STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

APPELLANT,

Appellate Case No. 2015-000513

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge violate Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of statements he gave during custodial interrogation based on the totality of the circumstances, including (1) the first officer, who advised him of his rights, informing the Appellant the rights did not mean anything, (2) Appellant's intoxication, (3) the length of the interrogation, and (4) the officer's failure to honor his request for counsel, which rendered Appellant unable to voluntarily, knowingly, and intelligently waive his rights?

II. Did the trial judge violate Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of the statement given by Appellant during custodial interrogation where the police requested Appellant sign his statement after he requested counsel?

III. Did the trial judge violate Appellant's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by refusing to qualify his witness as an expert in the area of ballistics in refusing to permit the witness to testify regarding his opinion based on observations?

IV. Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduce the State's burden of proving each element of the offense beyond a reasonable doubt?

V. Did the trial judge err in sentencing Appellant to consecutive terms of imprisonment based upon his mistaken belief that his discretion was restricted in such a way that he was required to order consecutive sentences where neither statute nor case law restricted the judge's discretion in sentencing?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. The trial judge did not abuse his discretion in finding Appellant made a knowing and voluntary waiver of his Miranda rights and admitting the confessions where law enforcement read Appellant his Miranda rights on four occasions, Appellant spoke clearly and cohesively with officers, Appellant was offered food, drink, and bathroom breaks during his detention, and Appellant reinitiated discussion with law enforcement following his ambiguous and conditional request for counsel.

II. The trial judge did not abuse his discretion in admitting the statements of Appellant where the first statement was written prior to Appellant's mention of counsel, law enforcement's request for Appellant's signature did not constitute an interrogation, Appellant did not make a clear and unambiguous request to speak to counsel, and Appellant waived his right to counsel by re-initiating questioning.

III. The trial judge properly refused to qualify defense expert in ballistics where the witness had no formal training in ballistics, was not employed in a profession studying ballistics, and whose only experience in ballistics evidence was personal experience removing lead debris from a shooting range.

IV. The trial judge erred in instructing the jury malice may be inferred from the use of a deadly weapon where the evidence may have reduced or mitigated the charge of murder, but the error was harmless beyond a reasonable doubt in light of the jury's rejection of the verdict of murder in favor of voluntary manslaughter.

V. Appellant's argument the trial court mistakenly believed it lacked discretion in sentencing Appellant to consecutive terms is not preserved for review where Appellant failed to object to his sentencing at trial and instead agreed with the court when questioned whether the terms were to run consecutively.

RESPONDENT'S STATEMENT OF THE CASE[1]

An Oconee County grand jury indicted Appellant, Shane Adam Burdette, in October 2013, for murder and possession of a weapon during a violent crime. (Indictments.) On February 23, 2015, Appellant's case was called to trial before the Honorable J. Cordell Maddox, Jr. (T. p. 1) W. Wilson Burr, Esquire, represented Appellant during the trial. (T. p. 1). Assistant Solicitor David Wagner, Jr., represented the State. (T. p. 1.) The jury returned a verdict of guilty of the lesser included charge of voluntary manslaughter and guilty of the charge of possession of a weapon during a violent crime. (T2. p. 267.) Judge Maddox sentenced Appellant to twenty five years' imprisonment suspended upon the service of fifteen years' imprisonment and five years' probation. (T2. p. 276, lines 11-19.) Judge Maddox also sentenced Appellant to a consecutive term of five years' imprisonment for the possession of a weapon charge. (T2. p. 276, lines 20-24.)

Appellant filed a timely notice of appeal. This appeal follows.

[1] The trial transcripts are in three volumes. The transcript of February 23-24, 2015, is designated as T. in the citations. The transcripts of February 25 and February 27, 2015 are designated as T2 in the citations because the two transcripts are paginated consecutively.

RESPONDENT'S STATEMENT OF FACTS

The victim, Evan Tyner, was killed on July 9, 2013, near Mount Pleasant Baptist Church in the Westminster area of Oconee County. (T. p. 264, lines 4-10.) The Appellant's father lived in the nearby parsonage, and Appellant would stay there from time to time. (T. p. 259, lines 1-6.) Appellant's fiancé (Tiffany), with whom he had two children, was the sister of the victim. (T. p. 149, lines 5-14.)

On the day before the murder, Evan and his roommate Richard Dale Bagwell, or Bubba to his friends, went to Tiffany's house to spend some time with her. (T. p. 148, lines 12-25; p. 150, lines 15-23; p. 248, lines 8-13.) When the two men arrived, they found Appellant and his friend Josh using drugs around the Appellant's children. (T. p. 150, lines 5-21.) Evan disapproved of the drug use around his niece and nephew, which escalated the tension among the men. (T. p. 151, lines 1-5.) Appellant left the house, which, according to Bubba, meant he left to get high. (T. p. 151, lines 15-17.) Evan and his sister argued about Appellant, and Evan told his sister, "there's gonna be a problem" if Appellant were to come home and raise his voice. (T. p. 151, lines 18-25.)

Appellant returned to the house and became angry, and Evan confronted him. (T. p 152, lines 1-4.) The two men began shoving each other, and Evan and Bubba made Appellant leave the house. (T. p. 152, lines 4-11.) Bubba admitted he and Evan had used methamphetamine the day before and had been awake for "three or four days." (T. p. 152, lines 12-23.) Bubba, Josh, and Evan (collectively, "the men") stayed at the house after Appellant left. (T. p. 153, lines 1-7.) Appellant returned a few hours later with hid friend Ken, and the men made him leave again. (T. p. 153, lines 9-11.) Appellant

screamed, "it isn't over," and before he left pointed in the victim's direction and said, "I got somethin' for his ass." (T. p. 153, lines 12-14; p. 242, lines 1-9.)

The men decided they wanted to get some cigarettes, so they left Tiffany's house in her green SUV to go to Walmart. (T. p. 153, line 16 – p. 154, line 17.) Lacking money, the men needed to retrieve Tiffany's bank card from Appellant, who was staying at the parsonage. (T. p. 154, line 18 – p. 155, line 4.) The men got the card from Appellant's friend Ken when they noticed Appellant was on the phone engaged in an angry conversation. (T. p. 155, lines 12-20.) As the men drove off, they began to have car trouble. (T. p. 156, lines 7-9.) They pulled into a driveway and borrowed someone's phone to call Tiffany, who said she would find someone to pick them up. (T. p. 156, lines 7-24.) The men fell asleep in the car waiting, and when they awoke they noticed Appellant driving by -- waiving, laughing and making rude gestures. (T. p. 156, line 24 – p. 157, line 3.) This infuriated Evan, who was determined to drive the car back to the parsonage to confront Appellant, despite the noises coming from the car's engine. (T. p. 157, lines 7-13.)

When the men arrived at the parsonage, Appellant's car was not there, so they waited for him to return. (T. p. 158, lines 17-20.) After about five minutes, Appellant drove up and parked his car behind the men. (T. p. 158, line 18 – p. 159, line 5.) Appellant walked over to Evan's side of the car, and they began arguing. (T. p. 159, lines 14-17.) Appellant told Evan he "had something for [them]." (T. p. 158, line 19.) Appellant walked into the house and was gone for about ten minutes. (T. p. 162, lines 1-16.) Appellant returned from the house via the carport with a shotgun. (T. p. 163, lines 1-3.) Appellant yelled, "You're not taking my kids," and fired a round. (T. p. 163, lines 5-

9.) Bubba got out of the car and ran into the woods but noticed Appellant change his position from the left side of the car to the right side of the car to fire again. (T. p. 164, lines 1-7.) When Bubba looked up, he saw Evan lying on the ground. (T. p. 165, lines 4-9.) Bubba then saw Appellant toss the shotgun onto the ground. (T. p. 165, lines 16-20.) Bubba went to Evan and realized he was in bad shape, so he decided to go get Tiffany and bring her to the scene. (T. p. 166, lines 1-4.) Bubba jumped in Appellant's truck and left while Appellant was on the phone. (T. p. 166, lines 4-13.) When Bubba returned, the paramedics were there. (T. p. 166, lines 13-14.) Bubba heard Appellant telling his parents he was "goin to jail for layin the law down." (T. p. 166, lines 15-23.)

