STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JAN 22 2016
SC 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.

PETITION TO ARGUE AGAINST PRECEDENT

The Respondent State of South Carolina petitions before this Court pursuant to SCACR Rule 217 to argue against precedent as set forth in the Final Brief of Respondent, pages 26-34. Particularly, Respondent asserts the precedent of State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) which allows a jury charge on a lesser included offense based upon a criminal defendant's previous statement that has been recanted, repudiated by the defendant, and held out by both the prosecution and defense to be false. Respondent is advised that this case is set for oral argument before the Court of Appeals on February 2, 2016.

Respondent submits that this precedent set forth by Knoten is unworkable as it fails to recognize the legal waiver of the lesser included offense instruction by the completely inconsistent defense and creates a windfall loophole by which the defendant could potentially escape liability altogether despite a jury's finding the defendant guilty

of a lesser-included offense based as a compromise arising from evidence known to be false. Simply put when the repudiated statement by a criminal defendant is contrary to both the defense case at trial and the state's theory of the case, a lesser included offense instruction should not be based solely upon that repudiated statement. The precedent of *Knoten* suggests that this may be appropriate albeit suggests reliance on a statement known to be false by both parties. The precedent further impedes the administration of justice by requiring instructions based upon false evidence which neither side is relying upon as the truth.[1]

In Knoten, the Court rejected the State's argument that because the criminal defendant recanted the statement and it was not consistent with his defense, the repudiated statement should not be considered in determining whether a defense request for a lesser offense should be charged. The Court applied the general standard that in determining issues to be charged, all the testimony, both for the state and the defense must be considered. The Court specifically rejected a concept that a criminal defendant's assertion of that another had confessed to him about committing the crimes and that his statements were false and the product of the alleged perpetrator's threats to kill his family waived his right to use the repudiated statements to create a lesser offense. The Court

[1] The false and repudiated statements were introduced not to prove the truth of those statements but as a showing of consciousness of guilt. statements "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). "A false exculpatory statement is probative of a defendant's consciousness of guilt." *People v. Milka*, 211 Ill.2d 10, 181 (2004); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App.2004) (holding that attempts to conceal incriminating evidence and making improbable statements to police are probative of wrongful conduct and circumstantial evidence of guilt); *King v. State*, 29 S.W.3d 556, 564–65 (Tex.Crim.App.2000) (holding that the act of making false statements to police is circumstantial evidence because it shows a consciousness of guilt); False statements by a defendant may be admitted to "support an inference of consciousness of guilt." (*People v. Showers* (1968) 68 Cal.2d 639, 643.) Defendant's false and contradictory statements to the responding officers also constitute circumstantial evidence "tending to show consciousness of guilt." *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992).

