STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appeal Case No. 2013-002508

THE STATE

RESPONDENT,

V.

TAVISH DOMINIQUE YEARGIN,

APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6307

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville, SC 29601-2185

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

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

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

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

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court abused its discretion in denying Appellant's request for a defense of others jury instruction where there was no evidence his co-defendant had the right to kill the victim in self-defense, and Appellant was not without fault in bringing on the difficulty that resulted in the shooting of the victim?

II. Whether the trial court abused its discretion in denying Appellant's request for an involuntary manslaughter jury instruction when the argument raised on appeal was not presented to the trial court, and there was no evidence Appellant was acting lawfully with reckless disregard for the safety of others, and Appellant's firing of the gun was intentional?

III. Whether the trial court abused its discretion in admitting two letters written by Appellant while at the Pickens County Detention Center when the letters were admissible, relevant as to his culpability, and any error in admitting the letters was harmless?

STATEMENT OF THE CASE

On November 18-20, 2013, Appellant Tavish Dominique Yeargin ("Appellant") was tried by a jury for the murder of Sean Timothy Dinneen and one count of grand larceny. (Indictments, R. pp. 340-41). Appellant was tried in the Pickens County Court of General Sessions before the Honorable Robin B. Stilwell, Circuit Court Judge. John Dejong, Public Defender for Pickens County, represented Appellant. The State was represented by Assistant Solicitors Doug Richardson and Brandi Hinton, both of the Solicitor's Office for the Thirteenth Judicial Circuit.

On November 20, 2013, Appellant was convicted of murder and grand larceny. (R. p. 332). He was sentenced to sixty years confinement for the murder conviction and five years confinement for the grand larceny conviction, both to be served concurrently. (R. p. 335).

Before this Court is Appellant's direct appeal of his convictions. Appellant requests this Court reverse his convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

RESPONDENT'S STATEMENT OF FACTS

On September 17, 2011, Appellant shot and killed Sean Dinneen in the parking lot of Crosswell Baptist Church in Easley, SC. Dinneen was shot once. The shot entered in his right upper chest, right at the clavicle. (R. p. 296). The shot fractured the mid-point of the clavicle, crossed diagonally downwards towards the back, injured the left lung, pierced the diaphragm, and ended up right in front of one of the large vessels. (R. p. 297). Dinneen died as a result of blood loss resulting from the wound to the right side of the lung. (R. pp. 297-99).

Appellant plans to steal a car from the victim

Appellant and his two co-defendants, Kayla Williams and Nyia Utsey,[1] initially planned to steal one of two cars the victim had for sale. The victim had a teal Pontiac Grand Prix and a blue Mitsubishi Lancer for sale, and he was asking $7000 for each car. (R pp. 2-3).

Kayla testified that she initially received a call from Appellant on September 16, 2011. Nyia also indicated that she received a call from Appellant asking if he could get a ride from Kayla. (R. p. 203). Appellant had informed Kayla and Nyia that he had some cars in Easley that he wanted to pick up. (R. pp. 139-41, 204-05). Appellant indicated that he needed a ride to get the cars from Easley. (R. pp. 204-05). Kayla, who at the time drove a Ford Mustang, agreed to assist as long as Appellant provided her with gas money. (R. pp. 140, 142, 204-05). The three initially met on Friday, September 16, after Kayla and

[1] Nyia Utsey is one of Appellant's sisters. Kayla Williams was Nyia's girlfriend at the time. (R. pp. 136, 201-02).

Nyia dropped off Nyia's son at Nyia's mother's house.[2] (R. pp. 141, 205-06). During the drive to the victim's house, Appellant indicated to Kayla and Nyia that he planned on robbing the victim. (R. p. 144). Kayla noted that Appellant stated he wanted to tie the victim up with zip ties and knock him out. (R. p. 144). Nyia stated that Appellant had told them that the plan would be for Kayla and Nyia would get the victim to come to his front door, and while they were talking with the victim Appellant would enter from the back door, get the car keys, and tie the victim up. (R. pp. 206-07). Nyia indicated that before they left the house that Friday, she saw Appellant get a long barreled gun from their brother Michael, and she further noted she saw them load the gun. (R. pp. 207-08). Appellant placed the gun in the trunk of Kayla's Mustang. (R. p. 208).

On that Friday, when the three went to the victim's home, no one was there. (R. pp. 145, 209-11).

The Three Regroup for a Second Attempt on Saturday

The next morning, Appellant called Kayla and Nyia again, asking if they would take him back to the victim's house.[3] (R. pp. 147, 211-12). After Appellant agreed to provide Kayla with gas money, they agreed to again help Appellant. (R. pp. 147, 212). The two picked up Appellant after they dropped Nyia's son off at Nyia's mother's house. (R. p. 148, see R. p. 213). Kayla testified that while at the mother's house, Appellant obtained a long barreled gun from his brother Michael. (R. p. 149). Nyia testified that they picked Appellant up from her

[2] Nyia indicated that they dropped off her son at her sister Tequala's house, and they then picked Appellant up from her mother's house. (R. p. 206).
[3] Nyia believed the conversation may have been on the evening of September 17th. (R. p. 211-12).

sister's house, but they went to her mother's house so Appellant could pick up the gun. (R. pp. 213, 246). Appellant put the gun in the trunk of Kayla's Mustang. (R. pp. 150, 214, 246). The three then went to Taylors and picked up Appellant's brother Charles. (R. pp. 152, 215-16).

The group started with a plan to convince the victim that they wanted to purchase both cars the victim had for sale. (R. pp. 153-54, 215, 216). Appellant made the initial contact with the victim by telephone. (R. p. 215, see R. p. 250). When the group arrived at the victim's house, Kayla, Nyia and Charles walked up to the victim's house to meet with him.[4] (R. pp. 157, 219).

