20–p. 597, line 21; R. pp. 1080–83).

Standard of Review

> "The trial judge determines admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); *State v. Smith*, 268 S.C. 349, 353–54, 234 S.E.2d 19, 21 (1977)). "The jury must determine whether the statement was freely and voluntarily given beyond a reasonable doubt." *Id.* (citing *Washington*, 296 S.C. at 55–56, 370 S.E.2d at 612). "On appeal, the conclusion of the trial judge as to the voluntariness of the statement will not be reversed unless so erroneous as to show an abuse of discretion." *Id.* (citing *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996)). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply whether the trial judge's ruling is supported by any evidence." *Id.* at 378–79, 652 S.E.2d at 448 (citing *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

State v. Samuel, 400 S.C. 593, 602, 735 S.E.2d 541, 546 (Ct. App. 2012), *cert. granted* June 11, 2014.

Analysis

The United States Supreme Court has described its decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, as follows:

> We held in *Miranda* that a suspect is entitled to assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questing when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Davis v. United States, 512 U.S. 452, 462 (1994) (emphasis in original).

Even assuming Appellant told Major Boland that she was going to get an attorney and turn herself in, that statement occurred prior to her arrest, prior to the multiple *Miranda* warnings she was given, and prior to her custodial interrogation. The United States Supreme Court has

> never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation" . . . . Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991) (additionally cautioning against the argument that "there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification of a suspect"). Respondent submits that

Appellant's purported request for counsel occurred outside of the *Miranda* framework[9] and that Appellant could not anticipatorily invoke her right to counsel.

Even if this Court finds that Appellant could have invoked her right to counsel prior to arrest, Respondent submits that the trial court did not abuse its discretion in admitting the May 26th statement. The trial court concluded that Appellant did not clearly invoke her right to counsel by any statements she made to Boland prior to her arrest. The trial court further distinguished this case from *State v. Kennedy*, 333 S.C. 426, 510 S.E.2d 714 (1998), where the defendant stated, "Well, I think I need a lawyer." The record supports the trial court's findings—Appellant's statement regarding counsel was ambiguous and equivocal and did not constitute an invocation of her right to counsel. *See State v. McCray*, 332 S.C. 536, 547, 506 S.E.2d 301, 306 (1998) ("Appellant's prior statement that he would retain a lawyer at some future date did not constitute an invocation of his right to counsel for *Miranda-Edwards* purposes [where the statement about retaining a lawyer was 'he "felt like at the time that his people would hire an attorney and he did not want an appointed attorney on that charge"']."). Of course, once Appellant was in custody, she was Mirandized, and she clearly waived her right to counsel. (R. p. 590, line 20–p. 592, line 25; R. pp. 1080–83). Respondent submits that, for all of the above reasons, the trial court did not abuse its discretion in admitting Appellant's May 26th statement to police.

[9] Compare the United States Supreme Court's recent decision, *Salinas v. Texas*, 133 S. Ct. 2174 (2013), where Justice Alito's plurality opinion stressed that the noncustodial nature of an interview placed "petitioner's situation outside the scope of *Miranda* . . . ." 133 S. Ct. at 2180.

III. The trial court committed harmless error in refusing to charge voluntary manslaughter where the only evidence to support such a charge was in Appellant's first statement, which she later recanted and also denied while testifying at her trial and which was inconsistent with her defense that another person committed the crime.

Introduction

Though Respondent concedes that the trial court erred in refusing to charge voluntary manslaughter, such error was harmless where there was very little evidence to support that charge and neither Appellant nor the State pursued a theory that would support a voluntary manslaughter finding by the jury.

