STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Stephen H. John, Circuit Court Judge
Appellate Case No. 2014-001679

THE STATE,

Respondent,

vs.

VIVIAN LYNN SCHRADER-FALLS,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
P.O. Drawer 1276
Conway, South Carolina 29528-1276
(843) 915-8608

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Did the circuit court err in requiring the Defendant to testify before calling her expert witness?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge commit a prejudicial abuse of discretion by requiring Appellant to testify before presenting the testimony of a social worker that she had battered spouse syndrome and the relation of that syndrome to this case because there was no evidence that Appellant acted in self-defense, since the only evidence of record is she was not without fault in bringing on the difficulty; and the evidence that she was a battered spouse does not excuse, justify, or otherwise explain her action in hunting down the supposed batterer, her victim, with a loaded weapon and engaging in a confrontation with him.

II. Whether the trial judge's decision requiring Appellant to testify before presenting the expert opinion of a social worker that she had battered woman syndrome and how that syndrome relates to Appellant's case was an abuse of discretion where there was absolutely no evidence that the shooting was in self-defense, in the absence of Appellant's testimony. And whether Appellant can show any conceivable prejudice from the ruling since she and her expert were both permitted to testify to all matters relevant to her "defense", the trial judge's ruling eliminated the potential necessity for a mistrial that may have occurred if either Appellant had exercised her right not to testify or if she did not testify that the victim allegedly battered her; and she has not clearly articulated how this ruling was prejudicial to her, other than to argue that this was not the

order in which trial counsel wanted to present the witnesses and that the trial judge could have ruled differently?

STATEMENT OF THE CASE

Appellant, Vivian Lynn Schrader-Falls, # 360053 (Appellant) is confined in the Graham Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of her Horry County murder conviction and sentence for murdering Tony Hughes. The Horry County Grand Jury indicted her for murder on July 26, 2012. (2012-GS-26-02679). **R. pp. 615-616**. Jonathan Eric Fox and Kia T. Wilson, of the Fifteenth Circuit Public Defender's Office, represented her in the trial court. Assistant Solicitor Scott E. Graustein, of the Fifteenth Circuit Solicitor's Office prosecuted her.

On May 5-8, 2014, Appellant received a jury trial before the Honorable Stephen H. John. She claimed that she shot Hughes in self-defense and presented evidence that she suffered from battered spouse syndrome. Although Judge John charged her jury on criminal intent, murder, voluntary manslaughter and self-defense (**Tr. pp. 522-30, R. pp. 525-533**), the jury convicted her of murder. **Tr. pp. 534-37. R. pp. 537-540**. Judge John sentenced her to thirty years imprisonment. **Tr. pp. 558-59. R. pp. 561-562**.

In sentencing Appellant, Judge John specifically rejected her argument that she was eligible for early parole under S.C. Code Ann. §16-25-90 (2003).[1] **Tr. pp. 544-48; 553-59. R. pp. 547-551; 556-562**. However, Appellant filed a post-trial motion to reconsider, in which she

[1] Section 16-25-90 provides that:

> [A]n inmate who was convicted of ... an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate ... presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.
>
> The South Carolina Supreme Court recently explained in *State v. Hawes*, 411 S.C. 188, 190, 767 S.E.2d 707, 708 (2015) that "[t]he legislative history of section 16–25–90 indicates that the statute was intended to confer early parole eligibility only to long-term victims of repeated abuse at the hands of a household member. See Act No. 7, 1995 S.C. Acts 58–59 (indicating that section 16–25–90 was first enacted alongside the defense of battered spouse syndrome).

asked Judge John to reconsider his decision denying her parole eligibility pursuant to §16-25-90. **R. pp. 617.**[2] On May 22, 2014, Judge John held a hearing on her motion. **5/22/14 Tr. pp. 1-50. R. pp. 564-614.** On July 14, 2014, he issued an Order granting her motion to reconsider and ruling that she was eligible for early parole after serving one-quarter of her sentence, pursuant to §16-25-90. **Order, R. pp. 1.**

STATEMENT OF FACTS

One reading Appellant's brief might develop the mistaken impression that she was the victim in this case when, in fact, nothing could be further from the truth. The victim in this case is Tony Hughes. He was senselessly murdered by Appellant.

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, is that Appellant and Tony Hughes dated in 2011. However, their relationship had ended in January 2012, Tony was no longer interested in her, and he had become interested in someone else. Early in the morning of March 31st, 2012, Appellant tried desperately to find Tony. She called each of his parents but could not locate him.

When she called Tony's cell phone and he did not answer, she repeatedly called a woman whom she had never met because that woman had the temerity to date Tony. By that point, Appellant was full of jealousy, rage and malice. She armed herself with a loaded .380 semi-automatic pistol and went to that same woman's home because Tony was there. Appellant called the unarmed and unsuspecting Tony out of this woman's previously locked home and, even

[2] Appellant timely served and filed a notice of appeal from her conviction and sentence. She thereafter moved to remand the case, so that Judge John could entertain her post-trial motion to reconsider. The Honorable Jasper M. Cureton denied her motion to remand, in an Order filed on June 23, 2014, but dismissed the appeal without prejudice to "file a new appeal within ten days of receiving actual notice of the circuit court's ruling on the motion for reconsideration."

though he had only dated the woman once, Appellant repeatedly shot him when he came out to talk to her.

Diane Movsky testified that she lives in Myrtle Beach, South Carolina. She met Tony Hughes through an online dating service called Plenty of Fish at the end of January 2012. They began communicating with each other through this website and through Facebook. They also exchanged telephone numbers. Because they had a number of mutual interests and common values, they eventually arranged to meet face-to-face on March 30, 2012. **Tr. pp. 50-54; 67-68. R. pp. 53-57; 70-71**. It was a meeting that forever altered Diane's life[3] and resulted in Appellant murdering Tony.

Diane met Tony at her residence between 6:00 and 7:00 p.m. They had originally planned to go out for the evening, but Tony brought a movie. So, they stayed at Diane's home that night, where they drank "some beers," watched the movie and talked until about 1:00 or 2:00 a.m. on March 31st. Tony did not call anyone that night and he did not receive any calls. **Tr. pp. 54-56. R. pp. 57-59**.

Although Diane had never been to Tony's residence, she knew that he lived "a good hour or so" from her and she knew that he had been drinking. As a result, he stayed at her house that night. **Tr. p. 56. R. p. 59**. Diane was awakened early on March 31st by the sound of her cell phone ringing. She did not get up to answer it, and let it keep ringing. However, she got up "about eight something because somebody was banging on ... my front door[,] ... which is [on] the side of my house." **Tr. pp. 56-58. R. pp. 59-61**.

When Diane opened the door, she saw Appellant. Appellant was "very agitated" and asked Diane if Tony was there. Diane said "no," because she was "kind of taken [aback] like in

[3] She began seeing a therapist as the result of this murder. **Tr. p. 84. R. p. 87**

shock because she was very agitated and angry, and I had just [woken] up and was trying to figure out what was going on." (Sic). **Tr. pp. 59-60. R. pp. 62-63.**

> Then [Appellant] asked me again. She said just send Tony out, and I said he's not here. She's like I know he's here. Send him out. So I just shut and locked the door.

Tr. p. 60. R. p. 63.