Margaret Hinson, the victim's neighbor, testified that on September 17, the victim received calls from a male wanting to look at the two cars he had for sale. (R. p. 4). She noted that at least one of the calls was to her house phone. (R. pp. 3-4). Later that evening, as it was just getting dark, she noted three people came to see the car. (R. pp. 4-6). Hinson indicated there were two females who were looking at the cars, and a male was midway down the hill in the driveway from the victim's house. (R. pp. 5-6).

The three looked at both the Grand Prix and a Mitsubishi Lancer the victim had for sale. (R. pp. 157, 219-20). At some point during the initial meeting with the victim, Charles expressed reluctance about continuing with the group's plan. (R. pp. 157-58, 219-20). Kayla and Nyia informed the victim that they needed to go to a local gas station to use the restroom, and that they would return. (R. pp.

[4] Appellant remained in Kayla's Mustang; he did not want the victim to recognize him because he had previously lived with the victim. (R. pp. 154-55, see R. p. 215).

158, 221). Hinson noted that when the group left, the victim brought the Grand Prix down from his house and parked it in front of her house. (R. pp. 7-8). She also stated that the victim was heavily intoxicated, and that he was drinking. (R. pp. 8-9).

The group left the victim's house, went to a gas station, and left Charles at the station. (R. pp. 159, 222). Appellant, Kayla, and Nyia then returned to the victim's residence; Kayla and Nyia went back to the house to look at the two cars. (R. pp. 160-61, 223). Nyia noted that she saw the gun in the backseat of the Mustang at this point. (R. p. 223). They were unable to start the Lancer and keep it running.[5] (R. p. 161).

Hinson testified that when the group came back, they pulled into the victim's driveway. (R. p. 8). The victim had indicated to her that they planned on taking the Grand Prix for a test drive. (R. pp. 8, 9). Kayla and Nyia then requested to test drive the Grand Prix. (R. pp. 162, 224). During the test drive, Kayla drove the Grand Prix, and Nyia sat in the front passenger seat. (R. pp. 163, 192, 225, 252). The victim sat in the back seat of the Grand Prix. (R. pp. 163, 192, 225, 252). Both Kayla and Nyia testified that he was heavily intoxicated, and he was drinking during the test drive. (R. pp. 163-64, 225, 252). Appellant remained in Kayla's Mustang, and he followed the Grand Prix during the test drive. (R. pp. 164, 225).

[5] Both Nyia and Hinson indicated the attempt at operating the Lancer occurred during their first contact with the victim. (R. pp. 6, 219-20).

The Two Cars Stop in a Church Parking Lot

Kayla testified that during the test drive, she followed signals from Appellant as directions of where he wanted her to take the car. (R. pp. 164-65, 191-92).[6] Eventually, Kayla pulled into the parking lot of Crosswell Baptist Church because she was tired of driving. (R. pp. 165, 226). She pulled into the parking lot, and Appellant pulled in behind her. (R. p. 226). Once they were stopped, Nyia got out of the Grand Prix and went back to the Mustang to talk with Appellant about their next move. (R. pp. 165-66, 193, 226, 254). After talking with Appellant, Nyia went back to the Grand Prix to talk with Kayla. (R. pp. 166, 226-27). Kayla then went back to the Mustang to talk with Appellant. (R. pp. 166, 193, 227-28, 254). While the two were talking, they noticed the victim had gotten out of the car and was starting to walk towards the driver's side of the car.[7] (R. pp. 166-67, 227-28; see R. p. 195). Kayla ran back to the Grand Prix and jumped in the driver's seat before the victim could get into the seat. (R. pp. 167, 193, 227-28, 254-55). Kayla then tried to start the car. (R. pp. 167, 228). The victim got on top of Kayla and attempted to jerk the keys out of Kayla's hand. (R. p. 167). During cross-examination, Kayla indicated that the victim was grabbing at her, and at some point, she showed where she was bruised to law enforcement. (R. p. 194).

---

[6] Nyia testified that this was done according to the instructions by Appellant. (R. pp. 223, 253).

[7] Kayla noted that the victim did have a beer bottle in his hand when he was walking towards the driver's side of the car. (R. p. 195). Kayla did not know when the beer bottle was broken in the parking lot. (R. p. 195). She also did not know if it was thrown or dropped. (R. p. 195).

Kayla testified that he also attempted to put the car in park while she was attempting to put the car in drive. (R. pp. 167-68, 195). Nyia also confirmed the victim Kayla and the victim were engaged in a struggle over the car. (R. p. 228). Nyia observed the victim throw the beer bottle behind him, and further saw him lose a shoe after Kayla got the car to go a little bit. (R. p. 228).

Kayla noted, "[the victim]'s not hitting me, he's just trying to get me out of the car, trying to pull me out." (R. p. 168, ll 6-7). She also noted that the victim was not saying anything. (R. p. 168). Nyia testified the victim was laying on top of Kayla. (R. p. 229). His hands were on the driver's seat and, at some point in time, on the ignition switch. (R. p. 229). She also stated that she did not see him hit her, but he "[m]ight be pushing her a little bit." (R. p. 229, ll 21-22).

The Shooting

Kayla described what happened next as follows:

> It happened so fast. Tav [Appellant] pulled up beside the car, the Grand Prix that we were in. And the window was rolled down on the passenger side of the Grand Prix. And my window won't roll down in my Mustang on the driver's side. So, he opens his door, sticks the gun out and tells him to get up off me or he's going to shoot him.
>
> And Dinneon says, Shoot me, I don't care.
>
> And he shoots him on top of me.