How the Issue Was Raised at Trial

Appellant's May 26th statement was introduced by the State during Robert Dennis's testimony as he described Appellant's first statement to police concerning what happened the night of May 7, 2011. (R. p. 590, line 20–p. 599, line 4). In that statement Appellant describes the night of Victim's murder as follows:[10]

> Saturday May 7th 2011 around 11 pm I picked John up hoping to have a nice time. After picking John up John did his normal mental and hitting abuse. I tried to take him back home but he would not let me. He said he did not leave house for nothing and he wanted sex . . . .
>
> I did NOT want to end his life but I felt that it was me or John that night. He had been smoking crack and drinking that night . . . . He found out I was actually moving the night of May 7th 2011. Which started a one sided arguement with me. I beleive that it was him or me that night and it was almost me. I stayed away from everyone for the next week or so to Hide my bruses and black eyes . . . . The gun used I had gotten from Tim shortly after the restraing order was given. John knew I had the gun since then but knew I did have the heart to use the gun. I don't remember a portion of what happen. I blacked out after John had hit me newmous

[10] The below excerpt is only a portion of Appellant's May 26th statement, but the excerpt includes everything Appellant said about the night of May 7th. The remainder of the statement is mostly Appellant's statements of Victim's past mistreatment and abuse of Appellant. (*See* R. pp. 1080–83).

> times and when I came out of blackness I was holding gun and he was lifeless on ground in front of me. I sat there on my knees cring and tring to figure out what I did for 15 mins or so before I left. I tried to revive him though mouth to mouth when I first realized what I had done and when I couldn't bring him back I was so scared so I left . . . .

(R. pp. 1080–83 (errors in original)). It does not appear that the above portion of the statement was read aloud to the jury. (R. p. 597, line 6–p. 598, line 12).

Dennis did not testify that Appellant stated that Victim hit her before she shot him. However, Dennis did testify that Appellant told investigators that that night on Judy B. Road "started off good but then it became more abusive because he was fussing about her moving. He told that she was running around on him and she tried to, as she told, she tried to calm him down . . . ." (R. p. 594, lines 5–8). According to Dennis, Appellant

> stated that she thought she pretty much snapped. That she had been outside the truck and that she had the gun with her because she had it for protection after a restraining order. And she told that after she shot him for the first time Tim freaked. And Tim got in his truck and left. I asked her what happened. She said she was in the woods whenever she shot him first and that John came at her and she shot him again.

(R. p. 594, lines 12–19).[11] Dennis further testified that on June 10, 2011, he spoke with Appellant again, at her request, and at that time she recanted her May 26th statement and gave a new statement implicating Wise in Victim's murder. (R. p. 599, line 7–p. 605, line 13).

When Appellant testified, she denied that her May 26th statement was true, and she stated that she only made that statement because she believed Wise "was still out and he had my dogs and he knew where my family was." (R. p. 917, line 19–p. 919, line 25).

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[11] Appellant also admitted at trial that she confessed to shooting Victim in her May 26th statement. (R. p. 932, lines 12–17).

Prior to closing arguments, defense counsel requested that voluntary manslaughter be included in the jury instructions. (R. p. 953, lines 9–19). In particular, defense counsel argued, "[T]here is some evidence both from T.C. Wise's testimony and from the statements that Mandy and John Henry were engaged in smoking crack cocaine. Something happened and she shot him at that instance." (R. p. 953, lines 11–15).

Counsel for the State argued that there was no evidence to support such a charge, stating, "We don't believe at this point that there was sufficient, any kind of provocation that would necessitate a voluntary manslaughter." (R. p. 953, line 22–p. 954, line 8).

Defense counsel countered that "the State is really arguing three inconsistent positions to the jury, that is Mandy operated alone, that is that Mandy operating in conjunction with T.C. and that, if evidence of the statements that the State would introduce into evidence then their third would be the voluntary manslaughter." (R. p. 954, lines 13–18). Defense counsel specifically noted Wise's testimony that Appellant and Victim walked off and smoked crack together and evidence that smoking crack changed Victim's temperament. (R. p. 955, line 23–p. 956, line 11).

The trial court denied defense counsel's request to charge voluntary manslaughter, ruling:

> I think the law in South Carolina is you can present inconsistent defenses. I agree with that. However, no voluntary manslaughter is the taking of the life of another in the sudden heat of passion based on sufficient legal provocation, both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Even if I believe that both [Victim] and [Appellant] were smoking crack cocaine, of course, voluntary intoxication by alcohol and or drugs is not a defense to a specific intent crime. It does not seem to be sufficient legal provocation nor sudden heat of passion.