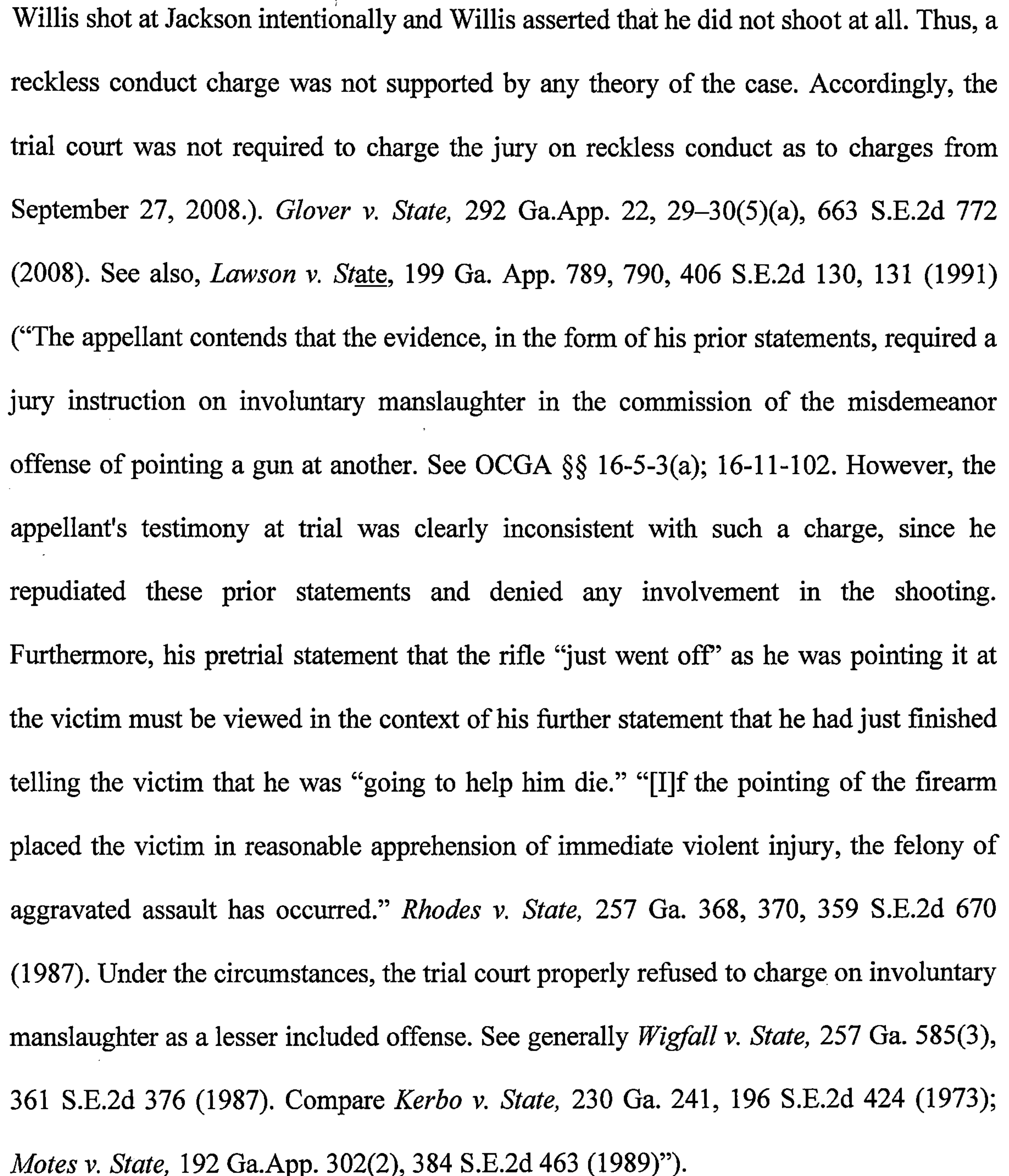
similarly relied upon another case, State v. Moore, 245 S.C. 416, 140 S.E.2d 779 (1965) which reversed a conviction for assault and battery of a high and aggravated nature on the refusal of a jury charge of a lesser offense of simple assault and battery based upon some evidence that the victim only received slight injuries when under the defense theory he claimed to be elsewhere and could not have been guilty of even assault and battery.

In Knoten, the State had relied upon State v. Weaver, 265 S.E.2d 130, 217 S.E.2d 31 (1975) where the Court had found no error in denying a defense request to instruct concerning the use of unreasonable force when the defendant at trial had denied he had resisted arrest. The Knoten court distinguished Weaver because Weaver had not given a pretrial statement rto support the lesser offense involved concerning the use of force.

However, the persuasiveness of *Weaver* arises from the fact that the defendant testified positively that he did not resist arrest which led to no duty to instruct the jury that if they found that patrolman used unreasonable force to making the arrest, then the defendant had a right to lawfully resist. The point of *Weaver* is the defense theory presented at trial in contrast to the state theory, not whether a statement repudiated by both sides was introduced. Simply put, the lesser instructions were inconsistent with any theory that was presented by either the state or the defense.

Other jurisdictions have applied similar logic regarding statements repudiated by both sides as lacking a basis for an instruction on lesser offenses. *See Bignall v. State,* 887 S.W.2d 21, 23 (Tex.Crim.App.1994*); Roach v. State,* No. 11-07-00216-CR, 2009 WL 399206, at *1 (Tex. App. Feb. 19, 2009) (In his confession in Roach, appellant stated

that he knew his accomplice had a gun when he robbed Luby's. Appellant subsequently recanted, claiming that his confession was not true, that he had lied, and that he had nothing to do with the Luby's robbery.) A defendant's own testimony that he committed no offense is not adequate to raise the issue of a lesser included offense. *Lofton v. State*, 45 S.W.3d 649, 652 (Tex.Crim.App.2001); *State v. Harris*, 293 Kan. 798, 269 P.3d 820 (2012) (defendant was not entitled to jury instruction on attempted voluntary manslaughter as a lesser included offense of attempted first-degree murder; defendant diminished credibility of his recorded statements to police, that he shot victim because he thought he was reaching for a gun, by testifying at trial that they were a lie, and surviving victim's testimony further disputed accuracy of what defendant said in recorded interview). See Raymond v. State, 170 Ga.App. 676, 677(2), 318 S.E.2d 71 (1984). (when defendant asserts a legal presence at the scene without an unlawful intent, issue of criminal trespass is not raised); *Anderson v. State*, 264 Ga. App. 362, 365, 590 S.E.2d 729, 733 (2003); *Willis v. State*, 316 Ga. App. 258, 267, 728 S.E.2d 857, 866-67 (2012) (Willis also asserts that the trial court erred in failing to give his requested charge on the lesser offense of reckless conduct. Willis notes that he told the Jones County officers that he shot at a house and a tree instead of shooting at Jackson. He argues that this evidence does not support a finding of aggravated assault with regard to Jackson. But at trial Willis specifically repudiated his statement to the Jones County officers. He said that he lied and just told Pitts what he wanted to hear. Willis's defense at trial, as he testified, was that his brother shot Jackson and that all the witnesses who identified him as the shooter were lying. "A request to charge must be apt, a correct statement of law, and precisely adjusted to some theory in the case." (Citation and footnote omitted.) Here, the State asserted that