(R. p. 169, ll 1-8). Nyia recalled, "[s]o the Defendant, he drives around and he told Sean he said, Get off her. And Sean looked up at him and said, Kill me. And he had the gun pointed at the window. And he shot him." (R. p. 230, ll 3-8). Nyia also indicated Appellant had pulled up to the passenger side of the Grand Prix, opened the Mustang door, and fired the gun towards the victim. (R. pp.

230, 258-60). Nyia acknowledged the victim was not using any weapons, and he was not threatening Kayla in any way. (R. p. 231).

Kayla indicated that immediately prior to the shooting, the victim had half of his body in the Grand Prix and had his legs dangling out of the Grand Prix. (R. p. 169). Kayla testified that she saw Appellant shoot the victim. (R. p. 169). After he was shot, the victim went limp. (R. p. 169). Nyia also admitted she saw Appellant shoot the victim. (R. p. 230).

During cross-examination, Kayla testified that she could not tell what Appellant may have seen during the confrontation between her and the victim. (R. p. 198). She also did not know what Appellant could see when he shot the victim. (R. p. 197). Kayla surmised Appellant was just trying to get the victim off of her. (R. pp. 197).

Kayla testified that after Appellant shot the victim, she panicked. (R. p. 170). She pushed the victim off of her, started the Grand Prix, and sped out of the parking lot. (R. p. 170). Nyia also confirmed that Kayla pushed the victim out of the car and took off. (R. pp. 230-31). Eventually, Appellant and Nyia were able to catch up with Kayla in Kayla's Mustang. (R. pp. 170-71, 231). Kayla and Appellant switched cars, and they drove back to Appellant and Nyia's mother's house. (R. pp. 171, 231-32). Kayla testified that Appellant was bragging about shooting the victim at his mother's house. (R. p. 171). She also noted Appellant said that he got his mother's car back. (R. p. 171).

That night, Kayla and Nyia went back to their hotel. (R. p. 234). The next day, September 18, they received a call from Appellant. (R. pp. 173, 235). They

later picked up Appellant, and over the course of several days, travelled from Greenville area to Gatlinburg, TN, back towards Spartanburg, SC, Traveler's Rest, SC, and eventually to Asheville, NC. (R. pp. 175-81, 237-40). The three were apprehended at a Sleep Inn in Asheville. (R. pp. 79-80, 130-34, 181, 241).

Law Enforcement Investigation

The victim was still breathing shallowly, but was otherwise unresponsive when the first officer arrived to the scene. (R. pp. 41, 43). The first deputy to arrive noted that the victim was face down, and there was blood on the ground when he arrived. (R. p. 43). The victim was lifeless by the time EMS arrived. (R. pp. 45, 46, 49).

At the scene, a broken liquor bottle and a tennis shoe were located several feet away from the victim's body. (R. pp. 52-53, 55, 110-11). Law enforcement was able to identify the victim via his driver's license. (R. p. 55).

Law enforcement obtained a lead when a detective spoke with Ms. Hinson about the call she received. (R. pp. 61-62). Hinson provided a detective with the phone number from which she had received a call about seeing the cars. (R. pp. 61-62, 100). Law enforcement traced the number to Harold Sloan. (R. p. 21). Sloan testified that the number was for a cell phone that he provided to Taznick Utsey, one of Appellant's sisters.[8] (See R. pp. 21-22, 62). Law enforcement later made contact with Taznick, and they were able to establish Appellant, Kayla, and Nyia as possible suspects. (R. pp. 66-67).

[8] Josqueze Thomas, one of Taznick's ex-boyfriends, testified that he recalled seeing Appellant use the phone on September 17, 2011. (R. pp. 24-5, 26).

The Grand Prix was found in Greenville on Monday, September 19, by the US Marshal Service. (R. pp. 68-69). Near the car was a rolled up license plate. (R. p. 72). A receipt from a Family Dollar dated September 18, 2011 was found in the car. (R. pp. 74-75). Video from the Family Dollar on the date and time of the timestamp on the receipt reflected that an individual with a similar appearance to Appellant came to the store in the Grand Prix and made a purchase inside the store. (R. pp. 77-78).

After Appellant and his co-defendants were arrested, Kayla's Mustang was searched. (R. pp. 79-83). A BB gun was found underneath the passenger seat.[9] (R. p. 83).

The victim's blue Lancer was processed for fingerprints. (R. pp. 101, 113-14). Three prints from the Lancer were matched to Nyia. (R. pp. 280-81, 290). The Grand Prix and the license plate found behind the Grand Prix were also processed for fingerprints. (R. pp. 118-21, 125). Prints from the rolled up license plate were matched to Appellant. (R. pp. 282-83, 292). Prints from the Grand Prix were matched to Appellant and to Kayla. (R. pp. 284, 287-88, 289).

[9] Kayla had testified that Appellant gave her a BB gun on the night of the shooting, and he told her to use it on the lady (Ms. Hinson) with the victim when they were initially looking at the cars. (R. p. 156). Nyia confirmed Appellant gave Kayla the gun, and further confirmed that Appellant told Kayla to use it to keep the lady with the victim from going anywhere to call the police. (R. p. 217). Nyia also testified that Charles threatened to punch Kayla if she hit the lady with the gun. (R. p. 221).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION REGARDING THE DEFENSE OF OTHERS; THERE WAS NO EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE CHARGE.

The trial court did not abuse its discretion in denying Appellant's request for a defense of others charge. First, there was no evidence to support a finding that Kayla Williams, the individual Appellant asserted he was defending, would have had the right to kill the victim in self-defense. Second, there was also no evidence that Appellant was not without fault in bringing on the difficulty that led to the shooting.

Argument at trial

At trial, Appellant requested a jury instruction for defense of others.