(R. p. 956, line 16–p. 957, line 6).

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). The erroneous denial of a requested manslaughter jury instruction is subject to a harmless error analysis. *State v. Battle*, 408 S.C. 109, 121, 757 S.E.2d 737, 743 (Ct. App. 2014). "When considering whether an error with respect to a jury instruction [is] harmless, [an appellate court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

Analysis

Based upon the South Carolina Supreme Court's opinion in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), Respondent concedes that the trial court erred in denying Appellant's request to charge voluntary manslaughter as the charge was warranted based upon Appellant's first statement to law enforcement that she later repudiated. In Appellant's first written statement to police (R. pp. 1080–83), she indicated that she shot Victim after he hit her numerous times. Those facts, combined with Dennis's testimony that Appellant told him in her first oral statement to police that "she thought she pretty much snapped[,]" were sufficient to warrant a voluntary

manslaughter charge.[12] Though Appellant recanted her first statement and expressly denied that it was true at trial, under South Carolina law, she was still entitled to the voluntary manslaughter instruction. *See Knoten*, 347 S.C. at 306, 555 S.E.2d at 396 (finding there was evidence to support a voluntary manslaughter charge where the

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[12] Respondent notes that it is arguable whether this issue was properly preserved. In requesting the voluntary manslaughter instruction, defense counsel only vaguely referred to what happened in the woods that night, saying "[s]omething happened and she shot him at that instance. And some more facts to that but I will submit there is some evidence, Your Honor, that would support a voluntary manslaughter charge to the jury." (R. p. 953, lines 14–17). Defense counsel also pointed out that "[t]here was testimony that the smoking the crack cocaine does at times change [Victim's] temperament." (R. p. 956, lines 9–11). Defense counsel did not reference Dennis's testimony that Appellant said she thought she snapped, and, importantly, defense counsel did not specifically argue that Appellant's written statement accused Victim of hitting her numerous times before she blacked out and apparently shot him. Though the trial court had heard extensive testimony about a history of physical abuse, the only evidence that Victim was hitting Appellant immediately before she blacked out was in the written statement. And it does not appear that her written statement was read into the record. (R. p. 597, line 6–p. 598, line 17).

Based on the substance of the trial court's ruling refusing to charge voluntary manslaughter, it is clear that the trial court did not understand the argument that defense counsel was making to be the same one Appellant now raises. *See State v. Frieburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an argument advanced on appeal was not preserved for review because it was not raised to and ruled on below). Respondent submits that the trial court was not able to rule after considering "all relevant facts, law, and arguments[,]" *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 281–82 (Ct. App. 2005) (quoting *I'ON, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)), because defense counsel did not draw the trial court's attention to those specific facts that supported a voluntary manslaughter charge.

Instead, defense counsel almost exclusively focused on Wise's statements to police and Wise's testimony at trial, which have nothing to do with Appellant's May 26th written statement to police. (R. p. 953, line 9–p. 957, line 7). Had defense counsel truly been relying on the information in Appellant's May 26th statement to support his voluntary manslaughter instruction request, it would have been simple to point out that Appellant shot Victim after he hit her numerous times (classic self-defense or involuntary manslaughter depending on *mens rea*). However, what defense counsel argued was "[s]omething happened . . . [a]nd some more facts[,]" and then he asked the trial court to charge voluntary manslaughter on that basis. Such vague representations cannot be sufficient to preserve the issue, particularly where the statement defense counsel was referring to is one that no party was pursuing as the truth, so there was very little discussion or factual development of that statement at the trial.

defendant's second statement to police supported the charge though the defendant recanted his second statement and testified that it was a fabrication). Accordingly, Respondent is constrained to concede that it was error to deny Appellant's request to charge voluntary manslaughter even though this lesser offense was repudiated by Appellant's later statements and the defense theory presented at trial.