Dr. Brett Woodard, the forensic pathologist, testified the victim died from a single shotgun pellet to the back of the right side of his neck. (T. p. 234, lines 6-9.) The pellet fractured his first and second vertebrae, resulting in hemorrhage rising into the base of the victim's brain. (T. p. 234, lines 13-18.)

ARGUMENT

ISSUE I

The trial judge did not abuse his discretion in finding Appellant made a knowing and voluntary waiver of his Miranda rights and admitting his statements where law enforcement read Appellant his Miranda rights on four occasions, Appellant spoke clearly and cohesively with officers, Appellant was offered food, drink, and bathroom breaks during his detention, and Appellant reinitiated discussion with law enforcement following his ambiguous and conditional request for counsel.

The trial judge's proper admission of Appellant's statements to law enforcement was supported by substantial evidence at trial Appellant made a knowing and voluntary waiver of his Miranda rights when he spoke to law enforcement officers. Under the totality of the circumstances -- in which Appellant was Mirandized on numerous

occasion, Appellant was offered food and water and allowed to use the bathroom, Appellant was agitated but coherent and able to speak clearly, law enforcement made no offers or threats to Appellant to obtain his statements, and Appellant re-initiated questioning following his mention of counsel -- Appellant freely gave his statements in an effort to minimize his culpability in the killing of his friend.

How the Issue Was Raised at Trial: Jackson v. Denno[2] Hearing

John William Towery, of the Oconee County Sheriff's Department, responded to the dispatch call indicating shots were fired near the Mount Pleasant Church. (T. p. 55, line 10 – p. 56, line 7.) Towery found Appellant at the scene, and advised him of his Miranda rights. (T. p. 56, lines 4-21.) Towery read the rights from a form provided by the department. (T. p. 56, line 16 – p. 57, line p.) Towery acknowledged he told Appellant before he read him his rights, "[t]his does not mean anything, it's just something the law we gotta do." (T. p. 62, lines 3-14.) Appellant signed the form acknowledging the receipt of his Miranda rights. (T. p. 57, lines 9-12.) Towery placed Appellant in his patrol car for Appellant's safety, while he roped off the area and interviewed other people at the crime scene. (T. p. 57, lines 12-17.)

Towery opined Appellant may have been under the influence of some substance that morning, based on his behavior. (T. p. 59, lines 1-10.) Towery said Appellant was shouting, he spoke hurridly, and his words were slurred. (T. p. 59, lines 10-25.) Towery also testified, however, Appellant appeared to understand what he was saying, was able to follow instructions, was able to read his Miranda waiver form, and was able to respond appropriately when directed by Towery. (T. p. 60, lines 1-20.)

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[2] *Jackson v. Denno*, 378 U.S. 368 (1964)

Detective Amanda Tinsley, of the Oconee County Sheriff's department, arrived on the scene around 8:30 am. (T. p. 64, lines 1-20.) Appellant was still seated in the back seat of Towery's car. (T. p. 64, lines 21-22.) Tinsley moved Appellant to the front passenger seat of a Crown Victoria driven to the scene by the Victims' Advocate. (T. p. 65, lines 5-11.) Tinsley also Mirandized Appellant, wanting to "make sure he understands his rights." (T. p. 65, lines 21-25.) Appellant initialed the waiver form and agreed to talk to the detective. (T. p. 66, line 21 – p. 67, line 4.) Tinsley took notes of Appellant's statement. (T. p. 67, lines 18-22.)

According to Tinsley, Appellant gave an extremely detailed account of the preceding thirty-six hours. (T. p. 69, line 13 – p. 70, line 14.) Tinsley took four pages of notes from Appellant's account. (T. p. 70, lines 11-12.) In Tinsley's opinion, Appellant was agitated and upset at the events, but he was not intoxicated. (T. p. 70, lines 15-22.) Appellant was responsive to questioning, spoke in narrative form, and gave details in chronological order. (T. p. 70, line 23 – p. 71, line 6.) Tinsley asked Appellant to provide a written statement, and he agreed. (T. p. 71, lines 19-24.) Appellant provided a two page statement in which he indicated he shot the victim while throwing the shotgun at him. (T. p. 73, line 3 – p. 75, line 5.) While giving his first written statement, Appellant did not ask for an attorney or otherwise indicate he wanted the interview to stop. (T. p. 75, lines 10-25.) Appellant completed the written statement at approximately 1:47 pm, after he was transported to the sheriff's department. (T. p. 75, line 22 – p. 76, line 2.)

The investigators continued interviewing other witnesses about the crime. (T. p. 76, lines16-21.) Sometime after lunch, when investigators asked Appellant if he would agree to a polygraph test, Appellant declined and stated he wished to speak to an attorney

before he would take the test. (T. p. 77, lines 3-15.) Officers concluded the interview, and Appellant remained in an interview room while they continued their investigation. (T. p. 77, lines 21-23.) At some point, Appellant began banging on the wall or table in the interview room and turning off the lights. (T. p. 78, lines 4-9.) When the officers asked Appellant what he needed, he told Captain Greg Reed he wanted to talk to them and add information to his first statement. (T. p. 78, lines 7-9.)

Tinsley re-read Appellant his *Miranda* rights at 5:45 pm. Appellant initialed and signed the waiver again. (T. p. 79, lines 7-9.) Tinsley provided Appellant with a form to write his requested addition to his first statement. (T. p. 79, lines 10-25.) Tinsley also took notes of their conversation. (T. p. 80, lines 11-18.) The statement read:

> As I pulled up my father's home I saw that my wife's Blazer was there which was a problem because Evan had called Tiff sayin' it couldn't be drove and I'd just seen it up the road waitin' ten minutes before. As I walked up, I see the door to house is open after I locked it. I went in and walked to mom's room where the door was open and I also had been and also had been locked. As I came back through the house, my daddy's shotgun was in kitchen and not in bedroom. I was worried that they were stealing it or wantin' to hurt me and went outside wanting to know who did it and why sayin' I'd call the law and Bubba jumped outta car and ran into woods. Josh and Evan got out and came to front t -- front of Blazer. Josh was hollerin' and I was tellin' him he was supposed to be my friend and, etc., and Evan spoke. I turned and saw him slippin' up on me and stomped yellin', Don't sneak up on me. He ran behind car and I went around front and as he was runnin' down the road I held shotgun up above his head and to the left so if he looked back it scare him 'cause it wasn't loaded but then when I pulled trigger to pretend to fire and make myself more safe in mind, the safety wen -- was off and and it discharged. I was so scared, I throwed it away and ran to Evan.

(T. p. 81, line 11 – p. 82, line 7.) Appellant finished and signed this statement at 7:54 pm. (T. p. 82, lines 8-11.) Tinsley also read her notes to Appellant, who signed them, indicating the notes reflected what he intended to say. (T. p. 84, lines 2-17.)

After the second statement, Tinsley discussed with Appellant some inconsistencies in the physical evidence and his story. (T. p. 85, lines 1-11.) Tinsley told Appellant they knew two shots were fired from the shotgun, not one as he claimed. (T. p. 85, lines 9-13.) Appellant told Tinsley he was tired, and he wanted to sleep on it; he felt he would remember more the next day. (T. p. 85, line 15 – p. 86, line 7.)