> I would also move for a charge on defense of others. In this case, again, albeit through cross-examination, certainly one of the Co-Defendant's testified that her perception was, not her words mine, characterized the struggle between Williams and Dinneon. She characterized It looks like he was trying to rape her something. I would contend, Your Honor, as a result of that, certainly the Williams would have had the right to defend herself from that. Mr. Yeargin would have had a right, under what I read on defense of others, had a right to come to her defense and defending her on that, Your Honor.

(R. p. 315, ll 14-24).

In response, the State argued there was no evidence supporting such a charge.

> Your Honor, yes, we would ask that you not charge that. I believe the testimony was laid out in my asking the question whether there was a weapon involved. And also in regards to her talking about a rape, I didn't see any type of testimony that came out that said that she was in any position of harm or rape or

anything of that nature. I don't think the evidence is there to support such a charge.

(R. p. 316, ll 2-9).

The trial court denied the request for a defense of others jury instruction.

> And I'll tell you -- put on the record why. I heard that line of testimony as well. And I know that you elicited answers to questions that were posed in cross-examination. But I thought that each witness who testified with respect to self-defense or facts and circumstances which would purport to self-defense and defense of others, in court they actually denied that they thought that they were in any harm or jeopardy. And also I would, and I don't -- I think it was a very wise decision in your regard not to enter any evidence into the record, particularly in the form of the Defendant's testimony. However, without that and standing alone on the evidence that has been presented, it just doesn't rise to the level of a self-defense charge.

(R. p. 316, l 14 – 317, l 2).

Appellant did renew the request after the conclusion of jury instructions. (R. p. 330). The request was again denied. (R. p. 330).

Standard of Review

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at

445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas, 332 S.C. at 73, 504 S.E.2d at 310. To establish self defense in South Carolina, four elements must be present: (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 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. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000)(citing State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999)).

Appellant was not entitled to a defense of others jury instruction because Kayla, the person who Appellant claims he was defending, did not have the right to kill the victim in self-defense.

Contrary to Appellant's assertions, Appellant could not kill the victim under a theory of defense of others (specifically Kayla) because Kayla was not entitled to act in self-defense against the victim. First, Kayla was not without fault in bringing on the difficulty. At the time of the shooting, Kayla was actively engaged in a plan to steal the victim's car. In fact, the "struggle" between Kayla and the victim occurred when Kayla ran and jumped into the driver's seat of the victim's Grand Prix in an effort to thwart the victim's attempt at avoiding having his car stolen. (R. pp. 167, 193, 227, 255).

> "[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self defense ...." Ferdinand S. Tinio, Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense, 55 A.L.R.3d 1000, 1003 (1974). Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide. 40 Am.Jur.2d Homicide § 149 (1999). "[A] robber, who is met with such violent resistance by his victim that he has no opportunity to convince [the] victim that he has abandoned his criminal intentions and only wants to withdraw, may not claim self defense if he injures or kills his victim." 55 A.L.R.3d at 1003-04; see also United States v. Thomas, 34 F.3d 44 (2d Cir.1994) (one who commits or attempts a robbery armed with deadly force and kills the intended victim when victim responds with force may not avail himself of the defense of self-defense); People v. Couch, 436 Mich. 414, 461 N.W.2d 683 (1990) (a robber or other wrongdoer engaged in felonious conduct has no privilege of self-defense); Stiles v. State, 829 P.2d 984 (Okla.Crim.App.1992) (one who kills while committing armed robbery is an aggressor and an aggressor is not entitled to a claim of self-defense).

Bryant, 336 S.C. at 345, 520 S.E.2d at 322.

Second, Kayla's testimony reflected that she was not in actual danger of losing her life or suffering great bodily injury, and she did not actually believe she was in imminent danger. Kayla never indicated in her testimony at trial that she was in fear for her life from the victim. She noted that the victim never threatened her with a weapon. (R. p. 182). Dinneen never beat her in any way. (R. p. 182). Kayla was not harmed in the entire incident, except for some possible bruising. (R. pp. 183, 194). Furthermore, there was no testimony that supported a finding that Appellant thought Kayla was in actual danger of losing her life or suffering great bodily injury. Appellant did not testify, and none of the witnesses testified that Appellant made any statements reflecting such a belief. To the contrary, Kayla testified Appellant bragged about shooting the victim to his mother. (R. p. 171).

Third, there was no evidence to support a finding that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that Kayla 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. Both Kayla's and Nyia's testimony confirm this. While both confirmed that the victim did have his beer bottle in his hand when he initially moved towards the driver's seat, Nyia testified that the victim threw the bottle away as he attempted to turn the car off. (R. p. 228). Nyia also noted that the victim was not hitting Kayla, and at most, he may have pushed Kayla a little bit.

(R. p. 229). She also noted that she did not see the victim using any weapons or threatening Kayla in any way. (R. p. 231).

Finally, Kayla clearly had other means by which to avoid the danger. Both Nyia and Kayla indicated that the victim was clearly attempting to avoid having his car taken from him. Kayla could have simply disengaged from the struggle and allowed the victim to take his car.

Appellant relies upon Nyia's statement that it appeared that the victim was attempting to rape Kayla when he was trying to wrestle control of the car away from her as support for his argument that Appellant reasonably believed Kayla was in danger of imminent harm. (R. pp. 255-56). Respondent submits this statement was not enough to warrant a defense of others charge. First, there was no testimony or evidence that Nyia's initial impression of the victim's actions was what Appellant viewed. Nyia also testified that Appellant was in the Mustang behind the Grand Prix, whereas Nyia was viewing the interaction between Kayla and the victim from the front seat of the Grand Prix. Furthermore, the impression by Nyia does nothing to negate the lack of evidence to support a finding that Kayla was not without fault in bringing on the difficulty, or that Kayla had other means to avoid the danger that did not require she kill the victim. Respondent would note that even under Appellant's version of events, he could not have acted in the defense of Kayla because Kayla was actively engaging in an attempted theft of the victim's car when the confrontation occurred.