Though the trial court erred in refusing to charge voluntary manslaughter, such error was harmless. Whether an error with respect to a jury instruction was harmless is a very fact-intensive inquiry. *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435. And a court's "'inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.'" *Id.* (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

Respondent submits that the lack of a voluntary manslaughter charge did not contribute to the verdict. The facts of this case, as outlined in this brief's Statement of Facts section, largely support a theory propounded by the State, that Appellant and Wise acted in concert in killing Victim. However, depending on the weight that the jury gave the testimony of Wise and Appellant, the jury also could have found that either of them acted on their own in shooting Victim. Of course, there was extremely little development of the information provided by Appellant in her May 26th statement—the only evidence under which the jury could have found Appellant guilty of voluntary manslaughter—because neither side represented that the May 26th statement was the truth.

The State argued that Appellant's May 26th statement was just another example of her "lies and manipulations"—that it was her plan B after she initially told police to look at Hill. (R. p. 1010, lines 21–24; R. p. 1013, line 1–p. 1014, line 16; R. p. 1016, line

15–p. 1017, line 20). The State also told the jury during closing arguments, "It has not been the State's contention all week that you should believe every word that comes out of Tim Wise's mouth. I don't think that just because we called him as a witness, folks." (R. p. 1013, lines 10–13).

Defense counsel, in both his opening and closing statements, asked the jury to think about "who had the gun." (R. p. 145, lines 11–25; R. p. 970, lines 5–11). And the defense theory of the case was consistent with Appellant's testimony—that Wise acted entirely on his own in shooting Victim and that Appellant was merely an innocent witness who later confessed to the shooting under threat.

While the *Knoten* case is most similar to the instant case as it also deals with evidence in a recanted statement that supports a lesser-included offense, our Supreme Court did not analyze whether the error in *Knoten* was harmless. However, there are other cases that are instructive on the issue of harmless error. In *Middleton* the South Carolina Supreme Court found that a trial court's failure to charge a lesser-included offense was harmless because "the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder . . . . In our view, there is no other way to construe the evidence in this case . . . ." 407 S.C. at 319, 755 S.E.2d at 436. In *Battle* this Court found that the refusal to charge the lesser-included offense of involuntary manslaughter was not harmless because the Court could not "construe the evidence . . . as only showing Appellant intentionally killed Victim." 408 S.C. at 122, 757 S.E.2d at 743–44. The Court distinguished its facts from those in

Middleton, noting "[u]nlike *Middleton*, the evidence in the present case does not support one clear-cut conclusion." *Id.*

Respondent submits that this case falls somewhere between *Middleton* and *Battle*. Though the evidence presented at trial does not necessarily "support one clear-cut conclusion[,]" *Battle*, 408 S.C. at 122, 757 S.E.2d at 737, the only evidence that would support a voluntary manslaughter conviction is miniscule compared to the entirety of the other evidence presented by both Appellant and the State, **and** both sides indicated that that evidence was **false**. The defense was particularly forceful when denying the truth of the May 26th statement. Appellant recanted her May 26th statement on June 10th and placed the entire blame for Victim's death on Wise. (*See* R. pp. 1084–87). She also explicitly denied shooting Victim in her testimony at trial. (R. p. 932, lines 12–21). She stated that her June 10th statement was the truth, (R. p. 934, lines 11–14), and she also testified that she only confessed to shooting Appellant in her May 26th statement because "[a]s far as [she] knew Tim was still out and he had [her] dogs and he knew where [her] family was." (R. p. 918, lines 3–4). Additionally, defense counsel asked the jury to consider "who had the gun"—not a very good argument if voluntary manslaughter was a possibility.