Diane walked back into the bedroom and Tony asked her who was at the door. Diane told him that she did not know, but that it was a woman asking for him. After she described the woman as "really tall with dark hair,"[4] he told her "that sounds like Vivian." Diane asked who "Vivian" was. Tony explained, "[T]hat's my ex-girlfriend, and he seemed perplexed that she would be there." Also, Diane's phone began ringing again. She did not recognize the number of the person calling her, and Tony told her that the number belonged to Appellant. **Tr. pp. 60; 70. R. pp. 63; 73.**

Tony and Diane then started laughing about the situation. Tony jokingly said, "[S]he can really ruin a mood." He told Diane that he would go outside and talk to Appellant. He also told Diane not to worry about it and that he would be "right back." He then dressed, grabbed his cigarettes and went outside, using the kitchen door. **Tr. pp. 60-61; 71. R. pp. 63-64; 74.**

"I turned around and got a drink and I just walked -- my house isn't that big, and before I even made it halfway through my bedroom to where the window was to look outside, ... I heard three [gunshots]." Diane clarified that she actually saw Appellant standing over Tony and fire the third shot, as Tony was either starting to fall or "lying on the ground beside [his] car." Diane immediately telephoned 911. **Tr. pp. 61-65; 72-73; 74-75. R. pp. 64-68; 75-76; 77-78.** Tony had been unarmed and he had been laughing when he went out to speak to Appellant. **Tr. p. 64.**

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[4] The SCDC Incarcerated Inmate Search lists Appellant as 5'9" tall and weighing 236 pounds. See http://public.doc.state.sc.us/scdc-public/.

R. p. 67. Also, Diane did not hear any argument or yelling before the shooting began. **Tr. p. 73. R. p. 76**.

Diane stayed on the phone with 911 until police arrived and, even though she was afraid that Appellant would shoot her, she went back to a window and described Appellant's vehicle at the dispatcher's request. She also watched Appellant. Appellant kneeled beside Tony and held his head. She then went to her car and sat there until police arrived. **Tr. pp. 65-67. R. pp. 68-70.**

Ryan McCarty testified that he lives next door to Diane Movsky in Myrtle Beach. On the night of March 30th, 2012, Diane and Tony were outside smoking a cigarette when Mr. McCarty got home from work, and she introduced him to Tony. **Tr. pp. 198; 201-02. R. pp. 201; 204-205**. After Mr. McCarty came home from driving his wife to work on March 31st, he started to go to bed. However, he heard a gunshot and immediately ran to a window on the side of his house that is closest to Diane's residence. He heard another shot before he reached the window. **Tr. pp. 198-99; 202; 205. R. pp. 201-202; 205; 208**.

When Mr. McCarty looked out of the window, he saw Appellant pointing a gun "directly at Tony." Tony was standing but he was holding his chest and leaning back on his car. There had not been any arguing or sounds of a fight before the shooting started, but after the first two shots, Mr. McCarty heard Tony ask Appellant "why are you doing this[?]" Mr. McCarty then heard Appellant reply, "I'm not going to jail for this, and I can't believe you did this to me."[5] **Tr. pp. 199-201; 204-06. R. pp. 202-204; 207-209**. Appellant shot Tony again and Mr. McCarty ran to call 911. He heard yet a fourth shot and he called 911. **Tr. pp. 202-05. R. pp. 205-208**.

On cross-examination, Appellant impeached Mr. McCarty with a statement that he had given to police on March 31st, shortly after the murder, Defendant's Exhibit 3 for Identification. In his statement, he said that he was asleep when he was awakened by the sound of four

[5] She was not screaming but it was loud enough for Mr. McCarty to hear it in his house.

gunshots. He likewise told police that the shots were fired as a group, and not separated as he testified on direct examination. However, he was adamant that he heard four gunshots, and that he had seen Appellant fire the weapon at Tony. **Tr. pp. 210-12; 215; 217. R. pp. 213-215; 218; 220.**

Patrol Officers Steven Rhew and William Odom, of the Horry County Police Department, were the first responding officers to a reported shooting in progress on March 31st, 2012. They arrived at Diane's residence at roughly the same time.[6] When they arrived, Appellant was sitting in the front seat of her black Hyundai, with a gun on the seat beside her. She did not have any injuries, either fresh or old. They immediately detained her. **Tr. pp. 91-95; 97-98; 101-06. R. pp. 94-98; 100-101; 104-109.**

After they had detained Appellant, they saw Tony lying face-down in Diane's yard. They secured the scene, looked for possible evidence, and thereafter spoke to several neighbors. They did not find any other weapon at the scene. **Tr. pp. 93-96; 99; 104-05. R. pp. 96-99; 102; 107-108.** Officer Odom transported Appellant to police headquarters, and she did not require medical attention. **Tr. p. 106. R. p. 109.**

James L. Hughes testified that he was Tony's father. Mr. Hughes is a resident of Gresham, South Carolina, which is in Marion County. Tony lived "right behind" Mr. Hughes. Also, Tony worked at "Waste Management," in Florence, on weekdays. Mr. Hughes saw him "[e]very day," either before he went to work or on his way home. **Tr. pp. 171-73. R. pp. 174-176.**

Mr. Hughes knows Appellant. He met her, through Tony, while Tony was dating her. Tony dated her for less than a year. They were not dating in December 2010, and they had

[6] Both officers arrived fairly quickly after receiving the dispatch because they happened to be in the area. **Tr. pp. 97-98. R. pp. 100-101.**

broken up in January, 2012. **Tr. pp. 174-75. R. pp. 177-178.** Also, they had never lived together. **Tr. pp. 177-78. R. pp. 180-181.**[7]

Yet, Appellant would call Mr. Hughes looking for Tony, even after he had stopped dating her (**Tr. pp. 175-76. R. pp. 178-179**), and she would stop by Mr. Hughes' residence looking for Tony. When Mr. Hughes went by Tony's residence on March 30th, Appellant was there, sitting in her car. **Tr. p. 181. R. p. 184.** However, she had never visited Mr. Hughes with Tony, and she had never attended any family functions. Still, she would call Mr. Hughes "Dad" for some reason unknown to him. **Tr. pp. 179-81. R. pp. 182-184.**

Sarah M. Hughes testified that she was Tony's mother. **Tr. p. 187. R. p. 190.** Ms. Hughes lives in Florence, South Carolina, which is about "[f]orty-five minutes from where Tony lived in Gresham. She moved to her current home from Washington, D.C., in February 2012, after retiring from the Department of Commerce. While she did not live in South Carolina in 2011, she and Tony talked on the phone every week. Also, she "came down ... [to South Carolina] a couple of times a month" because she was looking for a house. As a result, she was aware that he had dated Appellant in 2011. **Tr. pp. 182-85. R. pp. 185-188.**

Ms. Hughes "always stayed with Tony" when she came down for a weekend. Appellant would come to Tony's house while she was there, but Ms. Hughes never saw the two wearing rings. **Tr. pp. 189-90. R. pp. 192-193.** Before Ms. Hughes moved to Florence, Tony told her that he had broken up with Appellant. The break-up was "friendly on [Tony's] part." **Tr. pp. 186-87; 190. R. pp. 189-190; 193.** Tony worked fifteen minutes away from his Ms. Hughes' house and he ate lunch there almost every day. On the rare occasions that he did not come to her house for lunch, he would call her. **Tr. p. 189. R. p. 192.**

[7] On cross-examination, Mr. Hughes testified that he was unaware of Tony often spending the night at Appellant's residence or that Toney kept personal belongings at her residence. **Tr. pp. 179-80. R. pp. 182-183.** Likewise, Tony never mentioned that he and Appellant were "married in the eyes of God." **Tr. pp. 180-81. R. pp. 183-184.**

One day after Ms. Hughes had moved to Florence, Appellant came to her residence - uninvited and alone - and told her "me and Tony [have broken] up. I'm dating now." Ms. Hughes said, "[W]ell, make yourself happy. You know, get you someone and make yourself happy." Appellant replied, "I am." Appellant also obtained Ms. Hughes' permission to call her "Ma." **Tr. pp. 186-87. R. pp. 189-190.**

Ms. Hughes explained that "[a]ny time Tony would come [to Florence], she would come looking for him. .... Usually she would drive her car ... and he would come. They would wind up there, but they wouldn't be in cars together." **Tr. pp. 186-87. R. pp. 189-190.** Appellant called Ms. Hughes early in the morning on March 31st, 2012, and wanted to know if she knew where Tony was; but Ms. Hughes did not know. **Tr. p. 188. R. pp. 191.**