Altogether, since Kayla did not have the right to kill the victim in self-defense, Appellant was not entitled to do so. Thus, the trial court did not err in denying his request for a defense of others jury instruction.

Appellant was also not entitled to a defense of others instruction because he was also not without fault in bringing on the difficulty.

The trial court was correct in not granting Appellant's request for a defense of others jury instruction because Appellant was at fault in bringing on the difficulty in this case. Appellant developed the plan for stealing the victim's Grand Prix. Also, Appellant was the one who instigated Kayla's attempt at preventing the victim from driving away in his own car. Kayla testified that Appellant told her "to run, go get in the car before he [the victim] gets in it." (R. p. 167, ll 16-7).

> "The doctrine of freedom from fault in bringing on a difficulty as a condition precedent to a plea of self-defense applies with equal force to a case in which one person interferes in a difficulty between two others in behalf of, or to protect one of them; and generally speaking a person who does this will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing, since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong."

State v. Cook, 78 S.C. 253, 257, 59 S.E. 862, 863 (1907) (quoting Wharton on Homicide § 332 (3d Ed. 1907)).

> In such case the right to take the life of such assailant upon such unprovoked assault extends to any relative, friend, or bystander who would likewise have the right to take the life of such assailant if such act was necessary to save the person so wrongfully assailed from imminent danger of being murdered by such assailant. In other words, if the assailant makes a malicious and unprovoked assault with a deadly weapon upon one person with the apparent malicious intention to take the life of the person assailed and thereby commit murder, then, where the danger of the commission of such murder is imminent, any relative, friend, or bystander would have the right to take the life of such assailant if necessary in order to prevent the commission of such murder, provided there was no other reasonable means of escape for the person so assailed, and **provided both the person assailed and the person coming to**

his defense were without legal fault in bringing on the difficulty.

State v. Hays, 121 S.C. 163, 168, 113 S.E. 362, 363 (1922) (emphasis added).

Since Appellant was at fault in bringing on the difficulty in this case, his request for a defense of others instruction was properly denied. His convictions should therefore be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN INVOLUNTARY MANSLAUGHTER JURY INSTRUCTION.

The trial court correctly denied Appellant's request for an involuntary manslaughter jury instruction. First, Appellant's argument on appeal is not preserved for appellate review as it was not presented to the trial court. Second, there is no evidence in the record to support a finding that Appellant was acting lawfully in defense of Kayla Williams. Nor was there evidence that Appellant acted in reckless disregard for the safety of others. To the contrary, the evidence relating to the shooting reflected Appellant's actions were unlawful and intentional. Thus, he was not entitled to an involuntary manslaughter charge.

What occurred at trial

After the request for a defense of others jury instruction was denied, Appellant requested an involuntary manslaughter jury instruction.

> I would move the Court for the charge on involuntary manslaughter. Certainly do not need to educate Your Honor on involuntary manslaughter, but simply bring to the Court's attention, the intentional killing of another without malice while engaged in a unlawful activity, not naturally intending to cause death or great bodily injury, to engaged in a unlawful activity, I don't know that that would particularly apply in this particular case. I would take the position that the grand larceny auto, and I'm certainly aware of what the State is asking you to charge. . . .
>
> But on grand larceny or theft of the vehicle, Your Honor, I would submit that that is not a crime that will tend to cause death or great bodily injury. Depending on what website you want to take into consideration, over a million cars are stolen in the United States a year. One website said that's a car every 24 seconds. Another said every 28 seconds. Either one, that' a lot of cars. I would simply submit that that is not a crime that would tend to cause death or great bodily injury. And respectfully move the Court for a charge on involuntary manslaughter.

(R. p. 317, ll 4-14, 16 – R. p. 318, l 1).

The State contended that there was no evidence presented to support a charge of involuntary manslaughter. (R. p. 318). The trial court denied the request. (R. p. 318, ll 14-7). Appellant renewed the request after the jury was charged. (R. p. 330). The request was again denied. (R. p. 330).

Standard of Review

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

The presence of evidence to sustain a conviction for the crime of a lesser degree determines whether it should be submitted to the jury. State v. Rucker, 319 S.C. 95, 98, 459 S.E.2d 858, 860 (Ct. App. 1995) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976)); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. State v. Patterson,

337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999). It is not error to refuse to charge the lesser included offense unless there is evidence tending to show that the defendant was guilty only of the lesser offense. State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (citing State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); State v. Mickle, 273 S.C. 71, 254 S.E.2d 295 (1979).

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006). To constitute involuntary manslaughter, there must be a finding of criminal negligence. State v. Wigginton, 375 S.C. 25, 35, 649 S.E.2d 185, 190 (Ct. App. 2007) (citing State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003)). Criminal negligence for involuntary manslaughter is statutorily defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2007). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

"A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense." Crosby, 355 S.C. at 51, 584 S.E.2d at 112. Evidence of a struggle between the defendant and the victim over a weapon supports submission of an

involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

Appellant's argument on appeal is not preserved for appellate review.

At trial, Appellant contended that he was entitled to an involuntary manslaughter charge based upon the first category upon which one can be found guilty of involuntary manslaughter. He specifically argued that Appellant was engaged in an unlawful act amounting to a felony (grand larceny), and not naturally tending to cause death or great bodily harm. (R. p. 317-18). At no point did Appellant argue that he was engaged in a lawful act, or that he acted with reckless disregard to the safety of others. On appeal, Appellant argues that the second category of involuntary manslaughter applies. He contends that Appellant was acting lawfully in the defense of Kayla Williams, and that he acted in reckless disregard in shooting the victim. This argument is not preserved for appellate review because it was not presented to the trial court, and was not subject to the trial court's ruling denying the request for the charge. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Appellant was not entitled to an involuntary manslaughter charge. There is no evidence in the record to support a finding that Appellant was acting lawfully, and there is no evidence to support a finding that he acted in reckless disregard for the safety of others.