The following day, Tinsley approached Appellant again to discuss his version of events. (T. p. 86, lines 3 – 25.) Tinsley Mirandized Appellant for a third time, and again Appellant signed the waiver of his rights form. (T. p. 87, lines 1-4.) In his third statement, Appellant said he fired a shot into the ground. (T. p. 89, lines 5-7.) One of the three men ran into the woods, another went toward a nearby church, and Evan, the victim, "took off down the road." (T. p. 89, lines 7-19.) Appellant claimed he shot into the air so the men would keep running, but he accidentally hit Evan. (T. p. 89, lines 21-25.) Appellant then offered a remorse laden confession discussing how much he loved his brother-in-law. (T. p. 89, line 25 – p. 91, line 2.) Appellant signed the statement, and Tinsley witnessed it. Appellant at no time asked for an attorney or indicated he wanted to stop giving the statement. (T. p. 90, lines 9-18.)

Tinsley testified Appellant told her another version of the story in which he confronted the men about using meth, and in which he admitted he also "snorted a line of meth" himself. (T. p. 98, lines 7-15.) Tinsley wrote this in her notes and had Appellant sign them to indicate she wrote his statement correctly. (T. p. 98, lines 7-15.)

Justin Ward, also of the Oconee Sheriff's Department, testified he arrived on scene shortly before Tinsely at approximately 8:15 am. (T. p. 99, line 15 – p. 100, line 7.) Ward as present when Tinsley Mirandized Appellant, and noticed he seemed excited and

"out of sorts." (T. p. 100, line 11 – p. 101, line 2.) Ward could not determine if Appellant was intoxicated because Ward was not familiar with Appellant's ordinary demeanor. (T. p. 101, lines 1-11.) Ward testified, however, Appellant was able to provide numerous details about the previous night, was coherent, and was able to write his statement without assistance. (T. p. 101, lines 9-18.) Ward also testified that when the captain approached Appellant about the possibility of a polygraph, Appellant stated he would want to speak to a lawyer before taking the polygraph. (T. p. 102, line 24 – p. 103, line 3.) At that point, Appellant had finished writing the statement he began at the scene, but he had not signed it. (T. p. 103, lines 3-7.) Although Ward asked Appellant to sign his statement from the morning, he did not continue the interview with Appellant and left the room. (T. p. 103, lines 4-10.)

Captain Reed was present for the interviews of Appellant taken at the scene and at the sheriff's department. (T. p. 104, line 21 – p. 105, line 6.) Reed's testimony was consistent with Tinsley and Ward: Appellant agreed to talk to the detectives and gave several statements, declining only to take a polygraph without speaking to a lawyer first. (T. p. 106, lines 1-18.) Reed confirmed the officers thereafter ceased questioning and resumed only after Appellant re-initiated the conversation. (T. p. 106, line 15 – p. 107, line 2.) Reed was also present the following day when Appellant agreed to talk to the officers after having a night to sleep on the inconsistent evidence. (T. p. 109, lines 17-25.) Reed testified Appellant freely and voluntarily gave all his statements to the officers and at no time appeared intoxicated. (T. p. 111, lines 1-25.)

The Trial Court's Finding of Admissibility

Following defense counsel's argument the statements should be excluded because the first officer, Towery, told Appellant the rights did not mean anything, the trial court ruled Appellant's statements to Towery in the police car were inadmissible. (T. p, 115, line 9 – p. 120, line 10.) The trial court further found, however, Tinsley's subsequent thorough Mirandizing of Appellant on multiple occasions cured any misstatement by the first officer. (T. p. 117, lines 7-12.) The judge also ruled the statements given after Appellant mentioned wanting a lawyer before he agreed to a polygraph were admissible. (T. p. 118, lines 7 – 25.)

Standard of Review

The admission or exclusion of evidence rests on the sound discretion of the trial judge 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); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless the conclusion was so manifestly erroneous as to show an abuse of discretion. *State v. Livingston*, 223 S.C. 1, 6, 73 S.E.2d 850, 852 (1952); *see also State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990).The standard of review is limited to determining whether the trial court's ruling is supported by **any evidence**. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added).

Under the Totality of the Circumstances, Appellant Made a Knowing and Voluntary Waiver of His Miranda Rights.

The Supreme Court has long recognized that one may waive one's constitutional rights upon proper warnings:

> ... we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda v. Arizona, 384 U.S. 436, 478-479 (1966). However, establishing whether a defendant received the Miranda warnings is only one part of the process to determine the correctness of the waiver – the inquiry is divided into two separate parts:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (emphasis added). See also *Miranda*, 384 U.S. at 445 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct.App. 2010). Factors to consider include "background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep." *Id,* 390 S.C. at 513-514, 702 S.E.2d at 401. Other courts have also specifically considered and noted prior interaction with law enforcement and exposure to one's constitutional rights as points supportive of knowledge and understanding. *See, for example, United States v. Pruden*, 398 F.3d 241, 246 (3rd Cir. 2005) ("Pruden was familiar with his rights, having been involved in the justice system on numerous previous occasions."); United States v. Robinson, 404 F.3d 850, 861 (4th Cir. 2005) ("Robinson had, on two prior occasions, been read his Miranda rights and waived them."). Again, no one point is dispositive: "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." *Moran v. Burbine*, 475 U.S. at 421.

Intoxication

Appellant cites several reasons why his waiver of rights was not valid under the circumstances, but he offers little support from the record to substantiate those claims. Appellant claims his intoxication precluded his knowing waiver of rights, but the record does not reflect Appellant was intoxicated at all, much less intoxicated to the point of substantial impairment.

In *State v. White*, the Court held that a suspect voluntarily waived his Miranda rights when he was in a hospital bed on four point restraints and had been given sodium pentothal five hours prior to the questioning. 311 S.C. 289, 294-95, 428 S.E.2d 740, 743 (Ct. App. 1993). The officers did not question the suspect until after they had given him the Miranda warnings. White seemed to be aware of why the troopers were there and understood what they said to him. "The fact that he had been under medication and was strapped to his bed was, at best, only a circumstance the trial court was to consider in determining voluntariness." *Id.* at 294-295, 428 S.E.2d at 743; *see also People v. Veloz*, 946 P.2d 525 (Colo. App. 1997) (finding that intoxicated defendant who was stumbling around was properly advised of his rights and made statements voluntarily); *State v. Tribou*, 488 A.2d 472 (Me. 1985) (although defendant had been drinking and smoking marijuana on the day of incident, he was not intoxicated and was able to understand and voluntarily waive his rights); *State v. Finson*, 447 A.2d 788 (Me.1982) (even a person heavily intoxicated is not necessarily incapable of waiving constitutional rights).