The jury's note during deliberations and their verdicts indicate that they did not believe that Appellant pulled the trigger. The jury's note read, "In agreeing that she is guilty, is that saying we think she actually shot John?" (R. p. 1100). They also found her guilty of murder but not guilty of possession of a weapon during the commission of a violent crime. (R. p. 1052, lines 13–19). These verdicts may be inconsistent—even if she did not shoot Victim, it was undisputed that Victim died from a gunshot wound, and

if the jury thought she was guilty of murdering Victim with Wise's help, she also should have been guilty of the possession charge under "hand of one, hand of all." The jury's note and their inconsistent verdicts indicate that the jury rejected the notion that the gun was in Appellant's hand when Victim was shot. As such, it is clear that the erroneous lack of a voluntary manslaughter instruction did not contribute to the verdict. Accordingly, the trial court's error is harmless beyond a reasonable doubt.

At the appropriate time, should oral argument be held, permission to argue against precedent will be sought pursuant to Rule 217, SCACR. In particular, Respondent would petition to argue against the precedent set by *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), which allows a jury charge on a lesser-included offense based on a previous statement that has been recanted, repudiated by a defendant, and held out by both the prosecution and the defense as false. Respondent submits that the precedent set by *Knoten* is unworkable as it fails to recognize the legal waiver of the instruction and creates a loophole by which a defendant could potentially escape liability altogether despite a jury's verdict finding the defendant guilty of a lesser-included offense.

IV. The trial court properly excluded evidence that Appellant's co-defendant previously shot and killed her dogs as such evidence was impermissible under Rule 608(b), SCRE and because the evidence was cumulative.

Introduction

Defense counsel argued that he wanted to present evidence that Wise shot and killed Appellant's dogs to show that Wise had lied during his testimony, and the trial court properly excluded the testimony under Rule 608(b). When defense counsel argued he wanted the same evidence to be admitted for different purposes, the trial court excluded it as cumulative, and the trial court did not err in so doing.

How the Issue Was Raised at Trial

At trial defense counsel brought out through Wise that Appellant was much closer to her dogs than the average person. (R. p. 437, line 14–p. 440, line 14). Defense counsel then asked Wise if he had shot any of Appellant's dogs, and Wise responded that he had not. (R. p. 440, line 15–p. 441, line 1).

Defense counsel also asked Buford about Appellant's dogs. (R. p. 732, line 4–p. 736, line 2). Buford testified that Wise shot Appellant's dog, Millie. (R. p. 733, line 21–p. 735, line 5). Buford further testified,

> Mille was a very loyal dog, very nice dog but it had a couple of other incidents with other dogs and it came to the point that Millie was not adapting to the group, to the family so to speak . . . . Mandy told me that Millie was put down by Tim.

(R. p. 734, lines 11–17). Buford also testified that Millie had been buried under a tree down by a pond and that when Buford went to visit Millie's grave, Wise approached him, "put his arm around [Buford] and said, just want to tell you it went quick, it was one shot and she didn't suffer . . . ." (R. p. 734, line 19–p. 735, line 2).

Defense counsel also questioned Buford at length about two of Appellant's other dogs, Ollie and Obie. (R. p. 747, line 10–p. 750, line 4). Counsel for the State objected, at one point, to the relevancy of the testimony. (R. p. 750, lines 5–6). Once the jury had stepped out of the courtroom, defense counsel asserted that Wise had denied shooting the two dogs and that he wanted to show that was not true through Buford's testimony. (R. p. 750, lines 12–23). The trial court responded that under Rule 608(b), SCRE, specific instances of conduct could not be proven by extrinsic evidence. (R. p. 750, line 24–p. 751, line 7). Defense counsel then responded that he "wasn't using it as a prior bad act. [He] was really just using it that [Wise] had guns. Just that [Wise] was familiar with guns, [Wise] used guns, [Wise] shot things with guns." (R. p. 751, lines 12–15). The trial court ruled that testimony for that purpose would be cumulative as there was already evidence that Wise had used a gun. (R. p. 751, lines 16–19).