Contrary to Appellant's assertions, there was no evidence to support his request for an involuntary manslaughter jury instruction. First, there was no evidence to support a finding that Appellant was acting lawfully because, as discussed in Argument I, there was not sufficient evidence at trial to support a finding that Appellant was lawfully acting in defense of Kayla Williams. As noted above, Kayla was not entitled to act in self-defense because she was not without fault in bringing on the difficulty. There was no evidence that she was actually in fear of losing or life or suffering great bodily injury, nor was there evidence that she feared she was in imminent danger of losing her life or suffering great bodily injury. Also, there was a lack of evidence to show that a reasonable prudent person would have believed Kayla was imminent danger of losing her life or suffering great bodily injury. Finally, Kayla had other means by which to avoid the danger.

Furthermore, there was no evidence presented at trial that would support a finding the shooting was not intentional. The only evidence reflecting the intent of Appellant's actions in shooting that night stems from the testimony of Nyia and Kayla. Kayla testified that Appellant told the victim to get off of Kayla or he would shoot. (R. p. 169). Both Nyia and Kayla indicated that the victim told Appellant to either shoot him or kill him. (R. pp. 169, 230). Both reflected Appellant pointed the gun out of the door of the Mustang into the window of the Grand Prix, and that he fired the gun. (R. pp. 169-70, 230, 257-60).

There is no evidence in the record that the shot that was fired was unintentional. Appellant points to no evidence in the record to support his argument that the firing of the weapon was unintentional. This case is clearly distinguishable from Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). In Crosby, the defendant was convicted of voluntary manslaughter in the shooting death of the victim. 355 S.C. at 49, 584 S.E.2d at 111. The two had been among a group of people gathered at an apartment that were drinking and playing cards. Id. At some point during the evening, the victim angered the defendant by telling him that he was going to take his girlfriend, who was also in attendance at the gathering. Id. at 50, 584 S.E.2d at 111. Later that evening, the defendant assisted in breaking up a fight involving the roommates and another female. Id. The victim told him not to touch one of the women involved in the fight. Id. The defendant told police that he saw the victim charging at him with one hand behind his back. Id. He then stated that he pulled his gun out, closed his eyes, and pulled the trigger. Id. He further stated that he did not know that he had pulled the trigger. Id. Others testified at trial that the defendant stated he did not mean to do it, and one witness testified that the defendant said the gun had slipped. Id.

The trial court denied the defendant's request for an involuntary manslaughter charge. Crosby, 355 S.C. at 51, 584 S.E.2d at 111. The Court of Appeals affirmed the trial court's decision, finding the defendant's actions were intentional and unlawful. Id., 584 S.E.2d at 111-112. However, the South Carolina Supreme Court reversed, finding that more than one inference could

have been made from the defendant's statement. Id. at 53, 584 S.E.2d at 112. Specifically, the Supreme Court noted that the defendant's statement that he did not even know he had pulled the trigger was evidence that inferred the gun was accidentally discharged. Id. Thus, an involuntary manslaughter charge was warranted. Id., 584 S.E.2d at 112-13.

Here, there is no testimony or evidence reflecting Appellant did not know he had pulled the trigger or that the gun he used was accidentally discharged. To the contrary, the testimony from Nyia and Kayla, which is the only testimony and evidence reflecting the circumstances regarding the shooting, reflect that the shooting was intentional.

Appellant's reliance upon State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), is similarly misplaced because Burriss is inapplicable in this case. In Burriss, the South Carolina Supreme Court held that a person could be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. 334 S.C. at 265, 513 S.E.2d at 109. In Burriss, the defendant was threatened and then attacked by the victim and another male. Id. at 258, 513 S.E.2d at 106. After being pushed to the ground, the defendant drew a gun and fired two shots at the ground. Id. at 258-59, 513 S.E.2d at 106. Both men backed away. Id. at 259, 513 S.E.2d at 106. As the defendant attempted to get off the ground, one of the attackers moved to attack the defendant again. Id. The defendant picked up his gun, and it went off, killing the victim. Id. The Supreme Court found that the defendant was lawfully armed in self-defense. Id. at 269, 513 S.E.2d at 109. Since there

was evidence that the firing of the gun was not intentional, the defendant in Burriss was entitled to an involuntary manslaughter charge. Id. This case is distinguishable from Burriss because: 1) Appellant was not lawfully armed in self-defense or in defense of Kayla, and 2) the firing of the gun was intentional.

"[T]he essence of involuntary manslaughter is the involuntary nature of the killing." State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010). The evidence presented at trial only reflected that the shot that killed the victim was fired intentionally by Appellant. There was no testimony or evidence that would support a finding that the shot was fired unintentionally. Thus, Appellant was not entitled to an involuntary manslaughter instruction. See State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996)(finding involuntary manslaughter charge not warranted where testimony reflected one of shots fired was intentional); Thompson, 278 S.C. at 7, 292 S.E.2d at 585 (same); Mickle, 273 S.C. at 73, 254 S.E.2d at 296 (1979)(finding trial court did not err in denying request for involuntary manslaughter charge where defendant stated shooting was intentional, was to stop decedent). Appellant's convictions should therefore be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE LETTERS APPELLANT WROTE TO HIS SISTER CO-DEFENDANT, NYIA, IN AN EFFORT TO CHANGE HER TESTIMONY. THE EVIDENCE WAS RELEVANT AS EVIDENCE OF APPELLANT' CULPABILITY, AND WERE PROPERLY ADMITTED BY THE TRIAL COURT. ANY ERROR IN ADMITTING THE LETTERS WAS HARMLESS.