In *U.S. v. Cristobal*, the Fourth Circuit held the defendant's statement was admissible even though he was on soft restraints in the surgical trauma unit following emergency surgery. *Cristobal,* 293 F.3rd 134 (2002). The court noted a deficient mental

condition, as a result of pain-killing narcotics administered after emergency treatment, was not enough to render a waiver involuntary. *Id.* at 141. The court considered the conduct of the officers involved in the questioning and the manner in which the interview was conducted to determine whether the waiver was voluntary. *Id.* at 142. In a separate analysis, the court considered whether the waiver was knowingly made while under the effects of pain killers, post-surgery. The court found no evidence of the medication's effect on his ability to think rationally. *Id.*

These cases indicate a defendant must be impaired to a substantial degree to overcome his ability to knowingly and intelligently waive his privilege against self-incrimination. *See also U.S. v. Phillips*, 506 F.3d 685 (8th Cir. 2007) (waiver was voluntary despite defendant's claimed intoxication from four ecstasy pills and a cup of brandy); *U.S. v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007) (waiver was voluntary despite defendant's argument that he was on prescription medicine and should have received rights in Chinese). The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights. "The defendant must produce evidence showing his condition was such that it rose to the level of substantial impairment. Only then could we conclude the government has failed to prove the defendant possessed full awareness of both the nature of his rights and the consequences of waiving them." *United States v. Burson*, 531 F.3d 1254, 1258 (10th Cir. 2008)

Appellant's only support from the record he was intoxicated or under the influence was from responding officer Towery's testimony, in which he said Appellant was very excited and spoke in a rushed manner. (T. p. 59, lines 10-12.) Towery said Appellant seemed confused about what he was saying, but later testified Appellant

understood what Towery was saying to him, responded to him appropriately, and followed his directions. (T. p. 59, line 12 – p. 60, line 11.) Detective Tinsley testified Appellant demonstrated no signs of intoxication. (T. p. 70, line 15 – p. 71, line 6.) Justin Ward testified Appellant was upset but did not appear to be under the influence of drugs or alcohol. (T. p. 100, line 18 – p. 101, line 15.) Lastly, Captain Reed also testified Appellant did not at any time appear intoxicated or under the influence. (T. p. 111, lines 22-25.) The evidence shows Appellant was not impaired to any substantial degree, if at all, on the morning the victim was killed. In the light most favorable to the State, Deputy Towery misinterpreted Appellant's agitation immediately following the shooting for impairment. Thus, Appellant's claim of intoxication is without support.

Length of Interrogation

Appellant also cites the length of interrogation in support of his argument the waiver of his rights was not knowing and voluntary. Appellant confuses the length of interrogation with the length of detention, however. Appellant was placed in the back of the patrol car by Deputy Towery for his own safety while Towery secured the scene. (T. p. 57, lines 4-14.) Tinsley arrived on scene but did not Mirandize Appellant until 9:46 am. (T. p. 65, lines 1-13.) Appellant gave a long narrative about the events of the night before the shooting while Tinsley took notes. (T. p. 70, lines 9-14.) Appellant then agreed to write a statement for the investigators, and they left him to write it in the back of the patrol car. (T. p. 75, lines 10-25.) During the time Appellant was left alone to write his statement, the officers were interviewing other witnesses and collecting evidence. (T. p. 76, lines 16-21.)

Throughout the day, Appellant was in an interview room at the station, but an investigator provided lunch for him and the other witnesses. (T. p. 77, lines 3-7.) Shortly after Appellant invoked his right to counsel with respect to the polygraph, the officers halted the questioning about the incident. (T. p. 77, lines 8-18.) Appellant was left alone until he re-initiated conversation with Tinsley by turning off the lights and banging on the table or walls. (T. p. 78, lines 4-9.) Appellant told the officers "he want[ed] to talk to [them], he ha[d] some information he want[ed] to add to his first statement." (T. p. 78, lines 7-9.) Accordingly, Tinsley Mirandized Appellant again at 5:45 pm. (T. p. 78, lines 21-23.) Appellant finished his second written statement at 7:54 pm. (T. p. 82, lines 8-11.) Following the second statement, Appellant stated he was tired and wanted to continue the conversation in the morning. Tinsley agreed they would end the interview for the night and resume the next day. (T. p. 85, lines 15-20.)

Early in the investigation, Appellant was clearly identified as the perpetrator of the shooting. Although Appellant was detained throughout the day, he was not subjected to a continuous interrogation. He was made as comfortable as possible, under the circumstances, by the officers when they offered him food, beverage, and trips to the bathroom. When Appellant stated he was tired, the officers respected his wishes and ceased the interview. Although Appellant was not free to leave the officers' custody, their interrogation was neither inordinately lengthy nor overbearing of Appellant's will.

Subsequent Interviews Cured by Proper Advisement of Rights

In Appellant's brief to this Court, he claims Towery's first advisement of Miranda rights tainted all future Miranda warnings pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004) and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). (IBOA, pp. 10-12.) As a

preliminary matter, this argument was not preserved at trial for review. The entirety of defense counsel's argument is included below:

> MR. BURR: I do, Your Honor. I think, uh, to be first when Sergeant Towery interviewed Mr. Burdette and told him that the warnings he was about to give him did not mean anything and also testified he appeared to be intoxicated slurred speech, that would violate *Denno*. He should not have questioned him so that any statements made was not any good and that tainted everything that happened for the rest of the day then when after he asked for an attorney, if I understood Officer Ward correctly, he still ask him if he go ahead and sign the second statement. Sergeant Tinsley's notes she'd been using the normal form throughout this thing, there's some notes I can't verify one way or the other as that is not a sworn statement by defendant and this defendant was locked up and held against his will but never placed or not placed under arrest until eight hours, fifty-three minutes later after all the damage was done so I don't, you know, none a the statements should now -- be allowed in under either *Denno* or *Miranda*.

(T. p. 114, line 15 –p. 115, line 7.) During the State's presentation of its case, Appellant made no objection when Tinsley read her extensive notes on Appellant's statement to the officers. (T2. pp. 37-43.) When the State projected Appellant's first written statement, State's Exhibit 5, onto the overhead projector in front of the jury, Appellant made no objection while Tinsely read it aloud. (T2. pp. 44-47.) Only after the statement was read to the jury, and during a discussion with the judge about the admissibility of the second statement, did defense counsel "renew all the objections from Monday." (T2. p. 53, lines 24-25.)

While a party need not use the exact name of a legal doctrine in the trial court in order to preserve it for appellate review, it must be clear that an argument has been made on such ground. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999);

State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party cannot argue one ground below then argue another on appeal. *State v. Hudgins*, 319 S.C. 233, 237, 460 S.E.2d 388, 390-391 (1995) overruled by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

Appellant failed to articulate with any specificity the nature of his objection to the admission of the statement at trial; therefore, Appellant's argument is not preserved for appellate review. The trial court cannot be left to guess what argument that a defendant is making; neither can a defendant claim to have raised every foreseeable argument regarding admissibility of statements by virtue of a request for a *Jackson v. Denno* hearing. The objections that were offered after the evidence was introduced provided no specific grounds, only referring nebulously back to the *Jackson* hearing. Trial counsel failed to put on the record that Appellant's statements were inadmissible due to a violation of *Seibert* or *Navy*. For all these reasons, the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review by this court. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). "[A] specific objection to the admission of evidence must be made to preserve the issue for appeal." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." *Id.* "The same ground argued on appeal must have been argued to the trial judge." *Id.*

Should the court find Appellant's argument was preserved, however, the subsequent confessions were not tainted by Officer Towery's statement the *Miranda* rights did not mean anything. Appellant was properly Mirandized three more times, each

time before Tinsley interviewed Appellant. *Siebert* and *Navy* are completely inapplicable to the case at hand. In those cases, the courts' preclusion of a subsequent waiver of Miranda rights following an unwarned, inculpatory statement was meant to prohibit the type of police misconduct in which officers force a confession, then administer the warnings and immediately re-initiate questioning now that the cat is out of the bag. The courts admonished police for what seemed to be a deliberate attempt to evade the *Miranda* requirements by use of a two part interrogation.

Subsequent statements are to be evaluated under their own totality of the circumstances analyses. *See State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 157-58 (1996) (finding defendant's initial oral confession was improperly obtained, but holding because defendant was freshly advised of his Miranda rights, and he knowingly and voluntarily waived them before signing the confession, the confession was admissible.) In *Register*, the court looked at several factors surrounding the defendant's confession: "The police did not coerce Register or threaten him with adverse consequences if he did not cooperate. The room where Register was questioned was comfortable, he was not deprived of necessities, and he was repeatedly read his Miranda rights. Accordingly, the conditions do not establish that there was an incentive for Register to render a false confession." *State v. Register*, 323 S.C. 471, 480, 476 S.E.2d 153, 158 (1996).