Jill Domogauer, a crime scene investigator with the Horry County Police Department, processed the scene on March 31st. The scene had been secured by the time she got there Unfortunately, it started raining hard before she could get there from her Conway residence. Still, she seized the Bersa Thunder .380 (State's Exhibit 3) that Appellant had used from the driver's seat of Appellant's vehicle. The gun's magazine (State's Exhibit 4) was still in it. There were no bullets in the weapon and the slide was locked open, which occurs when all of the bullets have been fired. Officer Domogauer did not locate any other weapons at the scene, but she found an "RB 380 shell casing" (State's Exhibit 6) on the ground. **Tr. pp. 111-14; 121-27; 132-33. R. pp. 114-117; 124-130; 135-136.**[8] She "did [an] ATF trace" on State's Exhibit 3 and discovered that Appellant had purchased the Bersa .380 from a local pawn shop on May 27, 2011. **Tr. pp. 130-31; 148. R. pp. 133-134; 151.**

[8] She even used a metal detector, but her efforts to find more casings were unsuccessful. **Tr. p. 133. R. p. 136.**

Dr. Edward L. Proctor, Jr., is the forensic pathologist who performed the autopsy on Tony Hughes' body. **Tr. pp. 219-21. R. pp. 222-224.** Tony had been "shot multiple times." **Tr. p. 222. R. p. 225.**

The first bullet entered "in the right chest in this area." It then "passed in a right to left direction. It penetrated the heart, the left upper lung lobe, the left chest in this area, passed out of the chest and into the left upper arm." The projectile (State's Exhibit 6) was removed from Tony's left upper arm. Dr. Proctor opined that this wound was "[t]he most significant" one that Tony suffered and that it was fatal. **Tr. pp. 222-23; 225-26. R. pp. 225-226; 228-229.**

The second "major wound was a wound to the left neck ...." This bullet "struck him in the neck and actually came out ...." Dr. Proctor opined that the neck wound "was not a fatal wound." The bullet "hit structures in the neck and was deflected, but did not hit any major vessels, did not traverse the spinal cord or anything." **Tr. pp. 222-24. R. pp. 225-227.**

The third bullet entered in "the left shoulder area .... This bullet travelled in "a left to right direction ... and there was a projectile left in the body there." Again, this wound was not fatal. "That stayed basically in the superficial subcutaneous tissue just behind the clavicle, which is the collarbone, on either side, and there was a bullet in the deeper structures over here, in the axilla, that we did not remove." **Tr. pp. 223-25. R. pp. 226-228.**[9]

Also, Dr. Proctor found "gunshot wounds of entrance and exit in the right forearm below the elbow, so through and through here. And then there were multiple gunshot wounds to the second and third fingers and thumb of the left hand in this area." Therefore, he opined that there were "five different gunshots." **Tr. p. 223. R. p. 226.**

[9] Officer Domogauer explained that it would have caused a great deal of damage to Tony's body to remove that projectile. **Tr. p. 141. R. p. 144.**

He explained that the through and through wound to Tony's arm and the wounds to Tony's fingers were "most likely wounds reflecting a defensive type posturing." **Tr. p. 225. R. pp. 228**. He explained on cross-examination that there were five different groups of gunshot wounds and admitted that one or more of the wounds to Tony's hands could have been caused by the bullet that caused the gunshot wound to Tony's chest. **Tr. pp. 228-29. R. pp. 231-232.**

Dr. Proctor was unable to determine the distance of any of these gunshot wounds because he did not see "any residue" on the body or Tony's clothing. The absence of residue suggested that the shooter had been 18"-24" at the time Tony was shot. Dr. Proctor opined that the victim "died as a result of the extensive trauma to the visceral organs in the chest with associated hemorrhage," and that the [m]anner of death is homicide." **Tr. pp. 223-24; 226-27. R. pp. 226-227; 229-230.**

Senior Special Agent James Green works as a firearms examiner in the firearms department of SLED's forensic Services laboratory. **Tr. pp. 152-55. R. pp. 155-158**. State's Exhibits 3-6 were submitted to Agent Green for his testing and analysis. He opined that the projectile removed at autopsy (State's Exhibit 5) and the casing found at the crime scene (State's Exhibit 6) had been fired by the semi-automatic Bersa .380. **Tr. pp. 158-66; 170. R. pp. 161-169; 173.**

In reply to Appellant's claim that Tony Hughes had abused her physically, sexually and psychologically,[10] the State presented two witnesses. Allison Felicia Goss testified that Tony was her boyfriend for thirteen years and the father of her son. They began dating in 1993, and they lived together for seven or eight years of the time that they were dating. Throughout the course of their relationship, Tony (1) never physically assaulted her; (2) never controlled her, so that she

[10] The dubious nature of her defense was underscored by the testimony of Vanessa Johnson and Rosanna Pegg, Appellant's daughters, that they only saw Appellant and Tony happy together, and they never saw Tony being abusive of her. They only saw abuse by a former husband. **Tr. pp. 258-67; 270-75. R. pp. 261-270; 273-278.**

could not go where she wanted to go; (3) never prevented her from seeing her friends; (4) never prevented her from seeing her family; and (5) never intimidate her or force her to do something that she did not want to do. **Tr. pp. 439-40. R. pp. 442-443.**

Lisa Denise Seabrook had dated Tony for about five months. She also testified that, throughout the course of their relationship, Tony (1) never physically assaulted her; (2) never threatened or demeaned her; (3) never prevented her from going where she wanted to go; (4) never prevented her from seeing her friends; and (5) never forced or intimidated her to do something that she did not want to do. **Tr. pp. 442-44. R. pp. 445-447.**

Thus, the **only victim** in this case **is Tony Hughes**. Appellant maliciously gunned him down in cold blood because she was jealous and envious of Diane Movsky because Diane had what Appellant wanted most: Tony Hughes!

ARGUMENTS

I. The trial judge did not commit a prejudicial abuse of discretion by requiring Appellant to testify before presenting the testimony of a social worker that she has battered spouse syndrome and the relation of that syndrome to this case because there was no that evidence that Appellant acted in self-dense, since the only evidence of record is she was not without fault in bringing on the difficulty; and evidence that she was a battered spouse does not excuse, justify, or otherwise explain her action in hunting down the supposed batterer, her victim, with a loaded weapon and engaging in a confrontation with him.

Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse his discretion by requiring Appellant to testify before presenting the testimony of a social worker that she has battered spouse syndrome and the relation of that syndrome to this case because there was no that evidence that Appellant acted in self-dense. To the contrary, the only evidence of record is she was not without fault in bringing on the difficulty. Also, evidence that she was a battered spouse does not excuse, justify or otherwise

explain her action in hunting down the supposed batterer, her victim, with a loaded weapon and engaging in a confrontation with him.

A. How issue developed at trial.

When Appellant's trial counsel first mentioned the order of his proposed defense witnesses during an *in camera* break in the State's case, he indicated that he planned to call Ms. Bourus, his expert, and then Appellant. The trial judge's only comment was "All right." **Tr. p. 234, lines 3-16. R. p. 237, lines 3-16.** The issue was addressed again after the trial judge denied Appellant's directed verdict motion and while the judge and the parties were discussing trial counsel's intention to elicit testimony from Appellant concerning past abusive relationships. The State objected to such testimony as inadmissible evidence of third party guilt. **Tr. p. 244, line 7 – p. 246, line 13. R. p. 247, line 7 – p. 249, line 13.**

The trial judge then addressed Appellant's counsel about what testimony Appellant's daughters, Ms. Johnson and Ms. Pegg, could offer on prior episodes of battering of Appellant by other men. Counsel agreed with the trial judge's statement that Appellant's expert would have to testify that "based on her expert opinion that a series of abusive relationships contributed to her suffering from battered spouse syndrome at the time that the shooting took place." **Tr. p. 246, lines 14-25. R. p. 246, lines 14-25.**

Likening this issue to "the chicken [or] the egg argument," the trial judge noted that:

> ultimately the situation is if there is not proper admissible evidence of domestic abuse, physical violence perpetrated by the victim on the Defendant, if there's no testimony of that or proper admissible evidence on that particular issue, then the testimony by Ms. Johnson on that issue or Ms. Pegg, or Ms. Bourus would not be proper, so it has to have that basic foundation, and if we don't receive that testimony, then I'm telling you I'm going to rule all of it inadmissible... and the jury cannot consider it, all right, and I may have some other issues that the State may bring up at that point in time, you know, depending upon that, and I'm not having you saying somebody has got to testify. I'm just telling you if it doesn't come in, then all of this is inadmissible.