What occurred pre-trial

The third issue stems from letters from Appellant to Nyia introduced into evidence during his trial. Before the third day of trial started on November 20, 2013, the State advised the trial court that it was in receipt of letters written by Appellant to his co-defendant, Nyia, while he was at the Pickens County Detention Center. (R. pp. 265-66). During the discussion, Appellant argued the letters should not be admitted into evidence. He noted that he did not know the basis for seeking admission of the letters. (R. pp. 266-67). Appellant further contended that he did not see how they could be used to impeach one of the State's witnesses. (R. p. 267).

The trial court indicated that if the State laid the proper foundation, it believed the letters could be admissible.

> I tend to -- I tend to believe it would be admissible if he lays the appropriate foundation and indicates that he got it from the Defendant. I have looked at the letter and I haven't read it word for word, but it would appear to me generally speaking what it is, is a request to a another Defendant to tell something less than the truth on the stand. And you know, generally the purpose of its introduction, I would suspect, is essentially to lend to his culpability in this crime, asking another witness to tell an untruth on the stand. Whether it was conveyed to the actually witness or not is a completely and entirely different issue. And I don't think it's relevant to it. It is a voluntary statement by the Defendant that was willfully and voluntarily transferred to a jailer. If he lays the appropriate foundation, I believe that it's admissible. Now, there may be objections to be posed when and if he testifies. But at this point, generally speaking, in a vacuum, I think that it would be admissible.

(R. p. 268, l 8 – 269, l 2).

In response, Appellant argued that admitting the letters would either show Appellant is asking someone to lie or that Appellant is a liar. He contended that would get into Appellant's character, and that would be inappropriate because the defense had not put Appellant's character at issue during the trial. (R. p. 269).

The trial court then stated,

> I understand. I haven't heard the testimony yet. I don't anticipate that it's an impeachment of his character or credibility. I think what it goes to is culpability. That's my understanding of it without having heard the foundation to be laid by the State in this case. So, I'm not suggesting at this point that any evidence with respect to his character is admissible.

(R. pp. 269, l 24 – 270, l 6).

During trial, Shane Brummitt, a detention officer at the Pickens County Detention Center, testified that on Saturday, November 16th, Appellant made contact with him and handed him a letter or note. (R. p. 304). It consisted of four pieces of paper. (R. p. 305). Brummitt later unfolded it, and asked a senior officer what he should do with it. (R. p. 306). Brummitt later had contact with Investigator Dow. (R. p. 306). The letters were admitted and published to the jury over Appellant's objections. (R. pp. 307-08). Specifically, Appellant objected based upon his previous objection. (R. p. 306). The trial court stated it "analyzed that letter in accordance with the mandates of Jackson v. Denno and find that all of the prerequisites have been met for the threshold of admissibility. Therefore, I respectfully deny the motion." (R. p. 307, ll 2-5).

During cross-examination, Brummitt noted that he never delivered the letters, and Nyia never got them. (R. p. 309).

In the letters, Appellant requests Nyia blame the entire incident on Kayla. (State's Exhibit 40-42, R. pp. 336-39). He further provides instructions on what she should say happened, including that Kayla shot the victim with a gun that was in her pocketbook. (State's Exhibit 40-42, R. pp. 336-39). Appellant requests that Nyia testify that he was not there. (State's Exhibit 40-42, R. pp. 336-39). He also asks that she testify that he provided a license plate to them after they requested one from him. (State's Exhibit 40-42, R. pp. 336-39).

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "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." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, S.C. R. EVID. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App.

1998). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001).

The trial court did not abuse its discretion in admitting the letters. The letters were admissible.

The two letters from Appellant to Nyia were admissible at trial. The trial court essentially found the two letters constituted written statements by Appellant. He further found the statements were voluntary under Jackson v. Denno, and they were admissible.

Appellant has not shown the letters were not admissible. "As a general rule, statements or declarations made by one accused of a crime are admissible against him." State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (quoting State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)). Such evidence must meet the threshold test of admissibility, i.e., relevance. See Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Further, the letters were admissible because each constituted a "statement against penal interest" under Rule 804(b)(3),SCRE, by a declarant who was unavailable under Rule 804(a). See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). Contra

State v. Terry, 339 S.C. 352, 53-58, 529 S.E.2d 274, 276-77 (2000) (defendant who chose not to testify could not introduce his own confession as statement against penal interest), *cert denied*, 531 U.S. 882 (2000). Also, each letter was admissible as an admission of a party-opponent under Rule 801(d)(2)(A), SCRE, and as a statement by a co-conspirator made in furtherance of a conspiracy to steal from and murder the victim, since it was unquestionably made in an effort to obstruct the prosecution of Appellant and Nyia. See Rule 801(d)(2)(E), SCRE; State v. Gilchrist, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000) ("While mere conversation or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible") (quoting United States v. Arias-Villanueva, 998 F.2d 1491, 1502 (9th Cir.1993)); accord State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); Yeager v. Murphy, 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987) (statements made by co-conspirators in furtherance of the conspiracy are admissible). Contra State v. Anders, 331 S.C. 474, 477, 503 S.E.2d 443, 444 (1998) (admission to crime is not statement in furtherance of conspiracy for purposes of co-conspirator hearsay exception).

Furthermore, contrary to Appellant's assertions, the letters did not constitute impermissible character evidence under Rule 404(b), SCRE. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. Evidence of other crimes is generally

admissible when it is necessary to establish a material fact or element of the crime charged. State v. Byers, 277 S.C. 176, 178, 284 S.E.2d 360, 361 (1981); State v. Cheatham, 349 S.C. 101, 108, 561 S.E.2d 618, 622 (Ct. App. 2002).