Here, Deputy Towery's hurried, off the cuff comments to Appellant in the back of the patrol car were not an attempt to elicit an inculpatory response from Appellant. Towery testified he was one of two officers on scene initially, and he was busy securing the scene, roping it off, and interviewing witnesses. Appellant shouted out some declarations that the shooting was accidental, but Towery did not attempt to interrogate

Appellant while he was in the patrol car -- he was too busy. The deputy also testified he read *Miranda* rights to everyone he talked to at the scene. Towery's comments easily could have been interpreted as the reading of the rights to Appellant did not mean Appellant would be charged with anything. The comments could also mean Towery was warning Appellant of his right to remain silent, but Towery also knew he would not have time to question Appellant. Thus, the reading did not mean anything because he would conduct no interrogation. Admittedly, Towery's comments could be construed as improper, and the trial judge properly excluded Appellant's initial outburst out of an abundance of caution, but the comments certainly did not taint the voluntariness of Appellant's future statements.

The Officer's Request to Sign Was Not Interrogation

As will be discussed more thoroughly in the following section, Appellant neither made a clear request for counsel, nor was he subject to interrogation when Ward asked him to sign his previously written statement. Moreover, given Tinsley's notes and the multiple page statement written by Appellant, his signature on the confession was not of any significance. Appellant could have refused to sign the document and it would not have precluded its admissibility if the totality of the circumstances indicated the waiver was otherwise voluntary. *See, e.g., U.S. v. Devall*, 462 F2d 137 (1972); *State v. Gonzalez*, 814 A.2d 384, 391 (2003) (finding a written waiver is not required).

The trial judge properly considered the totality of the circumstances in determining whether the State met its burden of proving Appellant's confessions were knowingly and voluntarily given. The following evidence in the record supports the trial judge's finding:

- Detective Tinsley followed proper protocol for advising Appellant of his Miranda rights each time she initiated questioning of Appellant.
- Tinsley advised Appellant of his Miranda rights on three occasions, including Appellant's re-initiation of questioning.
- Appellant was provided lunch and allowed to use the bathroom when needed.
- Out of an abundance of caution, officers ceased questioning Appellant about the shooting when he stated he would want to speak to an attorney before he agreed to a polygraph.
- Appellant re-initiated the discussion with the officers without any prompting.
- Appellant gave long, narrative statements to the officers full of details which were self-serving to Appellant.
- Officers made no promises to Appellant nor made any threats to obtain his statements.

The record contains more than enough evidence to affirm the trial judge's ruling Appellant made a knowing and voluntary waiver of his Miranda rights when he gave law enforcement multiple variations of the story in which he killed the victim. Appellant clearly understood his rights when he declined the polygraph without first speaking to counsel. Appellant had time alone to think on his evolving story and change some of the detail in an effort to lessen his culpability. Therefore, the trial judge's decision to admit Appellant's statements to police was not an abuse of discretion.

ISSUE II

The trial judge did not abuse his discretion in admitting the statements of Appellant where the first statement was written prior to Appellant's mention of counsel, law enforcement's request for Appellant's signature did not constitute an interrogation, Appellant did not make a clear and unambiguous request to speak to counsel, and Appellant waived his right to counsel by re-initiating questioning.

Appellant argues his Fifth and Fourteenth Amendment right were violated when the trial judge permitted the admission of his statements to police because an officer requested he sign a document after he made reference to speaking to an attorney in the event he took a polygraph test. Appellant's argument is without merit. To invoke the right to counsel, a suspect must do so "unambiguously." *Berguis v. Thompkins*, 560 U.S. 370, 381 (2010); *State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010). Moreover, administrative questions attendant to a suspect's custody or arrest are not considered interrogations for purposes of *Miranda*. *State v. Brown*, 389 S.C. 84, 92, 697 S.E.2d 622, 627 (Ct. App. 2010). Appellant neither invoked his right to counsel, nor did the officers interrogate Appellant after his supposed invocation. Thus, the trial court committed no error.

How the Issue Was Raised at Trial

As a preliminary matter, Appellant's argument is not preserved for review because Appellant failed to object when his first statement was initially presented to the jury. *See also*, **Issue I**, *supra*. Generally, a motion in limine seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. *State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. *State*

v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); *State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997). "However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001).

Thirteen witnesses testified during the State's case in chief before Detective Tinsley was called to the stand. (T. Index; T2. Index.) Tinsley testified she took four pages of notes from her discussion with Appellant when she arrived and he was seated in the car at the scene. (T2. p. 37, lines 2-12.) Tinsley read from her notes the highlights of Appellant's statement, which detailed the events from the previous night until after the shooting. (T2. p. 37, line 18 - p. 43, line 15.) Appellant failed to object when Tinsely read her notes of his statement. Further, Appellant failed to object when his written statement was placed on an overhead projector for the jury to see, and Tinsely was given a pointer and asked to read the statement aloud. (T2. p. 44, lines 15-22.). Tinsley continued to discuss how Appellant agreed to sign the statement, then asked to speak to an attorney, then re-initiated the conversation with the officers because he wanted to add to his statement later. (T2. p. 48, line 16- p. 50, line 1.) When Appellant finally did object, he based his objection on the possibility of Tinsley mentioning the polygraph test. (T2. p. 50, lines 2-18.) Appellant then began to argue the circumstances of his confinement in the interview room and his re-initiation of the interrogation, apparently in an effort to object

to the introduction of his second statement to the officers. (T2. p. 51, line 8 – p. 53, line 9.) Finally, Appellant renewed "all the objection from Monday." (T2. p. 53, lines 24-25.)

Appellant failed to preserve any challenge to the admissibility of Appellant's first written statement for appellate review. Because Appellant did not make a contemporaneous objection to the statements taken by Tinsley and discussed during trial in the jury's presence, he failed to preserve any issue related to the trial court's pretrial rulings. Should the court desire to address the merits of the issue, however, the State submits Appellant's argument must fail.

Appellant Made No Clear Request for Counsel and Was Not Subject to Interrogation

The Fifth Amendment to the United States Constitution provides: "No person shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. Amend. V. The Fifth Amendment's right against self-incrimination was made applicable to the individual states through the Fourteenth Amendment. U.S. Const. amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). In interpreting the Fifth Amendment, the United States Supreme Court has held that the prosecution may not use statements stemming from the custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. *Miranda,* 384 U.S. at 444. These safeguards are intended to prevent government officials from using the coercive nature of confinement to extract confessions that would not otherwise be given. *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987). "The main purpose of Miranda is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis v. Thompkins*, 560 U.S. 370, 383 (2010). Both of these rights protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. *Id.*

at 381. To invoke either the right to counsel or the right to remain silent a suspect must do so "unambiguously." *Id.* at 381-82; State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

If a suspect makes a reference to an attorney that is ambiguous or equivocal -- in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel -- our precedents do not require the cessation of questioning. *See Davis v. United States,* 512 U.S. 452 (1994). Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clear enough that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. *Davis*, 512 U.S. at 459. *See also Moran v. Burbine*, 475 U.S. 412, 433, n.4(1986) ("[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).

In *Davis*, the defendant initially waived his right to remain silent while being interviewed by Naval investigators, but then stated, at about an hour and a half into the interview, "Maybe I should talk to a lawyer." 512 U.S. at 454-455. The officers asked if he was requesting a lawyer and he said he was not. After a break, he was re-Mirandized and the interview continued until he asked to have a lawyer present and refused to speak further. *Id.* The Court held the suspect's ambiguous statement was not a request for counsel, stating, "Unless the suspect actually requests an attorney, questioning may continue." *Davis* at 462.