Tr. p. 228, line 23 – p. 249, line 14. R. p. 231, line 23 – p. 252, line 14. See also **Tr. p. 247, line 1 – p. 249, line 14. R. p. 250, line 1 – p. 252, line 14.**

Obviously concerned that he may have to rule that the testimony of Appellant's daughters was inadmissible, the trial judge ruled that the daughters could testify that they had personally observed "physical violence being perpetrated by Mr. Jones upon the Defendant, that she was battered, ... she did not contribute to it, it was violence perpetrated with no excuse by Mr. Jones, and if she observed it." Again, this was assuming that the expert would make their testimony relevant and that there would be testimony from Appellant concerning abuse of her by the victim. However, the trial judge ruled that Appellant's daughters could not testify to details of specific acts of violence. He also reiterated that there must be evidence that the victim had abused Appellant or none of the testimony was relevant. **Tr. p. 249, line 15 – p. 253, line 9. R. p. 252, line 15- p 256, line 9.**

When the State expressed concern that the expert's testimony may do nothing more than establish a defense "based on what someone else did [to the defendant]," **Tr. p. 253, lines 14-18. R. p. 256, lines 14-18**, the trial judge again stated that "there has to be a sufficient admissible tie-in between the victim and the Defendant and the battered spouse syndrome. If there is not sufficient evidence of that type of a relationship, then all of it is inadmissible." He explained that the other episodes might be relevant and the expert could testify as to their relationship to the homicide. However, "[t]here has to be a factual basis of a battered spouse syndrome between the victim and the Defendant" for evidence of battered spouse syndrome and evidence of her abuse by others to be admissible. **Tr. p. 253, line 20 – p. 254, line 21. R. p. 256, line 20- p. 257, line 21.**

After the trial judge had conducted an on-the-record examination of Appellant and she had indicated that she wished to testify, trial counsel asked to be heard on a matter that had been discussed in chambers. **Tr. p. 281, lines 15-20. R. p. 284, lines 15-20.** The trial judge stated that:

> ...[J]ust to put the matter in context before you raise your matter with the Court, understanding that the discussion we had yesterday as to the witnesses that were left from the Defense and what they might be anticipated to testify, as to what they could testify to, and the relationship between prior domestic abuse and this particular case, and the battered spouse syndrome, we had the discussion.
>
> I have thought about that and ... in the Court's mind for this matter to be properly presented and for the Court to be in the best position to evaluate the testimony of the expert as to its admissibility in this matter, I am going to require the Defense to have the Defendant, who has indicated that she wants to testify, and that was so indicated to me by her attorneys previously, that she would testify in this matter, and she has now confirmed that, that she testify prior to the presentation of the expert to be submitted by the Defense in this matter, and so -- and I understand that that is not how you planned to call your witnesses, Mr. Fox. I'll be glad for you to put that matter on the record.

Tr. p. 282, lines 1-21. R. p. 285, lines 1-21.

Trial counsel represented to the trial judge that after consulting with the defense expert, Ms. Vickie Bourus, and researching the matter, he had intended to first present Ms. Bourus' opinion that Appellant suffered from battered spouse syndrome, as well as the information that Ms. Bourus relied upon in reaching that conclusion. He then intended to call Appellant. Counsel pointed out that this Court's decision in *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003), held that "this type of testimony is relevant, highly probative, and admissible." He also argued that Rule 703, SCRE, provides that the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived [by] or ... [made known] to the expert at or before the hearing." Therefore, counsel asserted that Rule 703 did not require that there be testimony about the information upon which the expert bases his or her opinion before

the expert could testify and give an opinion. Thus, counsel objected to the trial judge's ruling. **Tr. p. 282, line 22 – p. 284, line 9. R. p. 285, line 22- p. 284, line 9.**

The trial judge, however, pointed out that he had to find that the expert's opinion "has a proper place ... [under] ... the facts of this particular case." The trial judge did not take issue with counsel's suggestion that there were situations in which an expert could offer an opinion without the necessity of the defendant testifying, but he reasonably believed that this case did not present one of those situations. "[W]hether or not ... this expert can testify in this particular case under the facts of this case, I think that's a situation that can only be established through the testimony of the Defendant, and if that testimony would fail in any way, I would be placed in the position of having to seriously consider a mistrial, and meaning that this matter would have to be retried at a later date, and that is not a good thing for the State or the Defense, or for any of the victim's family or the relatives of the Defendant in this matter." He emphasized that he was ruling that Appellant had to testify before her expert because of his belief that it was important for the case to be resolved by the jury in the current trial. **Tr. p. 284, line 10 – p. 285, line 12. R. p. 287, line 10- p. 288, line 12.**

B. Appellant cannot show an abuse of discretion because she was not entitled to a self-defense instruction because she was at fault in bringing on the difficulty.

Decades before the adoption of the South Carolina Rules of Evidence, the South Carolina Supreme Court had held that " '[t]he general rules for the introduction of testimony must necessarily be so often applied or relaxed according to circumstances apparent only to the Court engaged in conducting the trial, that a strict uniformity at all times is not to be expected, and indeed, in some instances would prove injurious to the interests of justice. The Courts are agreed, accordingly, that the order of proof must be left to the sound discretion of the trial Court, and

such Court will not be reversed unless it clearly appears that the Court has abused its discretion.' " *State v. Van Williams*, 212 S.C. 110, 113, 46 S.E.2d 665, 667 (1948) (quoting *Ford v. A.A.A. Highway Express, Inc., et al.*, 204 S.C. 433, 29 S.E.2d 760, 763 (1944)). *See also State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981) ("The order of proof during a trial rests in the discretion of the trial judge and no abuse of that discretion is shown here"), overruled on other grds., *State v. Gilchrist*, 342 S.C. 369, 372 n. 1, 536 S.E.2d 868, 870 n. 1 (2000); *Turner v. Pilot Life Ins. Co.*, 238 S.C. 387, 397, 120 S.E.2d 223, 228 (1961).

Currently, Rule 611(a), SCRE, states that "[t]he [trial] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." SCRE 611(a) is identical to the federal rule and is consistent with previous South Carolina law that the conduct of a trial is generally left to the discretion of the trial judge. *See* Note to Rule 611(a), SCRE.

Thus, the trial judge's ruling cannot be reversed unless Appellant can show that he abused his discretion. *Van Williams*, 212 S.C. at 113, 46 S.E.2d at 667. " 'An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.' *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)." *Hawes*, 411 S.C. at 191, 767 S.E.2d at 708 (citations omitted); *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). *See also State v. Broadnax*, ___ S.E.2d ___, 2015 WL 4099053, *2 (S.C., July 8, 2015); *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000); *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005).

Initially, Respondent submits that Appellant cannot show an abuse of discretion because, even though the trial judge instructed the jury on both self-defense and how the evidence of battered spouse syndrome bore on Appellant's claim of self-defense (**Tr. p. 526, line 5 – p. 530, line 21. R. p. 529, line 5- p 530, line 21.**),[11] there was no that evidence that Appellant acted in self-dense. Instead, the only evidence of record established that she was not without fault in bringing on the difficulty, since her own testimony was that (1) she tried to locate the victim by telephone, calling both of his parents and the victim without success; (2) she left the safety of her residence and she tracked the victim down to the home of a person whom she had never met but whom she suspected he was dating, while armed with a loaded semi-automatic pistol; (3) after unsuccessfully attempting to reach him on his cell phone, she unsuccessfully tried to reach him by calling the other woman's phone; (4) she approached the house and knocked on the door, fully aware that she was armed with her loaded weapon; (5) she thereafter demanded that he come outside, even after she was told that he was not in the residence; and (6) when he finally came outside, unarmed, she confronted him while armed with her weapon.