Defense counsel then proffered Buford's testimony about Ollie and Obie. (R. p. 751, line 20–p. 752, line 21). Buford testified to the following:

> Q. Did Tim confirm to you that those dogs were shot?
>
> A. When I came up that weekend they both talked about the dogs being put down. But it never was inferred or said that he specifically, like he did Millie.
>
> . . . .
>
> Q. But there is no question that they said they put them down?
>
> A. Yes, sir.
>
> Q. And Tim was one of them that said they put them down. But actually being shot comes from Mandy?
>
> A. Right. She said the dogs were put down by a weapon.

(R. p. 752, lines 8–21).

During Appellant's testimony, defense counsel asked whether Appellant knew if Wise had shot any of her dogs, she responded that she did know. (R. p. 864, lines 12–15). Defense counsel asked, "How many[,]" and Respondent answered, "Three." (R. p. 864, lines 16–17). The trial court stated, "I have ruled part of that inadmissible[,]" and then sent the jury out to hear from defense counsel, who stated,

> I am not offering it to attach [sic] the character of [Wise], I am offering to show the state of mind that she had a reasonable fear for her own safety and for that of the dogs as part of the reason that her actions occurred after the date of May 7th.

(R. p. 864, line 24–p. 865, line 4). The trial court again stated that that testimony had been ruled inadmissible, and he brought the jury back in. (R. p. 865, lines 7–22).

Later, the trial court allowed defense counsel to put further argument regarding that issue on the record. (R. p. 905, line 11–p. 910, line 10). Defense counsel again argued that he was seeking to admit evidence that Wise shot Appellant's dogs, not to show Wise's character, but to show Appellant's state of mind. (R. p. 905, line 16–p. 906, line 18). The trial court provided,

> But I have allowed evidence, testimony in whether it was credible or not that Tim Wise carried a gun most of the time on his holster. I have allowed two photographs, Defendant's 7 and 8 into evidence showing Tim Wise with a gun. Ms. Smith has testified that she took pictures of. I have allowed in evidence that Mr. Wise shot the dog, Molly [sic], that came through in extrinsic evidence from the testimony of Mr. Buford unobjected to. That testimony was that he had to put a dog down, that the dog was given a proper canine burial in a location that the dog loved to be at and that Mr. Wise later on conveyed feelings of sympathy for having had to have committed that act to Mr. Buford. So there is testimony from both Ms. Smith and from Mr. Buford. I have let testimony in time and time and time again that, through Ms. Smith that she has been threatened if she told on Mr. Wise, that he would kill her animals or family, he knew where her family lived. I have allowed all of that in.

(R. p. 907, line 11–p. 908, line 3). Counsel for the State then argued the evidence should also be excluded under Rule 403, SCRE. (R. p. 908, line 20–p. 909, line 18). Defense counsel then expressed his understanding that testimony regarding Ollie and Obie was not admissible under the trial court's ruling and further stated,

> In candor, had that testimony gone forward it would come out that Tim put down injured dogs which is part of my reason why I don't think it was a bad act per se, it wasn't a malicious killing dogs, it is putting down injured dogs. But just that she had seen him shoot dogs and was affecting her mental state of not reporting it to police.

(R. p. 909, line 24–p. 910, line 5).

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Analysis

Rule 608(b), SCRE provides that "[s]pecific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence." As outlined above, defense counsel initially sought to show through extrinsic evidence about Ollie and Obie that Wise lied during his testimony. The trial judge properly excluded the testimony regarding Obie and Ollie under Rule 608(b), SCRE.

Defense counsel then shifted his argument, asserting first that he wanted to show that Wise was familiar with guns and second that he wanted to show Appellant's fear of

Wise's alleged threat was reasonable because he shot her dogs. As the trial court pointed out in its ruling, there was evidence in the record to support both of those contentions—for example, there was evidence that Wise shot Appellant's dog Millie when she caused problems with the other dogs. Thus, the proffered evidence and the evidence defense counsel briefly summarized would have been merely cumulative to the evidence that was already before the jury. The trial court was entitled to exclude such evidence under Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."), and the trial court did not err in excluding the testimony.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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Columbia, South Carolina

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to her attorney of record:

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

This eighteenth day of May, 2015.

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