The facts of the case at hand are similar to *Davis*. Appellant initially waived his right to counsel and discussed the events of the shooting in a long narrative form. It was only when the officers asked Appellant if he would be willing to submit to a polygraph test that he mentioned he would want to speak to an attorney before doing so. (T. p. 77, lines 8-11.) Appellant did not make a clear request for an attorney; he made a conditional request. As Tinsely testified, Appellant did not say he wanted an attorney before he would speak to them further; he only indicated he wanted an attorney in the event he took the polygraph. (T. p. 77, line 10.) This conditional statement was not a clear and unambiguous invocation of counsel.

Appellant further claims the officers left him alone because they knew he invoked his right to counsel, but Tinsley testified they left Appellant in order to interview other witnesses and gather more information for their investigation. (T. p. 77, lines 21-23.) It is not clear whether the officer halted the interrogation out of an abundance of caution or because they wanted to continue their investigation before speaking to Appellant again. Regardless, Appellant clearly wanted to continue the discussion with officers because he began banging on the interview room table (or walls) and turning off the lights to get their attention some time later. (T. p. 78, lines 4-9.) Far from exercising his right to remain silent, Appellant was desperate to change his statement.

Even if the court were to consider the request for counsel unambiguous, Sergeant Ward's request Appellant sign his statement thereafter did not constitute a violation of Appellant's *Miranda* rights. Ward testified when he asked Appellant to sign his statement, Appellant had already completed it. (T. p. 103, lines 1-7.) Appellant agreed, and Ward notarized the statement and left the room. (T. p. 103, lines 5-10.) Ward did not

interrogate Appellant about the incident, nor did he engage in discussion with Appellant about the events leading to the shooting. Ward simply performed an administrative duty and asked Appellant to sign his name to the document.

Interrogation is defined as express questioning, or its functional equivalent which includes words or actions on the part of the police (**other than those normally attendant to arrest and custody**) that the police should know are reasonably likely to elicit an incriminating response." *State v. Brown*, 389 S.C. 84, 92, 697 S.E.2d 622, 627 (Ct. App. 2010) (quoting *State v. Sims*, 304 S.C. 409, 416–17, 405 S.E.2d 377, 381–82 (1991) (internal quotations omitted) (emphasis added). Appellant gave his statement after waiving his properly administered *Miranda* rights. Even if the court were to believe he later unequivocally invoked his right to counsel, Ward's request that Appellant sign the statement was an administrative function attendant to Appellant's arrest and custody, and is therefore an exception to the requirements of *Miranda*.

The trial court did not abuse its discretion when it found, under the totality of the circumstances, Appellant made a knowing and voluntary waiver of his *Miranda* rights when he gave his statements to police, and law enforcement did not violate those rights by making an administrative request he sign the statement after he conditionally referred to counsel. Thus, Appellant is not entitled to have his statements suppressed on this ground.

ISSUE III

The trial judge properly refused to qualify defense expert in ballistics where the witness had no formal training in ballistics, was not employed in a profession studying ballistics, and whose only experience in ballistics evidence was personal experience removing lead debris from a shooting range.

The trial court did not abuse its discretion in limiting the qualification of Appellant's expert testimony to that of gunsmithing and the repair of weapons and in refusing to qualify him as an expert in the area of ballistics. The trial court must find that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable to admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Appellant's expert had no professional training or experience in studying the motion of projectiles, or, ballistics. His proffered testimony indicated his experience was limited to the mass removal of projectile fragments as part of a lead recycling program. Moreover, his means of comparison—a visual inspection of the lead waste during its removal—was not a reliable form of testing ricochet patterns. Thus, the court committed no error by limiting his testimony.

How the Issue Was Raised at Trial

Both the State and the defense attempted to address the issues of whether the shotgun fired accidentally and whether the pellet that killed the victim ricocheted off the ground before striking him in the back of the neck. The State's firearms expert, a nine year employee of SLED as a forensics firearm examiner, testified about the functionality of the shotgun, and identified the ammunition used in the shooting. (T2. pp.10-14.) The State's expert also testified about the nature of lead as a soft metal, stating, "When they

get shot, they could have any kind of deformation from hitting anything, including each other, coming out of the shotgun." (T2. p. 15, lines 6-9.) When questioned specifically about the expected trajectory of a lead shotgun pellet, were it to strike an object and ricochet off, the expert stated:

> A From what I read, pellets have a shallow angle. After they hit their target, they don't really go at like 90 degrees. They're shallow, more along the same plane as like the ground.
> Q So if that pellet had hit anything, would it continue on basically the same trajectory?
> A From what I've read, that's what I understand.
> Q Okay. And if it did hit anything, it would not alter its path much?
> A From what I've read, they're in the same direction. So it wouldn't turn left all of a sudden. It would keep going in the same direction.
> Q The same direction as it went in, say, the victim?
> A Correct.
> Q It wouldn't alter and go off like, say, 90 degrees off that way?
> A No.

(T2. p. 19, line 16 – p. 17, line 7.) Appellant failed to object to this line of questioning or the State's qualification of their expert.

The defense called Richard Belmore, Jr., to the stand. (T2. p. 170, lines 10-12.) Belmore was the owner of Salem Gun & Archery Club and Richard's Firearms, and he worked full time for Allstate Insurance Company. (T2. p. 170, lines 17-19.) The club promotes sport shooting and offers training for the use of firearms. Belmore was an instructor, as well. (T2. p. 170, line 25 – p. 171, line 8.) Belmore was also a gunsmith repairman, with training via a correspondence course, and had a license to receive and resell firearms. (T2. p. 171, lines 9-18.) Belmore had a license for pistol and home defense and a concealed weapon permit from SLED, and he was a member of the National Shooting Sports Foundation. (T2. p. 171, lines 18-21; p. 172, lines 3-7.) The defense attempted to qualify Belmore as an expert in "gun, gunsmith, and ballistics." (T2.

p. 172, lines 8-10.) The State objected to his qualification in ballistics. (T2. p. 172, lines 11-25.) The court engaged in the following discussion with counsel:

> MR. WAGNER: Looking at his background, I don't think he's qualified to testify to that sort of thing.
> THE COURT: I have got to agree. I think he can testify about gunsmith and repair of weapons. But as far as trajectories and ballistics, I don't think that's enough. Under the law in South Carolina, which, as you know --
> MR. BURR: If I may, that would go to the weight of his testimony. But the fact that he has worked in the area for 20 years, has owned a range, has seen the results of firearms, he should be qualified certainly more than just reading an article on that. And that was specifically asked of the State's witness after we talked about the ricochet, she said she read an article. There was nothing else offered to qualify her. So that just goes to the weight of her testimony, whether you believe this or not. She did testify to it, no other qualification.
> THE COURT: Okay. I understand your objection, but I'm going to limit his testimony to that of a gunsmith. I think he meets that requirement but not ballistics. Ballistics is a whole other matter, and I think her testimony -- did you ask her that question or did you ask her that question?
> MR. WAGNER: I think I asked her that question just as far as --
> THE COURT: Because she had examined the pellet, and the question was whether or not the pellet appeared to have any kind of deformity or so. I mean, that's where I thought that was. But I understand your objection, and you're protected for the record.
> MR. BURR: May I continue to voir dire this witness on that area?
> THE COURT: If you want to, sure.
>
> VOIR DIRE EXAMINATION
> BY MR. BURR:
>
> Q Mr. Belmore, did you have occasion to inspect the pellet involved in this case?
> A Yes, I did.
> Q And have you had similar experiences owning a range of inspecting ricochet pellets before?
> A Yes. May I explain?
> Q If the judge will allow it, yes.
> A We're required by DHEC to have a lead removal program at my -- at an outdoor range. So our filing with DHEC, that we clean so much of the berm of the backstop every year, we recycle the products either at the metal recycling center or I melt down the lead myself for future bullet construction. Most of the projectiles that we have picked up have hit the ground before they hit the berm. They have hit the berm at a dead stop. And being that it's outdoor, several of them hit rocks. What I saw is

> consistent with what I typically pick up at the range, a projectile striking an abrasive surface.
> MR. BURR: Once again, your Honor, his qualifications, that would go to the weight of his testimony, but we still submit that he is an expert in the area.