For a defendant to be entitled to a self-defense instruction, there must be evidence demonstrating that:

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have

[11] At the charge conference, the State objected to an instruction on self-defense (**Tr. p. 453, lines 12-21. R. p. 456, lines 12-21**), and the State argued in closing that Appellant had not acted in self-defense or because the victim had done anything to cause the killing. **Tr. p. 5505, line 4 – p. 517, line 3**. R. **p. 508, line 4- p. 520, line 3**. Because the State objected to a self-defense instruction at the charge conference, it was unnecessary to renew the objection after the jury instructions. *See State v. Johnson*, 333 S.C. 62, 65 n. 1, 508 S.E.2d 29, 30 n. 1 (1998). Moreover, this Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. *See also Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987). The reasoning adopted by the trial court is not binding upon this court if the record discloses a correct result. *Id.*

> entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007). *See also State v. Bryant*, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999); *State v. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). Unquestionably, the prosecution's evidence, discussed in the "Statement of Facts," *supra*, did not support a jury instruction on self-defense. Appellant's own testimony likewise did not demonstrate that she killed in self-defense.

Appellant testified that she and Tony Hughes were still dating on March 31st, 2012. **Tr. p. 339, lines 14-25. R. p. 342, lines 14-25**. According to Appellant, he told her in January that he wanted to meet other women. Allegedly not troubled by his desire, she set up a profile on a dating website, Plenty of Fish, in order to help him meet other women. Even though Tony told Appellant that he was not pursuing any other women, he was flirtatious with the women he met on the computer and she once saw a message that he had received from two other women. So, Appellant suspected that he wanted to date other women. He began communicating with Diane Movsky through the online dating website at the beginning of March 2012. **Tr. p. 343, line 7 – p. 344, line 23; p. 346, line 6 – p. 347, line 25; p. 351, lines 8-15; p. 352, lines 15-18; 386, line 18 – p. 387, line 24. R.p. 346, line 7- p. 347, line 23; p. 349, line 6- p. 350, line 25; p. 354, lines 8-15; p. 355, lines 15-18; p. 389, line 18- p. 390, line 24**.

Appellant was aware that Tony and Diane were corresponding, and she gained access to Diane's address through the website. Also, Appellant claimed that Tony "made a point" of telling Appellant where Diane lived one day as they drove in the area of Diane's residence.

Further, he exchanged phone numbers with Diane, and Appellant then learned Diane's phone number. When she asked Tony what he would do if she had done something similar, he replied, "you can't be like me," and he threatened her. **Tr. p. 348, line 1 – p. 350, line 6; p. 387, line 25 – p. 388, line 23. R. p. 351, line 1- p. 353, line 6; p. 390, line 25- p. 391, line 23.**

Appellant went to Tony's Marion County residence on March 30th and saw his father there. At some point in their conversation, Tony told Appellant that he had unprotected sex with three other women. This upset Appellant because she was afraid of acquiring a sexually transmitted disease. **Tr. p. 352, line 19 – p. 353, line 21; p. 355, line 19 – p. 357, line 20. R. p. 355, line 19- p. 356, line 21; p. 358, line 19 – p. 360, line 20.**

Appellant later drove to North Carolina and picked up her, who had been in the hospital. She finally left North Carolina between 12:00 and 1:00 a.m. She reached her Myrtle Beach residence around dawn and dropped her sons off there. **Tr. p. 353, line 22 – p. 355, line 16, p. 358, lines 5-15. R. p. 356, line 22- p. 355, line 16, lines 5-15.**

When she left her residence, she had initially planned to go to a pawn shop and pawn a ring. After getting money for her ring, she was going to go to the grocery store. However, instead of going to buy groceries, she went to Diane Movsky's residence. Appellant admitted that she had called both of Tony's parents, trying to find him, as she drove. **Tr. p. 358, line 19 – p. 359, line 6; p. 390, line 11 – p. 391, line 6; p. 392, lines 11-22. R.p. 361, line 19 – p. 362, line 6; p. 393, line 11 – p. 394, line 6; p. 395, lines 11-22.**

She could not explain why she went to Diane's residence, uninvited but armed with a loaded Bersa .380 semi-automatic pistol,[12] even though the women had never met. Indeed, she testified that she did not think that she would find Tony there. **Tr. p. 358, line 24 – p. 360, line**

[12] Appellant had purchased the weapon the previous year "for protection." She always kept it in the glove compartment or her car. **Tr. p. 362, line 7 – p. 364, line 1. R.p. 365, line 7- p. 367, line 1.**

3. **R.p. 361, line 24 – p. 363, line 3**. Upon arriving at Diane's residence, she saw Tony's new car in the driveway. After parking her Hyundai "catty-corner" behind Tony's and Diane's cars, she took two pictures of his car. Allegedly, she had planned to drive away but, once again, she chose another course of action. **Tr. p. 360, line 4 – p.361, line 11. R.p. 363, line 4 – p. 364, line 11**.

First, she tried to call Tony. When he did not answer, she called Diane's number more than once. On one call, someone "picked up the phone and hung up," without speaking to her. **Tr. p. 361, lines 13-25. R.p. 364, lines 13-25**. After her phone calls went unanswered, she got out of her car because she "wanted to tell Tony not to come back to the house since he had did that, and went on and seen someone after he said that was not his intention ...." Supposedly, this is what she had wanted to tell him in the phone calls. **Tr. p. 362, lines 3-4; p. 366, line 19 – p. 367, line 5. R.p. 365, lines 3-4; p. 369, line 19 – p. 367, line 5**.

However, she thought about the financial hardship that she was experiencing because he had rejected a car that she had bought for him and on which she was stuck making costly payments. She also thought about his broken promise to help her with her phone bill. So, she got out of the car with the Bersa .380 in her hand, knowing it was loaded, because she considered shooting a tire on his car. She claimed that she decided against *this* plan because she was afraid that he would come out of the residence before she could leave. **Tr. p. 364, lines 13-16; p. 367, line 6 – p. 368, line 14. R.p. 367, lines 13-16; p. 370, line 6- p. 371, line 14**.

Rather than leave Diane's residence, she tucked the weapon in the waistband of her pants, on her hip, walked up to Diane's house and knocked on the door. Diane came to the door and Appellant asked to speak to Tony. She told Diane that "it was very important." When Diane said that she would have Tony call Appellant, Appellant said, "it's very important I need to speak to

him, and ... I don't know if she hesitated or what. She shut the door." **Tr. p.368, line 23 – p. 370, line 22. R.p. 371, line 23- p. 373, line 22.**

Appellant waited on the porch for several minutes and Tony came out of the house, as she started to leave. He asked her what she was doing there and Appellant said something about "Xavier." When Tony said that Diane had called the police, Appellant asked, "[W]hy would she do that? I haven't [done] anything. And ... he just kind of shrugged his shoulders, he had lit his cigarette, and he walked around me to the car." **Tr. p. 371, line 22 – p. 374, line 6. R.p. 374, line 22 – p. 377, line 6.**

She told Tony that she had tried calling him first, but he did not answer. She also told him,

> I wanted to tell you I got the boys and everything is fine. I'm good with this. Did you tell her I'm good with this? ... I'm not mad. I won't do anything. .... Why would you let her call the law because I hadn't [done] anything. I just wanted to tell you that, but the only thing is, you can't come back to my bed."

Tr. p. 374, line 8 – p. 375, line 2. R.p. 377, line 8- p. 378, line 2.