> Evidence of prior bad acts is admissible when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime.

State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511-12 (Ct. App. 2004) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see Rule 404(b), S.C. R. EVID. "[T]he 'bad act' must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). If the prior bad act evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." State v. Nix, 288 S.C. 492, 497, 343 S.E.2d 627, 630-631 (Ct. App. 1986)). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." Sweat, 362 S.C. at 128, 606 S.E.2d at 514.

> Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.

State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008) (internal citations omitted).

Appellant's contention that the letters constitute improper character evidence under Rule 404(b) is without merit. "[W]itness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt." State v. Edwards, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009). In Edwards, the Supreme Court found no abuse of discretion in the admission of death threats made by the defendant against the victim to the victim's mother in a criminal sexual conduct with a minor case. The Supreme Court noted that witness intimidation could be expressed "in a litany of other forms." Edwards, 383 S.C. at 69, n.2, 678 S.E.2d at 407, n.2. The Supreme Court ultimately found that evidence of witness intimidation was admissible.

In so doing, the Court noted its approach was consistent with the majority of other jurisdictions that have addressed the issue, citing specifically to United States v. Hayden, 85 F. 3d 153 (4th Cir. 1996). In Hayden, the Fourth Circuit stated, "[e]vidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable." Hayden, 85 F.3d at 159. This proposition derives from longstanding precedent "that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent." United States v. Reamer, 589 F.2d 769, 770 (4th Cir. 1978)(citing Wilson v. United States, 162 U.S. 613,

620-21, 16 S.Ct. 895 (1896); United States v. Jamar, 561 F.2d 1103, 1106-07 (4th Cir. 1977).

Respondent submits these longstanding principles support a finding the trial court did not abuse its discretion in admitting the letters written by Appellant into evidence. First, it cannot be said that the letters do not constitute witness intimidation. While Appellant did not threaten harm to the intended recipient, it is clear that he was attempting to sway Nyia's testimony. Thus, while the letters do not neatly fit within example of witness intimidation, it is similarly reflective of consciousness of guilt and criminal intent. Respondent would note that the fact Appellant did not threaten harm to Nyia in the letters also supports a finding that the probative value was not substantially outweighed by danger of unfair prejudice. Altogether, the trial court did not err in finding the letters were admissible.

Any error by the trial court in admitting the letters was harmless.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

There was overwhelming evidence of Appellant's guilt outside of the letters. First, Appellant's co-defendants testified that Appellant was the one who came up with the plan to steal cars from the victim. (R. pp. 141-44, 205-08). Nyia noted that Appellant was the one who first made contact with the victim. Appellant could be tied to the phone number that made the initial calls to the victim about the vehicles the victim intended to sell. Both co-defendants also testified that when they stopped in the parking lot, Appellant attempted to get them to continue with the ruse of a test drive in order to further the attempt to steal the victim's car. (R. pp. 165-67, 227-28, 254-55). Both testified Appellant was the one who brought the gun used in the shooting, and both witnessed Appellant shoot the victim. (R. pp. 149-50, 169, 214, 230, 246).

Appellant's fingerprints were found on the Grand Prix and on a license plate found behind the Grand Prix. (R. pp. 118-21, 125, 282-84, 287-88, 289, 292). Also, video from a Family Dollar reflected Appellant was driving the car the day after the victim was killed. (R. pp. 77-78). The Grand Prix was found abandoned in Greenville. (R. pp. 68-69).

In addition to the physical evidence connecting Appellant to the vehicle and the testimony from his co-defendants, the State also presented evidence that Appellant fled the jurisdiction after the shooting. Both co-defendants indicated Appellant contacted them the next day after hearing that law enforcement was looking into the victim's death. (R. pp. 173-74, 235-36). Over the course of the next few days, the three absconded from the jurisdiction. (R. pp. 175-81, 237-40). Flight from prosecution is admissible as guilt. Thompson, 278 S.C. 1, 292

S.E.2d 581, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). Altogether, the State presented overwhelming evidence of Appellant's guilt of both crimes before the letters to Nyia were presented. As such, any error in admitting the letters was harmless. Appellant's convictions should therefore be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his convictions in the murder of Sean Dinneen and grand larceny.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

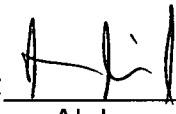
DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville, SC 29601-2185

ATTORNEYS FOR RESPONDENT

By: 
Alphonso Simon Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

August 3, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appeal Case No. 2013-002508

THE STATE

RESPONDENT,

V.

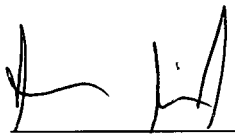
TAVISH DOMINIQUE YEARGIN,

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 3th day of August, 2015.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appeal Case No. 2013-002508

THE STATE

RESPONDENT,

V.

TAVISH DOMINIQUE YEARGIN,

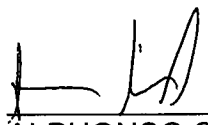
APPELLANT

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., 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, Jeffrey P. Dunleavy, Esq., Stephenson & Murphy, LLC, 207 Whitsett Street, Greenville, South Carolina 29601, and to Robert Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

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

This 3rd day of August, 2015.



ALPHONSO SIMON, JR.
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

August 3, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Tavish Dominique Yeargin
Appeal from Pickens County
Appellate Case No. 2013-002508

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and nine (9) copies of the Final Brief of Respondent in the above-referenced case, together with Certificate of Compliance and Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: Jeffrey P. Dunlaevy, Esq. (w/two copies of encls.)
Robert Dudek, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor, Thirteenth Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)