(T2. p. 173, line 9 – p. 176, line 12.)

The Trial Court's Finding of Admissibility

The trial judge considered Belmore's experience in lead removal at the shooting range, but declined to qualify him as an expert in ballistics, stating:

> THE COURT: Okay. And I understand your objection. I still don't think that's enough. I mean, just -- I think the way the law is going in South Carolina regarding experts, that he hadn't met the requirements. But he can testify about the gunsmith and all that business. I assume the question is going to be about the slamming the gun shut, but I understand. I mean, I understand your objection. I just don't think that's enough.
> MR. BURR: Your Honor, since he did just answer under voir dire that he has inspected the pellet involved in this case, will the defense be allowed to ask him if that is a picture of the pellet that he saw?
> THE COURT: You can ask him if that's a picture of the pellet he saw, but I don't think you can then go ask him if that pellet was a ricochet.
> MR. BURR: Very good. Thank you, your Honor.

(T2. p. 176, line 13 – p. 177, line 4.) Belmore went on to testify about the age of the shotgun, the wear to the gun's safety, and the defect in the trigger mechanism. (T2. pp. 178 – 181.) Belmore also testified he believed the weapon to be unsafe. (T2. p. 181, line 24 – p. 182, line 1.)

Appellant's Expert Was Not Qualified in Ballistics

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion. *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); *McGee v. Bruce Hospital System,* 321 S.C. 340, 468 S.E.2d 633 (1996); *Creed v. City of Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993). An abuse of discretion occurs when there is an error of law or a

factual conclusion which is without evidentiary support. *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995).

Expert testimony receives additional scrutiny relative to other evidentiary decisions. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability, and further find that the proposed evidence will assist the trier of fact. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim).

Next, the expert does not have to specialize in the particular branch of the field in question, but the proffered expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial

court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010).

The evidence supports the trial court's refusal to qualify Belmore as an expert in ballistics. Belmore had no knowledge, skill, experience, training or education specifically related to ballistics, or the motion of projectiles. Rather, it appears he merely studied the pellet before trial, which he indicated in his proffered testimony to the court. Appellant intended to ask Belmore to compare the abrasions on the pellet retrieved from the victim's body to that of the lead retrieved from the rear of the shooting range. Professionally, Belmore was an owner of a shooting range, a firearms instructor at the range, a gunsmith, and a retailer of firearms. Though Belmore need not necessarily have been employed as a ballistics analyst with SLED to be qualified as an expert, he did need to have some experience studying the motion of projectiles in order to offer his opinion whether the pellet appeared to have ricocheted off the ground before striking the victim.

Belmore's only experience relevant to his proffered testimony concerning the ricocheted pellet was his participation in the lead removal from the gun club. Belmore had no training, held no certifications, and had no professional experience studying the markings of projectiles. Belmore had no experience examining projectiles in any

scientific capacity or in any reliable format. Belmore did not offer any experience in conducting or witnessing tests of ricocheted bullets, only that he removed the lead en masse to comply with DHEC's disposal program. Thus, Belmore offered no explanation of how he would know which particular bullets had struck the ground before striking the berm so that he could make the comparison of those bullets to the pellet that struck the victim. His means of comparison—a visual inspection of the lead waste during its removal—was not a reliable form of testing ricochet patterns. Because the inspection was not in a controlled setting, he could not know whether the bullets struck the ground or each other as they were ejected from the firearm before ricocheting off into the berm. Moreover, Belmore had no experience in examining projectiles removed from the human body after striking bone. Belmore lacked any experience in knowing whether the pellet's striking of the victim's spine could also cause the deformity on the pellet.

In the role of gatekeeper, the trial judge permitted Belmore to testify about the wear and functionality of the gun, which were properly within his purview. The judge did not abuse his discretion in finding the defense expert was not qualified as an expert because Belmore lacked experience and his basis for comparison lacked reliability. Therefore, the court committed no error by prohibiting Belmore from offering an opinion on whether the pellet ricocheted off the ground before striking the victim.

ISSUE IV

The trial judge erred in instructing the jury malice may be inferred from the use of a deadly weapon where the evidence may have reduced or mitigated the charge of murder, but the error was harmless beyond a reasonable doubt in light of the jury's rejection of the verdict of murder in favor of voluntary manslaughter.

Appellant correctly asserts the trial judge should not have given the implied malice instruction to the jury, but he cannot show how the judge's error contributed to the jury's verdict of voluntary manslaughter. When considering whether an error with respect to a jury instruction was harmless, the 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, reh'g denied (Apr. 2, 2014), cert. denied, 135 S. Ct. 196, 190 L. Ed. 2d 152 (U.S.S.C. 2014) (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998). Voluntary manslaughter involves an intentional act on the part of the perpetrator but lacks the element of malice. *State v. Blassingame*, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978). Because the instruction pertained to the finding of malice, and the jury rejected the charge of murder, the instruction did not contribute to the verdict and the judge's error was harmless beyond a reasonable doubt.

How the Issue Was Raised at Trial

After the trial judge's questioning of Appellant concerning the waiver of his right to testify, the court offered copies of his jury charge to counsel, then took a five minute recess to allow counsel to review the charge. The judge and defense counsel engaged in the following discussion:

> THE COURT: Any changes, objections from the State?
> MR. WAGNER: No, sir.
> THE COURT: From the defense?
> MR. BURR: Yes, your Honor. On page 19 of your instructions --

THE COURT: Hold on a second. Okay.
MR. BURR: First full paragraph, second paragraph, "Malice may be inferred from conduct showing a total disregard for human life."
THE COURT: Yep.
MR. BURR: "Inferred malice may also arise when the deed is done with a deadly weapon." I would object to that portion of that instruction, your Honor.
THE COURT: Why?
MR. BURR: I don't think we can infer there was a total -- based on the evidence presented, there's no -- we can't have any inference of total disregard for human life.
THE COURT: Say that again.
MR. BURR: There's been evidence presented on accident which would be in mitigation. So this inference leads to an improper conclusion.
THE COURT: Okay. Let me look at accident. Because, basically, we're giving them the option, and I took some language out of the accident portion – hold on a second. Okay. I understand why you'd want that. I mean, it goes to the weight and goes to one of the
things they have got to decide is whether or not there was a total disregard, but --
MR. BURR: Your Honor, if I may.
THE COURT: Yeah.
MR. BURR: The footnote that goes with that --
THE COURT: Right
MR. BURR: -- kind of excludes that.
THE COURT: Well, it says, "Where evidence is presented that will reduce, mitigate, excuse or justify." Actually that should not have been in there. That was a note to me. "But with intent to kill, the jury shall not be charged." Well, there's been evidence potentially that could reduce or mitigate. There's also been evidence that they did not. And I'll be very clear that the State has to prove malice by proof beyond a reasonable doubt. I understand your objection. You actually got a private note to me that was printed, so.
MR. BURR: Thank you.