In response, the 6'2"- 6'3" and 200 pound Tony "raised his voice" and asked her, "[W]ho the F do you think you are and [he] told me what I could do." Next, he gave her a look that he would give when he was going to "come at" her, he threw down his cigarette and he lunged at her. Appellant said that "I just closed my eyes and all I remember was the gun firing." She did not open her eyes again until she heard the gun click. **Tr. p. 375, line 4-19; 377, line 16 – p. 378, line 7. R.p. 378, lines 4-19; p. 380, line 16 – p. 381, line 7.**

By the time that she opened her eyes, Tony was in arm's reach. While Appellant testified that she did not know that she had shot Tony, he looked at her, turned and headed to his car. Then, he fell, face-down, on the ground. He made an attempt to get up but Appellant said, "there's no freakin' way, and I just kept the gun pointed at him because I was headed to ... my

car ... because I thought he was getting up [and] coming after me." **Tr. p. 375, line 19 – p. 376, line 12. R.p. 378, line 19 – p. 379, line 12.**

Once Appellant was in her car, she realized that Tony had not moved. That is when she got out of her vehicle and went over to where he was lying on the ground. **Tr. p. 376, lines 11-16. R.p. 379, lines 11-16.** She later went back to her car and sat in it. **Tr. p. 377, lines 4-7. R.p. 380, lines 4-7.**

Thus, Appellant's own testimony did not support a jury instruction on self-defense because even her account of the events showed that she was not without fault in bringing on the difficulty. Rather than establishing that she was without in bringing on the difficulty, Appellant's own testimony clearly demonstrates that the homicide would not have occurred but for her actions. Specifically, she tried to locate the victim by telephone, calling both of his parents and the victim without success. More importantly, she left the safety of her residence and she tracked the victim down to the home of a person whom she had never met but whom she suspected he was dating, while armed with a loaded semi-automatic pistol; after unsuccessfully attempting to reach him on his cell phone, she unsuccessfully tried to reach him by calling Diane's phone; she approached the house and knocked on the door, fully aware that she was armed with her loaded weapon; she thereafter demanded that he come outside, even after she was told that he was not in the residence; and when he finally came outside, unarmed, she confronted him while armed with her weapon.

Thus, she was not entitled to an instruction on self-defense. *See In re Tracy B.*, 391 S.C. 51, 71, 704 S.E.2d 71, 81 (Ct.App. 2010) ("... the State presented evidence to disprove the first element of self-defense beyond a reasonable doubt. Specifically, we do not believe Appellant was without fault in bringing on the difficulty. .... The record reflects that the initial difficulty

had passed by the time Appellant chose to fire the fatal shot. According to Ebony's estimate, the Town Car had passed their house and was two houses beyond when Appellant ran out to the front gate and fired his gun. Appellant admitted in his statement to Detective Gomes that he shot at the car '[a]fter the car passed by me.' "); *Slater*, 373 S.C. at 70-71, 644 S.E.2d at 52 (evidence did not support instruction on self-defense, where murder defendant approached an altercation that was already underway with a loaded weapon by his side, an activity that could be reasonably calculated to bring about the difficulty that arose; the defendant acted in violation of the law by carrying a weapon; and defendant's unlawful possession of the weapon was the proximate cause of the homicide, in that he carried cocked weapon, in open view, into an already violent attack in which he had no prior involvement) (citation omitted); *State v. Santiago*, 370 S.C. 153, 634 S.E.2d 23 (Ct.App.2006) (finding that defendant was not without fault in bringing on difficulty where he brought a loaded gun to the victim's home); *State v. Strickland*, 147 S.C. 514, 143 S.E. 404 (1928) (one cannot seek another for purpose of raising a difficulty and abetting a wrong, and plead self-defense); *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322 ("[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self defense"); *State v. Trammell*, 40 S.C. 331, 18 S.E. 940 (1894) (same). *Cf. State v. Franklin*, 310 S.C. 122, 125-26, 425 S.E.2d 758, 761 (Ct.App. 1992) ("this case does not involve self-defense. There is no evidence that Franklin's stepmother posed a threat of serious bodily harm or death to Franklin. She was in the kitchen down the hallway right before he shot and beat her to death"), overruled on other grounds, *State v. Brightman*, 336 S.C. 348, 520 S.E.2d 614 (1999) (holding that *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) instruction is no longer required).[13]

[13] Moreover, one who is not on her own property has a duty to retreat unless by doing so she would increase her danger of being killed or suffering serious bodily injury." *See State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) ("an individual ha[s] no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury"); *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct.App. 1985) ("there is a duty to

Further, neither Appellant's testimony that Tony Hughes physically, sexually and psychologically abused her, nor Ms. Bourus' expert opinion that Appellant suffered from Battered Spouse Syndrome permitted her to end-run the requirement that she be without fault in bringing on the difficulty in order to receive a self-defense charge under the facts of this case. The South Carolina Supreme Court first recognized Battered Spouse Syndrome in *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986). In *Hill*, the Court held that an accused could present expert testimony about battered spouse syndrome to establish a claim of self-defense in a homicide case. *Id.* at 399-400, 339 S.E.2d at 122.

The Court explained that "[t]he issue of whether to allow expert testimony on this syndrome has been addressed by an increasing number of courts in recent years. Many of these courts have held, in accordance with the emerging trend, that the testimony is relevant to the issue of self-defense and highly probative of the defendant's state of mind at the time of the incident." *Id.* at 400, 339 S.E.2d at 122. The Court reversed the defendant's conviction because it found that "[i]f the jury accepted the [defendant's] version of what happened, that would make the proffered expert testimony not only relevant, but critical." *Id.* at 399-400, 339 S.E.2d at 122.

Subsequently, the General Assembly passed S.C. Code Ann. § 17-23-170 (2003), which permits the introduction of expert testimony of the battered spouse syndrome where the accused raises self-defense as a defense. Section 17-23-170(A) provides as follows:

> Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions.

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retreat unless one is on his own premises"). *See also State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984); *State v. Wiggins*, 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998). Appellant was armed but the victim was not. Thus, she could have safely retreated to her car and left the premises. Her failure to retreat under these circumstances likewise negated any claim of self-defense. *Id.*

In *Robinson v. State*, 308 S.C. 74, 78, 417 S.E.2d 88, 90-91 (1992), the Court found that the petitioner's trial counsel was not ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), for failing to present the battered woman's syndrome in the context of a claim of self-defense in a trial held six years before the Court's decision in *Hill* because the Court could not "say that trial counsel was ineffective for failing to present evidence of a complex psychological phenomenon which had not yet been recognized by this Court, and which only recently had been identified by the scientific community." In doing so, the Court began its discussion by explaining that:

> A battered woman is a woman who repeatedly is subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. *Commonwealth v. Stonehouse*, 521 Pa. 41, 555 A.2d 772 (1989) (citing L. Walker, *The Battered Woman* xv (1979)). The battered woman's syndrome is identified by a series of common characteristics that appear in women who are abused for an extended period of time by the dominant male figure in their lives. *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984). These characteristics include fear, hyper-suggestibility, isolation, guilt, and emotional dependency, which culminate in a woman's belief that she should not and cannot escape her batterer. *Stonehouse*, 521 Pa. at 62 n. 6, 555 A.2d at 783 n. 6 (citing Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code*, 26 Vill.L.Rev. 105 (1980)). A battered woman believes that her batterer is capable of killing her. *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C.1979).
>
> The battered woman's syndrome results from the cyclical nature of the relationship between the battered woman and the man who abuses her. In the first phrase of the cycle, tension increases between the woman and her partner, and minor abuse occurs. In the second phase, the violence escalates and the battering takes place. In the third phase, which occurs after the battering, there may be a temporary lull in the physical abuse inflicted on the woman, at which time the woman forgives the batterer. *State v. Allery*, 101 Wash.2d 591, 682 P.2d 312 (1984). During the third phase, the batterer may feel contrite and loving, and may promise the woman that the violence will never happen again. As the relationship progresses, however, the tension building before battering becomes more common, and the batterer's feelings of loving contrition decline. L. Walker, *The Battered Woman Syndrome* 97 (1984).