Willis shot at Jackson intentionally and Willis asserted that he did not shoot at all. Thus, a reckless conduct charge was not supported by any theory of the case. Accordingly, the trial court was not required to charge the jury on reckless conduct as to charges from September 27, 2008.). *Glover v. State,* 292 Ga.App. 22, 29–30(5)(a), 663 S.E.2d 772 (2008). See also, *Lawson v. State*, 199 Ga. App. 789, 790, 406 S.E.2d 130, 131 (1991) ("The appellant contends that the evidence, in the form of his prior statements, required a jury instruction on involuntary manslaughter in the commission of the misdemeanor offense of pointing a gun at another. See OCGA §§ 16-5-3(a); 16-11-102. However, the appellant's testimony at trial was clearly inconsistent with such a charge, since he repudiated these prior statements and denied any involvement in the shooting. Furthermore, his pretrial statement that the rifle "just went off" as he was pointing it at the victim must be viewed in the context of his further statement that he had just finished telling the victim that he was "going to help him die." "[I]f the pointing of the firearm placed the victim in reasonable apprehension of immediate violent injury, the felony of aggravated assault has occurred." *Rhodes v. State,* 257 Ga. 368, 370, 359 S.E.2d 670 (1987). Under the circumstances, the trial court properly refused to charge on involuntary manslaughter as a lesser included offense. See generally *Wigfall v. State,* 257 Ga. 585(3), 361 S.E.2d 376 (1987). Compare *Kerbo v. State,* 230 Ga. 241, 196 S.E.2d 424 (1973); *Motes v. State,* 192 Ga.App. 302(2), 384 S.E.2d 463 (1989)").

Respondent respectfully request that the precedent of State v. Knoten be reconsidered in for the administration of justice and true verdicts.

Respectfully submitted,

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Attorney General

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DONALD J. ZELENKA
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BY:

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January 19, 2016
Columbia, South Carolina

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Appeal from Newberry County

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THE STATE,

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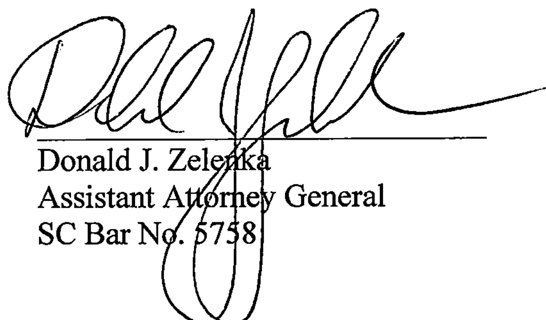
PROOF OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within PETITION TO ARGUE AGAINST PRECEDENT on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to her attorney of record:

Laura Ruth Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This nineteenth day of January 2016.



Donald J. Zelenka
Assistant Attorney General
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ALAN WILSON
ATTORNEY GENERAL

January 19, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

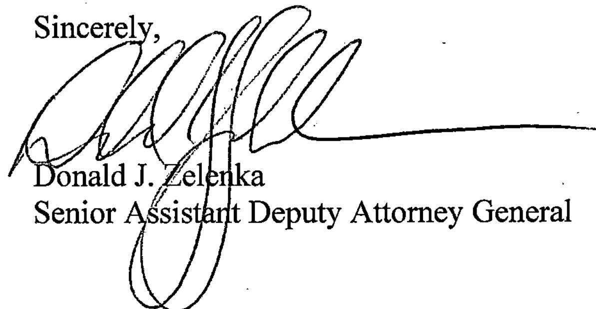
Re: The State v. Mandy Lenore Smith
Appeal from Newberry County
Appellate Case No. 2013-002209
State's Petition to Argue Against Precedent

Dear Ms. Kitchings:

Enclosed please find the original plus three (3) copies of the Petition to Argue Against Precedent, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,



Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ

Enclosures

cc: Laura Ruth Baer, Esq., Appellate Defender
The Honorable David M. Stumbo, Eighth Circuit Solicitor
Trisha Allen, Victim Services

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