(T2. p. 201, line 1 – p. 202, line 22.) Thus, Appellant's objection to the jury instruction was properly preserved for review. The judge later instructed the jury:

> Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind could be express and would be express malice. Malice may be inferred from conduct showing a total disregard for

human life. Inferred malice may also arise when the deed is done with a deadly weapon.

(T2. p. 248, lines 1 - 10.) The judge read his instruction again on the charges of murder, voluntary manslaughter, and involuntary manslaughter after he received a note from the jury requesting clarification of the charges. (T2. p. 261, line 8 – p. 266, line 3.)

The Instruction Was Harmless Beyond a Reasonable Doubt

The Respondent would agree with Appellant the trial judge erred in giving the inferred malice instruction because the record contained evidence mitigating or reducing the charge of murder. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)(holding the "use of a deadly weapon" implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing). However, in *Chapman v. California*, the Supreme Court held error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." 386 U.S. 18(1967); see also *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). Respondent strongly disagrees with Appellants assertion the trial judge's error was not harmless.

In the case at bar, the trial judge's instruction to the jury that it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on the ultimate outcome of Appellant's case based on the verdict returned by the jury. Despite the fact the jury was instructed it could infer malice from the use of a deadly weapon, its verdict reflected it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was the precise type of jury misunderstanding the Supreme Court's rule in *Belcher* sought to

avoid. *See Belcher*, 385 S.C. at 610, 685 S.E.2d at 808-809 ("[I]nferring malice form the use of a deadly weapon is indeed only a 'half-truth.' The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts."). Critically, even though the evidence presented showed Evan's death resulted from the use of a deadly weapon, the jury demonstrated it found Appellant's actions did not involve malice and were mitigated under the circumstances by convicting him of the lesser-included offenses of voluntary manslaughter. *Cf. Nation v. State*, 252 Ga. App. 620, 623-624, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any error that resulted from the giving of an erroneous jury charge was harmless and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge). Thus, the inference of malice jury instruction did not confuse the jury in Appellant's case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. *See State v. Chambers,* 194 S.C. 197, 203, 9 S.E.2d 549, 552 (1940) (finding any error resulting from the trial judge's jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the defendants acted with malice). As a result, any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Appellant's case.

Appellant cites *Belcher,* and *Rose v. Clark,* 478 U.S. 570 (1986) for the proposition the instruction cannot be considered harmless. Appellant is incorrect. In both *Belcher*, and *Rose*, and in *State v. Miller*, 397 S.C. 630, 725 S.E.2d 724 (2012), the courts

said the instruction was subject to the harmless error analysis. In those cases, however, the defendant was convicted of murder and the error could not be harmless. In the instant case, there is no more striking example of harmless error than the jury clearly rejecting the erroneous charge. Appellant's convictions should be affirmed.

ISSUE V

Appellant's argument the trial court mistakenly believed it lacked discretion in sentencing Appellant to consecutive terms is not preserved for review where Appellant failed to object to his sentencing at trial and instead agreed with the court when questioned whether the terms were to run consecutively.

Appellant argues the trial judge erred when he mistakenly believed he had no choice when he sentenced Appellant to a consecutive term of five years' imprisonment for possession of a weapon during the commission of a violent crime. Pursuant to S.C. Code Ann. § 16-23-490, the court may impose a concurrent or consecutive term with the principle crime. The trial judge appeared uncertain of the sentencing guidelines, however, and consulted with defense counsel before sentencing Appellant. Appellant not only failed to object when the court indicated it lacked discretion to impose a concurrent sentence, Appellant actually agreed with the judge the sentence would be consecutive. Thus, Appellant's argument on this ground is not preserved for review.

The Issue Was Not Raised at Trial

Following the verdict of guilty on the charges of voluntary manslaughter and possession of a weapon during the commission of a violent crime, the trial court engaged in the following discussion of the sentencing requirements with counsel:

> THE COURT: All right. You've got the sentencing sheets? You're ready?
> MR. WAGNER: Give me two seconds, Judge.
> THE COURT: All right. Now, the voluntary carries two to 30?

MR. WAGNER: I think it's -- I always remember it as zero to 30, but it may have changed. I don't know.
THE COURT: All right. And then the weapons charge is consecutive, right? Five consecutive?
MR. BURR: Correct.
THE COURT: All right. What I'm going to do is go back, unless you object, talk to them, give them the option of coming back in here. Any objection from the State on that?
MR. WAGNER: No, sir.
THE COURT: From the defense?
MR. BURR: Not from the defense, your Honor.

(T2. p. 270, lines 1-17.) Later, upon addressing the court prior to sentencing, defense counsel mentioned the consecutive terms:

MR. BURR: Your Honor, he does have two children, one with the wife that you heard from here this week. He has one from the prior marriage. As your Honor mentioned, these charges, these sentences will run consecutively. We would ask that Adam be given no more than a sentence of ten years on the manslaughter and five years on the gun charge, your Honor.

(T2. p. 273, lines 11-17.) Later, when the trial judge imposed the sentence, he made the following comments:

THE COURT: The way the law is set up is, obviously, I don't have any real leeway. The possession of a weapon charge is consecutive, so -- and he's doing time now. How many years was he --
MR. WAGNER: It was five years on the grand larceny, your Honor.
THE COURT: All right. The sentence on the voluntary manslaughter, after listening to the evidence -- I think this is fair -- is 25 years provided upon the service of 15, the balance suspended, probation for five. I'm doing that because there is restitution that has to be paid. I'll PTUP that so once the restitution is paid, the probation will be off. That's probably going to be redundant. I'm running that concurrent with the probation. And then on the possession of a weapon, it's just a straight five. I'm running that consecutive to the probation. And the way I've written it, the 3-27-15 verdict for voluntary manslaughter. So 25, 15 and five and then five consecutive. Okay?

(T2. p. 276, lines 5-24.)

The Supreme Court of South Carolina has consistently held a challenge to sentencing must be raised at the trial level in order to be preserved for appellate review. *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). *See also State v. Garner*, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (absent contemporaneous objection, challenge to sentencing is not preserved for appellate review); *State v. Shumate*, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) (defendant's failure to timely object or seek modification of his sentence in the trial court precludes defendant from presenting an objection for the first time on appeal). The Johnson court conceded, however, an appellate court may consider an unpreserved sentencing issue in the interest of judicial economy in "exceptional circumstances." *Johnson*, 333 S.C. 459, 464, 510 S.E.2d 423, 425. The court outlined two such circumstances: the first when the State conceded the trial court imposed an excessive sentence and the second when the defendant could remain imprisoned beyond the appropriate sentence due because of the additional time required to pursue post-conviction relief. *Johnson*, at 464, 510 S.E.2d at 425; *see also State v. Bonner*, 400 S.C. 561, 735 S.E.2d 525 (2012).

Appellant challenges, for the first time on appeal, the trial court's sentence of five consecutive years' imprisonment for his conviction of S.C. Code Ann. §16-23-490, possession of a weapon during a violent crime. Subsection (B) grants the court discretion to run the term concurrent or consecutive to the principle crime. Appellant was sentenced to twenty-five years' imprisonment suspended upon the service of fifteen years and probation for five years for voluntary manslaughter. (T2. p. 276, lines 5-24.) Appellant's claim satisfies neither of the *Johnston* court's exceptional circumstances warranting a departure from the court's requirement of issue preservation. First, the trial court was

entirely within its right to sentence Appellant to consecutive terms of imprisonment, regardless of its understanding of the law. Thus, Appellant's sentence was not excessive or improper, and was in fact contemplated by the statute. Second, Appellant's sentence of fifteen years' imprisonment affords him more than enough time to pursue his post-conviction relief claim, should he elect to do so. Because Appellant did not properly preserve this issue for review, he is not entitled to relief on this ground.

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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