> A battered woman suffers from "learned helplessness" as the "repeated batterings, like electrical shocks, diminish the woman's motivation to respond." *Id.* at 7. This stems from the battered woman's belief that her batterer is more powerful than he actually is, and her fear of retaliation if she summons help. *People v. Day*, 2 Cal.App. 4th 405, 2 Cal.Rptr.2d 916 (1992). As a result, she ceases trying to escape even when the opportunity to do so is present. *State v. Williams*, 787 S.W.2d 308 (Mo.Ct.App.1990) (citing L. Walker, The Battered Woman 47 (1979)).

Robinson, 308 S.C. at 76-77, 417 S.E.2d at 90.

The Court thereafter "addressed the relationship between the battered woman's syndrome and the law of self-defense:"

> We have not previously addressed the relationship between the battered woman's syndrome and the law of self-defense as it is defined in South Carolina, and will do so now briefly in order to provide some guidance to members of the bench and bar. We find that the unique perceptions of a defendant suffering from battered woman's syndrome are generally compatible with the law of this State regarding self-defense.
>
> Self-defense is comprised of four elements:
>
> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent [person] of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a [person] of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.
>
> *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984). Self-defense is a complete defense; if established, a jury must find that the defendant is not guilty. *Id.*
>
> The first element of self-defense requires evidence that a defendant not be at fault in bringing about the difficulty. Often a battered woman will kill an abuser during a confrontation when the man clearly is the aggressor, so that this element is satisfied. However, **it may be possible to characterize a battered woman as the victim of a continuing assault at the hands of her batterer. When this is the case, the first element of self-defense may be satisfied even though the**

battered woman acts at a time when the batterer is not physically abusing her.

The second element of self-defense requires a defendant to actually have been in imminent danger, or to have believed that, at the time she acted, she was in imminent danger of death or serious bodily harm. At times, a battered woman actually is in imminent danger of violence when she acts. Depending upon the facts of each case, the second element of self-defense also may be satisfied when a battered woman believes she is in imminent danger of death or serious bodily harm even though her batterer is not physically abusing her when she acts. This is because battered women can experience a heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse. Often the terror does not wane, even when the batterer is absent or asleep. *State v. Norman*, 324 N.C. 253, 378 S.E.2d 8 (1989) (Martin, J., dissenting) (citing Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 Conn.L.Rev. 121 (1982)).

The third element of self-defense requires a defendant to show that a reasonable, prudent person in the same or similar circumstances would have acted as the defendant did in order to save herself. Where torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness. *See Norman*, 324 N.C. at 270, 378 S.E.2d at 18. (Martin, Jr., dissenting).

Under the fourth element of self-defense, a defendant must show that she had no other means of avoiding the danger than to act as she did. A battered woman who is held hostage by her batterer may have no other means of avoiding a battering than to kill her batterer in self-defense. Moreover, a battered woman often may be able to claim the inapplicability of this element of self-defense because she acts while on her own premises, and has no duty to retreat.

Our interpretation of the relationship between the battered woman's syndrome and self-defense is cursory, at best, and should not be construed as this Court's last word on the subject. Our law will continue to evolve as the scientific community's understanding of the battered woman's syndrome develops and society's comprehension of the condition becomes more sophisticated.

Robinson, 308 S.C. at 78-80, 417 S.E.2d at 91-92 (emphasis added).

Respondent submits that expert testimony concerning Battered Spouse Syndrome is only admissible as a shield from criminal liability in homicide cases and that it was never meant to be affirmatively used as a sword, as Appellant did in her trial. Respondent does not quibble with the Court's pronouncement in *Robinson* that "it may be possible to characterize a battered woman as

the victim of a continuing assault at the hands of her batterer." *Id.* at 79, 417 S.E.2d at 91. Respondent likewise does not take issue with the Court's statement that "[w]hen this is the case, the first element of self-defense may be satisfied even though the battered woman acts at a time when the batterer is not physically abusing her." *Id.* Thus, Respondent concedes that, under certain circumstances, an accused who has battered spouse syndrome may not have to show that the victim was battering her in order to act in self-defense. *See e.g.*, *Hill*, 287 S.C. at 399-400, 339 S.E.2d at 122.

However, the present case is a far cry from cases where the accused killed a batterer who was asleep or simply not being abusive when the homicide occurred, such as in *Hawes*, 411 S.C. at 191, 767 S.E.2d at 708, or *State v. Wilkins*, 305 S.C. 272, 273-75, 407 S.E.2d 670, 671-72 (Ct.App. 1991) (holding that trial judge erred by excluding expert testimony that defendant suffered from battered woman's syndrome, as part of defendant's claim that she killed victim in self-defense). Similarly, this case did not involve a batterer who was being physically aggressive or threatening before Appellant found and confronted him, such as in *Hill*, 287 S.C. at 398-99, 339 S.E.2d at 121-22.

Again, Appellant aggressively and needlessly hunted the victim down to the home of another woman whom she had never met. After tracking him to this residence, she got out of her vehicle, armed with a loaded gun and knocked on the door of a locked house. When the woman whom Appellant had not met answered the door, Appellant demanded that he come out of this other woman's home, she deliberately engaged in a conversation with her victim and ultimately killed him. Nothing about any of these actions reflects that they were the product of " 'learned helplessness' ... [or a] 'diminish[ed] ... motivation to respond' " on Appellant's part. *Robinson*, 308 S.C. at 77, 417 S.E.2d at 90. In fact, seeking out a batterer from whom she had already

escaped is contrary to the Court's discussion of Battered Spouse Syndrome in *Robinson*. *See id.* ("As a result [of the psychological effects of Battered Spouse Syndrome], she ceases trying to escape even when the opportunity to do so is present").

Thus, the only error in the case is one that did not prejudice Appellant – i.e., submitting the charges of self-defense and Battered Spouse Syndrome to the jury because Appellant was at fault in bringing on the difficulty and Battered Spouse Syndrome did not justify or play any role recognized by South Carolina law in her decision to kill the victim. Because Appellant was not entitled to submit the question of self-defense, the expert's opinion that she had Battered Spouse Syndrome was not properly admitted and she cannot show a prejudicial abuse of discretion resulting from the trial judge's ruling.

II. Alternatively, the trial judge did not abuse his discretion by requiring Appellant to testify before presenting the expert opinion of a social worker that she has battered woman syndrome and how that syndrome relates to Appellant's case. Rather than an "arbitrary" decision, as she argues, it was a sound exercise of discretion because there was absolutely no evidence that the shooting was in self-defense, in the absence of Appellant's testimony. Further, Appellant cannot show any conceivable prejudice from the ruling since she and her expert were both permitted to testify to all matters relevant to her "defense;" the trial judge's ruling eliminated the potential necessity for a mistrial that may have occurred if either Appellant had exercised her right not to testify or if she did not testify that the victim allegedly battered her; and she has not clearly articulated how this ruling was prejudicial to her, other than to argue that this was not the order in which trial counsel wanted to present the witnesses and that the trial judge could have ruled differently.

Even assuming *arguendo* that Appellant's testimony supported an instruction on self-defense, she still cannot show that the trial judge abused his discretion by requiring her to testify before presenting the expert opinion of a social worker that she has battered woman syndrome and how that syndrome relates to this case. Rather than an "arbitrary" decision, as she argues, it was a sound exercise of discretion because there was absolutely no evidence that the shooting was in self-defense, in the absence of Appellant's testimony.

While Appellant had previously represented to the trial judge that she intended to testify, there was no guarantee that she would testify and provide evidence that could support a self-defense instruction until the moment that she actually testified because an accused cannot be compelled to testify in a criminal trial, and because she alone had to decide whether she would testify. The decision of whether or not she would testify could not be made by counsel or the trial judge. *See Rock v. Arkansas*, 483 U.S. 44, 50, 107 S.Ct. 2704 (1987) ("[P]ermitting a defendant to testify advances both the 'detection of guilt' and 'the protection of innocence' ") (citation omitted); *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308 (1983) (" ... **the accused has the ultimate authority to make certain fundamental decisions** regarding the case, as to whether to plead guilty, waive a jury, **testify in his or her own behalf**, or take an appeal") (emphasis added); *State v. Rivera*, 402 S.C. 225, 243-44, 741 S.E.2d 694, 703-04 (2013) (finding that "defense counsel actively thwarted Appellant's desire to testify. Although ... preventing Appellant from testifying may have been an advantageous strategic decision, it had no basis in the law. .... It is apparent the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense;" thus, the trial court violated defendant's right to testify by refusing to allow him to testify because his testimony would have been damaging to defendant); *State v. Gunter*, 286 S.C. 556, 559, 335 S.E.2d 542, 543 (1985) ("The Fifth Amendment does not prevent a defendant from making a voluntary choice to testify, but it prohibits compelled testimony"); *cf. State v. Thrift*, 312 S.C. 282, 297, 301, 440 S.E.2d 341, 349, 351-52 (1994) (holding that the South Carolina Constitution requires that a person compelled to provide the government with self-incriminating testimony be granted immunity from any prosecution for a transaction or offense to which the

person's testimony relates; thus, defendants who were not granted immunity were improperly compelled to testify).

Rather than an "arbitrary decision" as Appellant argues, the trial judge's ruling was predicated on his desire to avoid the potential necessity for a mistrial that may have occurred if either Appellant had exercised her right not to testify, or if she failed to testify that the victim had battered her. A trial judge has broad discretion in his or her supervision over the progression and disposition of a case in the interests of justice and judicial economy. *See Capital City Ins. Co. v. B.P. Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct.App.2009). "The authority of the court ... to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). *Accord State v. Prince*, 279 S.C. 30, 301 S.E.2d 471 (1983) (The power to grant a mistrial should be used with the greatest of caution under urgent circumstances, and for very plain and obvious cases).

To further complicate matters, jeopardy had attached. Thus, if the State was placed in the positon of having to move for a mistrial based upon the improper admission of Battered Spouse Syndrome evidence - as well as evidence that Appellant was supposedly battered by others in the past - and if Appellant were to oppose the State's motion, the trial judge could only grant a mistrial if he found that "a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice." *See Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) ("[W]hen a defendant opposes the grant of a mistrial, [she] may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice"); *State v. Kirby*, 269 S.C. 25, 29, 236 S.E.2d 33, 34 (1977)

(holding the constitutional prohibition against double jeopardy permits a retrial following a mistrial if there was "manifest necessity" for the mistrial).

Even if the trial judge granted the State's mistrial motion because the jury had heard prejudicial and inadmissible evidence, and even if that ruling was affirmed on appeal, *see Arizona v. Washington*, 434 U.S. 497, 514-16, 98 S.Ct. 824 (1978) (the jury's exposure to inadmissible and highly prejudicial material created manifest necessity to support the mistrial), a new trial would have to be held and the case would have been needlessly protracted. This would thwart both judicial economy and the necessary goal of finality of litigation.

There cannot be a serious doubt that society has a significant issue in avoiding retrials. "Retrying defendants ... imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.' " *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710 (1993) (quoting *United States v. Mechanik*, 475 U.S. 66, 72, 106 S.Ct. 938, 942 (1986) (internal quotation marks omitted)).

Both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060 (1989).

Years earlier, Justice Harlan wrote that:

> If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never

> provides an answer at all. Surely it is an unpleasant task to strip a man of his [or her] freedom and subject him [or her] to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a [person] shall tentatively go to jail today, but tomorrow and every day thereafter his [or her] continued incarceration shall be subject to fresh litigation.

Mackey v. United States, 401 U.S. 667, 691, 91 S.Ct. 1160 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).[14] In *Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008), the South Carolina Supreme Court stated that "[a]t some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice"). *See also Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Further, Appellant cannot show any conceivable prejudice from the ruling since both she and her expert were permitted to testify to all matters relevant to her "defense."[15] Likewise, she has not clearly articulated how this ruling was prejudicial to her, other than to argue that this was not the order in which trial counsel wanted to present the witnesses and that the trial judge could have ruled differently. These arguments, however, do not show an abuse of discretion since they do not demonstrate that the trial judge's ruling was controlled by "an error of law or a factual

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[14] Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978).

[15] Ms. Bourus' expert opinions were extremely tentative. Ms. Bourus "imagin[ed] that [Appellant] has lived really in almost a constant state of post-traumatic stress disorder given her repetitive history with one brief change and that was a marriage that was not abusive in the sense that I'm talking about, but I think that it really destroyed her ability to believe in herself and to make good decisions." **Tr. p. 419, lines 9-14. R. p. 422, lines 9-14.** When asked to give her opinion of Appellant's mental state at the time of the shooting, Ms. Bourus testified that she "believe[d] that [Appellant] was highly anxious, very, very nervous, fearful, again wanting to extricate from the relationship, but terrified, you know, to do so, but moving ahead with it anyway." **Tr. p. 421, line 15 – p. 422, line 1. R.p. 424, line 15 – p. 425, line 1.** In response to a question as to whether she had formed an opinion as to whether Ms. Bourus thought that Appellant intended to kill Tony Hughes, Ms. Bourus testified, "I'd feel very confident to say no." **Tr. p. 423, lines 18-21. R.p. 426, lines 18-21.**

conclusion that is without evidentiary support." *Price*, 368 S.C. at 498, 629 S.E.2d at 365; *Broadnax*, ___ S.E.2d at ___, 2015 WL 4099053 at *2.

Finally, in support of her claim of error, Appellant relies on the United States Supreme Court's decision in *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891 (1972). However, her argument predicated upon *Brooks* is not properly before this Court on direct appeal because it was not presented to and ruled upon by the trial judge. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

Moreover, *Brooks* does not require a different result. In *Brooks*, a Tennessee statute required a defendant who desired to testify in criminal case to do so before any other testimony for the defense could be heard by the court trying the case. 406 U.S. at 606-08, 92 S.Ct. at 1892-93. Quite unsurprisingly, the Supreme Court held that this statute violated the defendant's privilege against self-incrimination and that the defendant could not be penalized for remaining silent at the close of the state's case by being excluded from the stand later in the trial. *Id.* at 608-13, 92 S.Ct. at 1893-95.

The trial judge's rulings in this case, however, did not compel Appellant to testify or to present *any* evidence. The United States Supreme Court has recognized "[w]hile no inference of guilt can be drawn from [a defendant's] refusal to avail [herself] of the privilege of testifying, [she] has no right to set forth to the jury all the facts which tend in [her] favor without laying [herself] open to cross-examination upon those facts." *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 948-49 (1990). Here, it was the defense that she wished to present that caused her to testify because, as discussed, there was no evidence that she acted in self-defense without it, and both her testimony and the expert testimony that she suffered from battered spouse syndrome was inadmissible without it. *See Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) ("A defendant's decision to testify or not must be made with knowledge of the consequences of either choice"); *Fitzpatrick*, 178 U.S. at 315.Therefore, Appellant's argument lacks merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should affirm the judgment, as well as Appellant's conviction of and sentence for murder.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

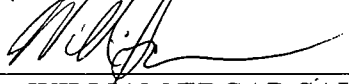
WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Office of Attorney General
P. O. Box 11549

Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON, III
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29528
(843) 915-8608

October 1, 2015.

By: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Stephen H. John, Circuit Court Judge
Appellate Case No. 2014-001679

THE STATE,

Respondent,

vs.

VIVIAN LYNN SCHRADER-FALLS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 1st day of October, 2015.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record,

Benjamin R. Gooding, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street, P.O. Box 11449, Columbia, SC 29211

Beth B. Richardson, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street, P.O. Box 11449, Columbia, SC 29211

Robert Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady St., Ste. #401, Columbia, SC 29201

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

This 1st day of October, 2015.

WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT