ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Newberry County
R. Knox McMahon, Circuit Court Judge
2010-GS-36-0503, 2011-GS-36-0505

S.C. Court of Appeals
Appellate Case No. 2013-002209

RECEIVED
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SC SUPREME COURT

THE STATE,

Petitioner,

v.

MANDY LENORE SMITH,

Respondent

APPENDIX

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STATE OF SOUTH CAROLINA

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V.

MANDY LENORE SMITH,

APPELLANT.

APPELLATE CASE NO. 2013-002209

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

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STATEMENT OF THE CASE

On August 5, 2011, the Newberry County Grand Jury indicted Appellant Mandy Lenore Smith of (1) murder; (2) possession of a weapon during the commission of a violent crime; and (3) desecration of human remains. R. 11, ll. 3-12; R.1103 – 1104; R. 1106 – 1107; R. 1109 -1110.

Appellant proceeded to trial on October 7, 2013 before the Honorable R. Knox McMahon and a jury. R. 1. Appellant was represented by Charles V. Verner, and the State was represented by Solicitor David M. Stumbo and Assistant Solicitor Christopher Dale Scott. Id.

On October 11, 2013, the jury found Appellant (1) guilty of murder; (2) not guilty of possession of a weapon during the commission of a violent crime; and (3) guilty of desecration of human remains. R. 1052, ll. 13-22.

On October 14, 2013, Judge McMahon sentenced Appellant to (1) forty (40) years for murder; and (2) ten (10) years for desecration of human remains. Judge McMahon ordered the sentences to run consecutive for a total of fifty (50) years. R. 1077. 19, ll. 12-20.

Appellant timely filed and served her Notice of Appeal.

STATEMENT OF FACTS

The decedent, John Henry Mayers, was reported missing by his family on May 10, 2011. R. 196, ll. 18-21. His family had last seen him on May 7, 2011. R. 161, l. 5 – 162, l. 12; R. 190, ll. 7-22; R. 198, ll. 12-15. Mayers did not show up for work on May 9, 2011. Tr. 168, ll. 19-21. Mayers' family gave law enforcement the name of Appellant during the search for Mayers. R. 192, ll. 17-22.

Appellant grew up in Chapin, South Carolina. R. 806, ll. 7-8. She had lived a difficult life starting when she was a young child. When she was ten years old, she suffered from a condition called hysterical blindness which causes a person to experience temporary blindness when a traumatic event occurs in your mind. It is a type of mental issue. R. 778, l. 17 – 779, l. 21. Appellant had also been sexually molested by her grandfather has a child. Her grandfather was convicted and placed on the sex offender registry for his sexual abuse of Appellant. R. 779, l. 23 – 782, l. 15. When Appellant was about thirteen years old, she was sent to live at the Epworth's Children's Home in Columbia. R. 783, ll. 6-18.

Appellant met Mayers while she was still in high school, around the age of fourteen or fifteen. R. 806, ll. 16-21. Mayers was about eleven years older than her and was in his twenties. R. 806, l. 22 – 807, l. 2. Mayers began a sexual relationship with Appellant. R. 808, ll. 3-5. Mayers also introduced Appellant to crack cocaine, and they would smoke crack cocaine together at least every day. Mayers and Appellant were together off and on until she was about eighteen years old. R. 808, ll. 13-25; 812, ll. 15-19.

About six months after Appellant began the sexual relationship with Mayers, she moved into his family home where Mayer's mother also lived. R. 787, ll. 4-10; 809, ll. 3-10; Mayers' family members confirmed at trial that Appellant lived with the Mayers family

as a teenager. R. 158, ll. 4-18; 181, l. 17 – 182, l. 17; 193, ll. 4 – 17. Mayers' family members also confirmed that Mayers had a crack cocaine addiction. R. 156, ll. 4-10; 159, ll. 17-20; 178, l. 24 – 179, l. 20.

Appellant loved Mayers and that he treated her nicely for the most part, although Mayers was often physically violent toward her. R. 810, l. 5 – 811, l. 7. The acts of violence occurred at least once a week. R. 812, ll. 20-21; 815, ll. 7-9. Appellant also asserted that Mayers would make her have sex with other men in exchange for crack cocaine. These encounters were arranged by Mayers. R. 813, l. 7 – 814, l. 8.

Appellant testified that while Mayers was pleasant and friendly when he was sober, Mayers usually became verbally abusive and aggressive after smoking crack cocaine. R. 814, l. 18 – 815, l. 6. During Mayers' violent episodes, he would slap her and hit her with closed fists. These incidents did not occur in front of Mayers' family. R. 815, ll. 10-18; 816, ll. 12-20. Mayers also punished her by making her have anal sex R. 816, l. 21 – 817, l. 4.

When Appellant was eighteen year old, she moved to Georgia and then to Michigan. R. 817, l. 8 – 820, l. 11. Around 2003 or 2004, she returned to the Lake Murray area and rekindled her relationship with Mayers. That lasted until she got married to a serviceman and moved to Germany for almost two years. R. 820, l, 18 – 821, l. 11.

Appellant got divorced and eventually moved back to South Carolina to a property on Wheeland School Road near Little Mountain. R. 824, ll. 1-6; 826, ll. 7-19. When she moved back to the Little Mountain area, Appellant met a man named Timothy Wise on the internet. She had one sexual encounter with Wise but then they became very good friends because Appellant was not interested in Wise as a boyfriend. R. 828, l. 15 – 830, l. 10.

Appellant believed she met Wise around 2009. As good friends, they saw each other almost every day. R. 831, ll. 6 – 13.

After Appellant had moved back to the Wheeland School Road property, Mayers found out she was back and living there. Mayers showed up at her residence one day. R. 832, ll. 13-21. Appellant and Mayer began seeing each other again and had been seeing each other for six or so months prior to his last being seen on May 7, 2011. They would meet a few times a week. R. 838, ll. 7-13. They often times went to a place out in the woods off of Judy B. Road for their encounters. R. 845, ll. 1-13.

On April 8, 2011, Appellant had a restraining order placed against Mayers because he had come to her property one night and hit her quite a few times. R. 841, l. 12 – 843, l. 23. Timothy Wise and another friend, Kris Hansen, helped Appellant obtain the restraining order. R. 842, ll. 18-20. Kris Hansen testified at trial that the incident which resulted in the restraining order occurred around March 23, 2011 after he and Appellant had returned back to her house from Waffle House. The two were sitting the car chitchatting when "two headlights just popped on and all of sudden [Appellant] was getting hauled out of the passenger side . . . ." Hansen saw "two arms and a fist, pulling her out and beating her." Hansen was able to pull Appellant back into the car. As a result of this incident, Hansen testified at the restraining order hearing, and the restraining order was issued against Mayers. Hansen and Wise were in attendance at the hearing with Appellant. R. 711, l. 22 – 715, l. 2.

Despite the restraining order, Appellant began seeing Mayers again approximately three days after the restraining order was issued. R. 843, ll. 1-4; 844, ll. 6-8. Mayers showed up at Appellant's home. They talked about the restraining order, and Mayers

apologized. Appellant and Mayers resumed a sexual relationship, and they saw each other about three to four times a week. R. 844, ll. 6-23.

When Mayers went missing, Detective Billy Derrenbacher of the Lexington County Sheriff's Office was assigned the case on May 11, 2011. R. 196, ll. 3-21; 198, ll. 16-18. Detective Derrenbacher had been given Appellant's name as someone that might have information on Mayers. R. 200, ll. 8-11. He went out to the Wheeland School Road residence where Appellant had been living, but found an empty trailer. R. 200, l. 18 – 201, l. 2.

Detective Derrenbacher first made contact with Appellant on either May 17 or 18 at the residence of Wise. R. 202, ll. 10-17. He had learned that Appellant was staying there with Wise who lived there with his mother. R. 203, ll. 8-11. Detective Derrenbacher spoke with Appellant that day. He did not speak to Wise. He believed that Appellant had already spoken to Major Wesley Boland of the Newberry County Sheriff's Office the previous day. Appellant acknowledged to Detective Derrenbacher that she had a relationship with Mayers. She told Detective Derrenbacher that she was not seen Mayers in a little while. R. 204, l. 6 – 206, l. 10. Appellant also stated that she had last seen Mayers getting into a vehicle with Elvis Hill. R. 207, ll. 6-11.

Detective Derrenbacher went back to the Wise residence on May 20. R. 207, ll. 23-25. This time Detective Derrenbacher went with Major Boland. They were met by Wise's mother who informed them that Appellant and Wise were not at the house but had gone to Wal-Mart. The officers drove to Wal-Mart to look for Wise's black Ford L450 pickup truck, but did not see the truck in the parking lot. They returned to the Wise residence. Appellant was not at the residence, but this time Wise was there. They spoke with Wise

who indicated that Appellant left in an unknown vehicle with unknown males at the Wal-Mart. R. 208, l. 5 – 209, l. 9. Detective Derrenbacher said they received a telephone call from Appellant indicating that she was out of town and would be more than happy to meet at the Newberry County Sheriff's Department when she returned in about two hours. R. 209, ll. 15-19. He said Appellant did not show up later. R. 210, ll. 13-15.

Detective Derrenbacher spoke with Wise again on May 20 where he provided a written statement. R. 210, l. 16 – 211, l. 3; 238, ll. 14-16. In this statement, Wise said he did not know anything about the disappearance of Mayers and did not kill Mayers or have any part in his disappearance. He also stated that Appellant had not told him that anything had happened to Mayers. He further claimed that he felt Appellant was capable of hurting or killing Mayers in self-defense. Finally, Wise stated that if Appellant did anything, her motive for hurting or killing Mayers would be "fear or blackout rage." R. 238, l. 14 – 240, l. 4; R. 1089; R. 1089 – 1091 (State's Ex. 30).

Major Wesley Boland of the Newberry County Sheriff's Department testified that he spoke with Appellant on May 16 at Wise's home, and that she gave him the name of Elvis Hill. R. 260, l. 21 – 261, l. 18; 263, ll. 2 – 13. On May 22, after Appellant had left town, she called Major Boland and said she wanted to retain an attorney and then turn herself in to speak with law enforcement. On May 23, Appellant, however, did not appear at the Newberry Sheriff's Department. R. 271, l. 19 – 273, l. 7.

Major Boland had gathered information that Appellant was staying at her mother's house in Greenville, and around midnight on the evening of May 24 or the early morning hours of May 25, Major Boland, along with Greenville County officers, arrested Appellant at her mother's house. She was actually arrested and brought in on a forgery charge for

selling Mayers' car to a scrapyard on April 21, 2011 approximately two or three weeks before Mayers went missing. Mayers had not filed any report for a stolen vehicle. Major Boland admitted that he brought Appellant in on the forgery charge so he could further investigate the possible murder of Mayers. R. 273, l. 10 – 277, l. 1.

Major Danny Gilliam of the Newberry Sheriff's Department first became involved in the missing persons case of Mayers when Captain Robert Dennis of the Newberry County Sheriff's Department asked him to speak to Wise. R. 292, l. 11 – 293, l. 15. He asked Wise that if Appellant had wanted to go somewhere or put something somewhere, where would she go. Wise informed Major Gilliam that there was a road out on Brazelman's Bridge Road that she liked to go to. Major Gilliam asked Wise if there was a possibility that she put a body out there and Wise indicated that he did not know. He then asked Wise if he could take the officers out there, and Wise agreed. Major Gilliam, Captain Dennis, and Wise drove out to the area. This occurred on May 25, 2011. R. 293, l. 16 – 294, l. 7.

Wise took them out to Judy B. Road in the Sumter National Forest. As the officers approached, Captain Dennis lowered the windows, and Wise wanted to know why the windows were being lowered. The officers informed Wise that they could possibly pick up a smell. Major Gilliam looked back, and Wise had covered up his nose. Major Gilliam said it was not much further when the smell hit. Captain Dennis said, "I think we are here." R. 296, ll. 1-24; 297, ll. 11-17. Major Gilliam felt that when Wise covered up his nose, he knew the smell was coming and he was anticipating it. R. 296, l. 25 – 297, l. 10; 304, l. 23 – 305, l. 24.

The officers parked at the end of Judy B. Road, started walking, and found the body of Mayers. R. 297, l. 23 – 298, l. 18; 360, ll. 8-22. The body was located in the woods. Captain Dennis also found some shells. R. 300, ll. 6-15.

Captain Dennis testified that on May 20, 2011, Wise gave a statement that he had loaned a gun to Appellant and that Wise had informed law enforcement where the gun was located. Captain Dennis retrieved the gun from the center console of Wise's truck. R. 558, l. 10 – 560, l. 17; 636, ll. 8-10. The State's firearm and tool mark examination expert testified that it was her opinion that this gun had fired the shell casing found where Mayers was killed. R. 353, l. 20 – 354, l. 6; 365, l. 22 -366, l. 2; 372, ll. 8-11. The State's expert could not say whether two bullets retrieved from Mayers' body during the autopsy were fired by this gun, and her opinion as to that was inconclusive. R. 363, l. 23 – 364, l. 13. There was no evidence presented at trial as to any fingerprints found on the gun.

As Major Gilliam had already described at trial, Captain Dennis said that on May 25, 2011, Wise indicated Judy B. Road as a place he thought Appellant might have gone with Mayers. Wise directed Major Gilliam and Captain Dennis out to Judy B. Road. R. 563, l. 11 – 567, l. 11. Captain Dennis also described rolling down the windows to see if there was any smell of decomposition and ultimately smelling an odor. R. 567, l. 12 – 568, l. 2. He confirmed that Wise started covering his nose before any smell could be detected, and in Captain Dennis' opinion, it was clear based on his observation of Wise's behavior that Wise had been close to Mayers' body before. R. 639, ll. 6-20. Captain Dennis said he located the body in the wood line. His body was positioned face down and his arms were outstretched above where his head would be. The head was not located with the body. R. 568, l. 5 - 570, l. 2. Captain Dennis believed that Mayers' body had been dragged into the

woods due to the fact that his hands were outstretched above where the head would have been and the shirt was rolled up. R. 641, ll. 8-16.

Captain Dennis collected a spent cartridge casing as well as a cigarette butt. R. 570, ll. 3-11. SLED was unable to obtain any DNA from the cigarette butt. R. 571, ll. 15-19.

After Wise took Captain Dennis and Major Gilliam to the end of Judy B. Road where Mayers' body was found, he gave another written statement on May 25, 2011. R. 575, ll. 12-15; 577, ll. 5-7; R. 1092 – 1093 (State's Ex. 31). In this statement, Wise said that on May 7, 2011, he was texted by Appellant and asked to call Mayers since she did not have minutes on her phone. Wise called Mayers and advised him that Appellant was moving from the residence on Wheeland School Road and that she no longer wanted anything to do with Mayers. Wise told Mayers that Appellant was going to be safe and she would be happy. Wise said that around 1:00 a.m. on May 8, 2011, Appellant texted him that she was on Brasselman's Bridge Road and needed directions to I-26. Wise said he told her which direction to go. Wise learned Mayers was missing the following Monday and claimed he became suspicious of Appellant when she started becoming paranoid. He further stated in his written statement that he told deputies he thought she might have hidden a body off Judy B. Road which was off Brasselman's because she and Appellant had been there before and since Appellant was on Brasselman's the night Mayers disappeared. R. 1092-1093 (State's Ex. 31); R. 577, l. 17 – 578, l. 11. In this May 25, 2011 statement, Wise still did not put himself at the scene of the crime. R. 578, l. 12-14.

Because Wise mentioned text messages, law enforcement retrieved his phone, but they were unable to retrieve any text messages. Therefore, law enforcement was unable to verify Wise's claims of the texts between Appellant and Wise. R. 578, l. 15 – 579, l. 20.

Captain Dennis met with Wise again on May 26, 2011 after Appellant had already been brought to the Newberry County Detention Center on unrelated charges. R. 580, ll. 1 – 17. On the 26th, Wise admitted being at the dead end of Judy B. Road when Mayers was shot. In this statement, Wise said Appellant texted him that evening and asked him to call Mayers and tell him that she was going to be at the stop sign besides Mr. J's. Wise called Mayers and told him. Then Wise sat down to play cards on the computer. Around 11:30 p.m., Wise said he received another text from Appellant to meet them at the end of Judy B. Road. Wise left his house at 11:45 p.m., went to the end of Judy B. Road and waited approximately twenty-five minutes. Appellant and Mayers then arrived and they stood around talking for about thirty minutes. R. 1094; R. 581, l. 12 – 582, l. 13.

In his statement, Wise claimed that Mayers then walked away from them towards the woods when Appellant pulled out a gun Wise had loaned her which she fired and hit Mayers in the right shoulder area. Wise said Mayers ran and tried to get away in the woods and that Appellant followed and fired one more time and emerged from the woods a couple of minutes later, stating that he was not going to bother her anymore and that she would feel safe. Wise said they then got into their separate vehicles and left. R. 1094 – 1096 (State's Ex. 32); R. 582, l. 13 – 583, l. 16.

Wise also told the officers that on May 19, 2011, he and Appellant returned to the end of Judy B. Road where Appellant removed the skull from Mayers' body and then drove to the Tyger River landing on Maybinton Road where she threw a bucket containing the

head into the river. R. 1094 – 1096 (State's Ex. 32); R. 583, l. 17 – 584, l. 7. After he gave this statement, Captain Dennis drove Wise out to the river where the additional remains of Mayers were recovered. R. 584, l. 8 – 587, l. 9.

Captain Dennis also spoke to Appellant on May 26, 2011. Her interview was conducted after Wise gave his final statement. R. 587, l. 15 – 588, l. 14. In this statement, Appellant advised Captain Dennis of her abusive and drug dependent relationship with Mayers. On the night of May 7, 2011, she and Mayers were together but they began having an argument about her moving from her Wheeland School Road residence. Captain Dennis said Appellant told him that she tried to calm Mayers down but that she then snapped. She said the gun she used was a gun she received from Wise after she had obtained a restraining order against Mayers. She did not remember a portion of what happened. She blacked out after Mayers hit her numerous times and when she "came out of blackness," she was holding the gun and Mayers was lifeless on the ground in front of her. Appellant said that Wise had no knowledge of what had happened until it was done and then Wise freaked out and left. Appellant said she went back a week later and removed Mayers' head and took it to the river. R. 1080 – 1083 (State's Ex. 19); R. 593, l. 9 – 597, l. 21.

Captain Dennis spoke with Appellant again on June 10, 2011 after she wrote a letter asking to revise her statement. R. 599, ll. 5 – 22. Appellant told Captain Dennis that everything she said about her abusive relationship and drug use with Mayers was true. R. 600, ll. 19-21.

Appellant then said that on May 7, 2011, she texted Wise around 10:00 p.m. to call Mayers so he would come hang out with Appellant. She picked Mayers up at a house about an hour and a half later. She texted Wise and let him know where she was going because

she always let Wise know where she was. When she and Mayers arrived at their destination, Wise was already there. Appellant asked Wise why he was there and he said he had a feeling of need to be there. Appellant thought Wise was being protective. The three talked for a while. Mayers was behind Appellant holding her when she was suddenly pushed to the ground. She heard a shot and when she looked up, Mayers and Wise were struggling with each other. Appellant screamed at Wise. Mayers took off running. Wise chased him, and Appellant heard a second shot. Appellant went to look at Mayers, and Wise grabbed her and pulled her away from Mayers. Wise told Appellant that he would kill her and her animals if she told anyone. She said Wise forced her to later return with him and remove Mayers' head. Appellant said Wise tossed it in the river. R. 1084 – 1086 (State's Ex. 20); R. 601, l. 10 – 603, l. 19.

Dr. Janice Ross conducted an autopsy on the body of Mayers on May 26, 2011. R. 324, l. 23 – 325, l. 4. The body was brought to her for analysis and the head was brought in separately for her to analyze. She also went out to the scene and observed the body as it was found at the Sumter National Forest. She testified that the body was lying face down with the arms outstretched above where the head would be located. R. 325, l. 10 – 326, l. 14.

During the autopsy, Dr. Ross found two bullets underneath the skin of the back. One bullet was located in the right midback and the other was close to the left shoulder, again in the back underneath the skin. R. 327, ll. 7-10. Dr. Ross found a hole defect in the fourth rib on the right which she testified was consistent with an entry wound which meant that at least one bullet went from front to back. R. 330, ll. 15 – 23. Her opinion was that Mayers' cause of death was the gunshot wounds to the chest. R. 332, ll. 21-24.

At trial, Wise testified against Appellant. He confirmed that he met her in 2009 on the internet and that they had sex when they first met. R. 384, ll. 5 – 20. Wise testified that they only had sex the one time and then became friends after that. R. 385, ll. 2-7.

Wise said that he only met Mayers twice through Appellant. R. 383, ll. 18-23. Wise helped Appellant to obtain the restraining order against Mayers. R. 545, ll. 21-23. Wise claimed that after Appellant obtained a restraining order against Mayers, she asked Wise if she could borrow a gun for her protection and to protect her animals. Wise testified that he gave Appellant a gun that belonged to his father. R. 390, ll. 4-14.

Wise testified that Appellant was living at the Wheeland School Road residence but she had fallen behind on her utility bill so the landlord told her she would need to find somewhere else to live. R. 392, ll. 18-25. The first week of May 2011, Wise helped Appellant move out of this property. Wise also helped Appellant obtain a utility building that Wise's father said she could place on his property. Appellant was planning to move all of her possessions into this utility building. She was also going to live in this building, to which Wise ran electricity and installed an air conditioner, until she could find a permanent place. R. 393, l. 1 – 394, l. 16.

Wise and two friends of Appellant, Don Buford and Drew, helped Appellant move her possessions. Wise used his black pickup truck, Buford used his white pickup truck, and Drew used his car to help move Appellant's possessions. On Saturday, May 7, 2011, Appellant, Wise, and Buford were continuing to help Appellant move. Appellant wanted to let Mayers know that she was moving that day. Because she did not have any minutes on her phone, she asked Wise to call Mayers to tell Mayers that if he wanted to see Appellant that day, she would be in Chapin that afternoon. Wise called Mayers and told him that

Appellant was going to be at Mr. J's gas station and Mayers responded "all right." This was around 3:30 in the afternoon. Wise said he stayed at home. R. 396, l. 13 – 398, l. 11.

Wise testified that later that evening, Appellant and Buford brought another truck load over to his house and after that Appellant had Wise call Mayers. Apparently, Appellant went to Mr. J's that afternoon, but Mayers left in a vehicle with someone else. Wise said he called Mayers for Appellant, and Appellant and Buford left his house. Later in the evening, Wise said Appellant texted him and asked if he wanted to come hang out with her and Mayers at Judy B. Road. He told her he would be out there in a little while. R. 398, l. 16 – 400, l. 19.

Wise said he got to Judy B. Road first. Then, approximately twenty-five minutes later, Appellant and Mayers showed up, around ten minutes before midnight. They drove up in Buford's white pickup truck which Appellant had borrowed from Buford. Wise said the three of them sat around and talked for about twenty-five to thirty minutes. His black pickup truck was parked side by side with the white pickup truck. R. 402, l. 11 – 403, l. 19. Mayers and Appellant were hugging on each other. R. 404, ll. 2-3. Eventually Appellant and Mayers walked off to smoke crack. R. 404, ll. 16-19. They walked about forty-five to fifty feet away. R. 405, ll. 2-3.

Wise testified that the next thing that happened was he heard a gun go off and then Appellant and Mayers came running past him. Wise said he could see that Mayers had been shot in the upper right shoulder. He said he was in shock, and Mayers was screaming. He said Appellant was screaming too. Wise testified that Mayers ran into the woods, and Appellant followed him. Wise then heard another gunshot. He claimed that Appellant then came out of the woods holding the gun and lit up a crack pipe. Wise also alleged that

Appellant said she felt safe and that Mayers would not bother her anymore. Wise left and went back to his house. He did not get the gun back at that time. R. 405, l. 12 – 406, l. 24.

Wise testified that he saw Appellant the next day around noon when she and Buford brought another truck load to his house. R. 408, ll. 19-25. Wise claimed that, later that week when helped Appellant finish moving, he found the gun in one of the boxes. He took it, wrapped it in some cloth, and put it in the console of his truck. R. 409, l. 15 – 410, l. 1; 472, l. 5 – 473, l. 2.

Wise then claimed that after law enforcement had come by to talk to Appellant, she told Wise she had to go back out to Judy B. Road. Wise drove her out there, alleging he did not know what she was planning to do. He said Appellant put on some latex gloves and removed Mayers' head and put it in a bucket that had been in Wise's truck. Wise said he then took Appellant down the road to the Tyger River, into which she threw the remains. R. 410, l. 2 – 412, l. 24; 489, ll. 5-15.

Wise contended that while he had a part in the desecration of the remains, he had no part in the initial shooting. R. 420, ll. 13-24. He was also adamant that he and Appellant did not commit the crime together. R. 517, ll. 22-24. Wise was charged with murder on May 27, 2011. R. 422, ll. 1-3. The charges were still pending against Wise during Appellant's trial. R. 422, ll. 4-8. He admitted he was hoping for leniency in exchange for his testimony against Appellant. R. 513, ll. 5-7.

Wise admitted that he had owned a concealed weapons permit that expired in 2011 after Mayers' death. R. 429, l. 19 – 430, l. 1. Wise also admitted telling Appellant's mother that he loved Appellant and that she was like a big sister to him. He would not admit

that he was jealous of her relationships with other men, including Mayers. R. 437, l. 3 – 439, l. 13. He did say that Appellant was his best friend. R. 538, l. 17.

Samantha Wright was a friend of Appellant's and had known her for about two years. R. 697, l. 3 – 698, l. 13. She never saw Appellant carry a gun. She saw Appellant about a week before Mayers was killed and did not see Appellant carrying a gun then. R. 702, l. 23 – 703, l. 14. Wright also testified that while she never saw Mayers hit Appellant, she went over to Appellant's house one day and Appellant had a black eye. Appellant told Wright that Mayers had punched her in the face. R. 707, ll. 7-15.

Don Buford had been a good friend of Appellant's for over ten years and had been romantically involved with her at one time. R. 722, l. 4 – 724, l. 3. Appellant owned many rescue dogs and loved them like they were her children. R. 725, l. 14 – 726, l. 13. Wise shot and killed one of her dogs because that particular dog was not "adapting well" with the others. R. 733, l. 21 – 735, l. 5.

Buford had never seen Appellant shoot any kind of gun or rifle. R. 735, ll. 22-25. He had never seen Appellant carry the gun that was retrieved from the console of Wise's truck. R. 736, ll. 3-4. Buford testified that he had seen Wise carry a gun, usually tucked into his belt or in his jacket. Wise seemed to have an interest in guns. R. 736, l. 9 – 737, l. 20. During Buford's testimony, photographs of Wise holding a gun were admitted as evidence. R. 738, l. 1 – 746, l. 16; R. 1097 (Defendant's Ex. 7); R. 1098 (Defendant's Ex. 8).

Buford further testified that when he was helping Appellant move in May 2011, he never saw any gun or her carrying a gun. R. 753, l. 19 – 757, l. 3. Buford was there on

May 7, 2011 when Appellant left that night. When Appellant returned after midnight on May 8, 2011, Buford did not see her with a gun. R. 758, l. 4 – 760, l. 18.

After Appellant had moved into the place behind Wise's house, Wise remained constantly in her presence. Around May 15, 2011, Wise told Buford that he was no longer welcome to visit. R. 763, l. 6 – 764, l. 20.

Appellant testified in her defense at trial. She testified that Wise carried a gun and a holster on his side quite often. R. 834, ll. 2-5. Wise had never given her a gun because of the restraining order against Mayers, and the only gun he had ever given her was something that looked like a little play gun with a plastic handle that was barely hanging on. It sat on her table and was just a conversation piece. R. 836, l. 8 – 837, l. 25; R. 843, l. 24 – 844, l. 1.

On May 7, 2011, she was in the process of moving from Wheeland School Road to a shed behind Wise's house because she was late paying her light bills. R. 840, ll. 9-25. Wheeland School Road was fairly close to where Mayers lived. She was moving to the other side of the county, and Mayers was not really happy about her move. R. 845, l. 17 – 846, l. 5.

Wise and Buford helped her move that day. At some point that afternoon, Appellant called Mayers from Wise's house and she was supposed to meet up with Mayers at Mr. J's but by the time she got there, Mayers had already been smoking crack and wanted to go off with his friends. R. 846, l. 6 – 847, l. 8.

Later that evening, Appellant used Wise's phone to call Mayers and asked Mayers if he wanted to meet up later. Wise was right there when Appellant called Mayers. Mayers agreed to meet Appellant. Appellant left in Buford's white pickup truck around 10:30 or

11:00 to go meet Mayers. R. 852, ll. 4 – 22. Appellant's intention for meeting Mayers that night was to have a sexual encounter. Appellant had told Mayers that she would pick him up around 9:30 that night at Mr. J's but she was running late. She texted Wise and asked him to call Mayers to let him know that she would be late picking him up. R. 854, l. 10 – 855, l. 11.

Appellant picked up Mayers and drove to Judy B. Road. Appellant said that Wise knew she was going out to Judy B. Road. When Appellant and Mayers arrived, Wise was already out there. Appellant testified that she did not invite Wise out to Judy B. Road, that he and Mayers were not buddies, that Wise did not tell her beforehand that he was coming out there, and that she did not expect to see Wise out there that night. R. 856, l. 3 – 857, l. 23. The lights of Wise's black pickup truck were not on when she and Mayers drove up. R. 857, l. 23 – 858, l. 4.

Mayers wondered why Wise was out there, and Appellant told him that she did not know. R. 858, ll. 5-10. Appellant asked Wise why he was out there and he responded that he just felt the need to be there. Appellant believed Wise was just probably lonely, that he would probably hang out for an hour and then leave. She did not think too much of it. R. 860, l. 20 – 861, l. 4.

Appellant and Mayers got out of the truck. Mayers stood in front of Appellant, and she had her arms wrapped around him. The three of them talked for about forty-five minutes. Then Wise went over to his truck and was texting on his phone. Appellant and Mayers kind of wandered off to talk to each other alone. Mayers had his arms around Appellant, and the next thing she knew, she was pushed to the ground and there was a gunshot. She did not know where Mayers was hit. R. 861, l. 12 – 20; 866, l. 5 – 868, l. 3.

Appellant testified that when she was pushed to the ground, she landed forward on her right knee. She had previously broken both of her ankles and therefore could not run fast or well at all. When she was on the ground, she looked back and saw Mayers and Wise together towards where the white pickup truck was parked. Appellant said it looked like Mayers was struggling to get the gun away from Wise. Mayers yelled at Appellant to run, and Mayers ran in the opposite direction. Wise chased Mayers. Appellant struggled to get up, and she heard the gun again. Appellant finally got to Mayers and he was lying on his back. Wise grabbed her and pulled her back to the white pickup truck. She and Wise stayed at the scene for about ten minutes later. She was sitting in the truck, crying and trying to figure out what just happened. R. 869, l. 2 – 874, l. 12.

Appellant denied forming any agreement with Wise to harm Mayers that night. She was not aware that Wise had intended to harm Mayers. R. 874, ll. 13-18.

Appellant drove back to her Wheeland School Road residence. She spent the next day moving. Appellant later asked Wise why he did what he did and he told her that she would never be away from Mayers any other way. Appellant did not feel like she could call the police because Wise never left her side and stayed with her all the time. R. 874, l. 19 – 879, l. 25. Whenever she opened the door to the shed she was living in, Wise would be right there. R. 880, ll. 1-6. Wise also threatened her and stressed that if she told anyone, he could kill her animals and her family. R. 880, ll. 7 – 16.

After the police had visited them, around lunchtime on May 19, 2011, Wise wanted to return to the Judy B. Road area. As they were driving out there, Appellant asked Wise what they were doing and he told her "you will see." When they got to the end of Judy B. Road, Wise pulled her out of the truck and took her to the body. He stood next to her with a

gun, made her put on a pair of gloves, and forced her remove the head with a knife that he gave her. Wise told her if she did not do it, he would kill her dogs and family. Appellant put the head in a bag which Wise put in a bucket. Wise then drove to the river and threw the bag in the river. He threw the bucket in the woods. R. 885, l. 5 – 897, l. 6.

When she was brought in by law enforcement and gave her first statement on May 26, 2011 where she said that she had killed Mayers, she only made that statement because she thought Wise was not in jail and would harm her family and animals if she told the truth. R. 917, l. 19 – 918, l. 4. Once she learned that Wise was being detained at the Newberry County Detention Center, she recanted her May 26, 2011 statement and made her June 10, 2011 statement asserting Wise had shot Mayers. R. 920, l. 1 – 924, l. 10.

ARGUMENT

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

At the close of the State's case, Appellant argued to the Trial Court that any charge on accomplice liability would be improper where there was no evidence that Appellant and Wise were acting in concert as to the murder of Mayers. Appellant pointed out that the State's theory of the case was that Appellant was the shooter while Appellant's theory of the case was that Wise was the shooter. There was no evidence that the two were acting together when Mayers was shot. R. 690, l. 22 – 691, l. 6.

The Trial Court denied the motion, finding texts from Appellant to Wise letting him know that she and Mayers were going to hang out and Wise's testimony that Appellant invited him to join them were sufficient to show "acts of preparation." The Trial Court additionally opined that Appellant, who had alleged physical and mental abuse by Mayers for years, may have wanted another adult male with her that night when she was with Mayers. The Trial Court believed the jury could infer from that evidence that the two were acting together such that the doctrine of "the hand of one is the hand of all" would apply. R. 691, l. 7 – 692, l. 11.

Prior to closing arguments and the Trial Court's charge to the jury, the Trial Court again advised the parties that he would be charging accomplice liability. R. 957, ll. 20-23. The Trial Court charged the jury:

Hand of one, the hand of all. If a crime is committed by two or more people who are acting together in committing a crime the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable and natural consequence of the acts done in carrying out the common plan and purpose.

For example. If two people set out to rob a convenient [sic] store and one goes in the store with the gun and the other stays outside as the lookout. There may be just one in there with the gun, armed robbery, the other may be outside as the lookout. But as the natural and probable consequence the hand of one is the hand of all and both are guilty of the crime of the armed robbery although only one robber went into the convenient [sic] store.

If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all or as it is said under our law sometimes, the hand of one is the hand of all. Prior knowledge that a crime is going to be committed, without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict a defendant as the principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal.

The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. A principal in a crime is the one who either actually commits the crime or who is present aiding, abetting or assisting in the commission of the crime. When a person does an act in the presence of and with the assistance of another the act is done by both. Where two or more people acting with a common plan or intent are present at the commission of a crime it does not matter who actually commits the crime, all are guilty. Again, the hand of one is the hand of all.

Presence at the commission of a crime means to be sufficiently near to aid, abet and assist in the commission of the crime. However, mere presence at the scene of the crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element. For there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurred, not accidentally or involuntary intent. Intent may be shown by acts and conducts of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

R. 1033, l. 1 – 1035, l. 3.

At the conclusion of the Trial Court's charge to the jury, Appellant renewed her objection on the hand of one is the hand of all charge and argued there were no facts presented at trial that would allow a jury to reach the inference that Appellant and Wise were acting together as to the murder of Mayers. The Trial Court affirming its initial ruling, stating that the text message from Appellant telling Wise where she would be that night could be interpreted as a conspiracy. The Trial Court also found that the evidence that Wise assisted Appellant in obtaining a restraining order and gave Appellant a weapon was sufficient to show a conspiracy. R. 1039, l. 19 – 1040, l. 8.

After the jury began its deliberations, it submitted a note to the Trial Court asking, "Can we have a copy of the statement regarding the hand of one, hand of all?" R. 1041, ll. 12-18; R. 1099 (Court's Ex. 3). The Trial Court then repeated the charge to the jury and then gave the jury a copy of the charge. R. 1041, l. 21 – 1046, l. 1.

The jury then sent out another note that asked, "In agreeing that she is guilty, is that saying we think she actually shot [Mayers]?" R. 1046, ll. 7-10; R. 1110 (Court's Ex. 4). The Trial Court again charged the jury:

> You can be guilty of murder, either as the individual who fired the shot or under the theory of accomplice liability. Either one of those theories you are guilty as the principal. Two people could be guilty of the charge of murder even though only one weapon was used even though only one round was shot.

R. 1046, ll. 19-24.

The Trial Court erred in charging the jury as to the theory of accomplice liability with respect to the charge of murder. "In criminal cases, appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the

trial court abused its discretion." State v. Miller, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

Under the "hand of one is the hand of all" theory of accomplice liability, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. . . . Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (internal citations omitted).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct. . . . Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. . . . Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Id. at 480, 697 S.E.2d at 584 (internal citations omitted).

"To admit evidence under [the accomplice liability] theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown." State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999).

The State presented no such evidence of a common plan or design between Appellant and Wise to murder Mayers. The State's theory of the case was that Appellant shot and killed Mayers. Wise, who the State presented and swore to tell the truth, averred that he had no knowledge that Appellant was allegedly planning to shoot Mayers that night.

If this was a lie, the State had no business presenting him. See State v. Wills, 762 S.E.2d 3, 14 (2014) (Beatty, J. dissenting). He testified the only reason he was at Judy B. Road on May 7, 2011 was because Appellant invited him to hang out with her and Mayers. He claimed that the first shot occurred when Appellant and Mayers were about forty-five to fifty feet away from him smoking crack. Wise contended he was in shock after the shooting. R. 398, l. 16 – 400, l. 19; 404, ll. 16-19; 405, ll. 2-3; 405, l. 12 – 407, l. 24. Wise, the State's very own witness, testified that he did not commit the murder of Mayes with Appellant. R. 517, ll. 22-24

Appellant, on the other hand, maintained at trial that she did not shoot Mayers. The jury likely believed her because they found her not guilty of possession of a weapon during the commission of a violent crime. R. 1052, ll. 17-19. Appellant testified that she and Mayers were off talking alone together when she was suddenly pushed to the ground and heard a gunshot. She looked up and saw Mayers was struggling to get the gun away from Wise. Wise then chased Mayers and she heard another gunshot. R. 861, l. 12 – 20; R. 866, l. 5 – 868 l. 3; R. 869, l. 2 – 874, l. 12. Appellant asserted that she had no idea that Wise was planning to harm Mayers that night. R. 874, ll. 13-18.

The evidence points to either Wise or Appellant shooting or killing Mayers and committing such act alone. Therefore, the theory of accomplice liability is not applicable in this case. See Wilds v. State, 407 S.C. 432, 439-40, 756 S.E.2d 387, 390-91 (Ct. App. 2014) (holding charge of accomplice liability was improper where the only evidence presented was that the defendant was the shooter and the co-defendants jointed in the robbery after the defendant pulled the gun on the victim).

The Trial Court thought that text messages between Appellant and Wise that evening – text messages which were not retrieved by law enforcement – were sufficient to support the charge of accomplice liability. Wise claimed Appellant texted him and invited him to come hang out with Mayers and Appellant at Judy B. Road. R. 398, l. 16 – 400, l. 19. Appellant testified that she had planned to meet Mayers at Judy B. Road for a sexual encounter but was running late to pick Mayers up so she texted Wise and asked him to call Mayers to let him know that she would be a little longer. She texted Wise again and asked him to call Mayers to let him know that she was on her way to pick up Mayers. R. 852, ll. 8-15; 860, ll. 1 – 11. Appellant further asserted at trial that she never invited Wise out to Judy B. Road and did not expect him to be there when she and Mayers arrived. R. 857, ll. 12-23.

These text messages show nothing more than regular, everyday conversations between acquaintances and do not demonstrate that Appellant and Wise intended to join together in a common design to achieve an illegal purpose, namely killing Mayers. That Wise assisted Appellant in the legal act of obtaining a restraining order against Mayers in the weeks before his death likewise does not show that he and Appellant planned to kill Mayers together on the evening of May 7, 2011. Another man, Kris Hansen, also assisted Appellant in obtaining the restraining order and there is no suggestion by the State that he was a part of this supposed common plan or design to kill Mayers. That Wise allegedly gave Appellant a weapon for protection weeks prior to the murder after the restraining order was issued does not show that either knew ahead of time that the other one was planning to kill Mayers on May 7, 2011. This scant evidence relied upon by the Trial Court is not sufficient to support a theory of accomplice liability.

In State v. Dickman, 341 S.C 293, 534 S.E.2d 268 (2000), the Supreme Court held there was sufficient evidence that the defendant and the driver of the car in which the victim was killed were acting pursuant to a plan to kill the victim to support charging the jury on the theory of accomplice liability. The Court stated that the "critical question [was] whether there [was] any evidence [the defendant] and [the driver] were acting together at the time of the killing . . . ." Id. at 296, 534 S.E.2d at 269.

The Court in Dickman determined that the following evidence supported demonstrated that the two were acting pursuant to a plan to kill the victim at the time of the murder: (1) testimony from the defendant that the driver asked him to kill the victim because the victim was always behind on rent; (2) the defendant told another friend that the murder would happen on a Sunday and the murder did in fact occur on a Sunday; (3) on the day of the murder, the driver tried to collect the rent from the victim without success; (4) when the driver subsequently saw the defendant, the driver's first words to the defendant were "do it;" (5) the defendant testified that he knew what the driver meant by those words; (6) immediately thereafter, the driver called the victim and arranged to pick him up for the fatal ride; (7) while they were driving, the defendant found the gun under a seat where the driver put it; (8) the defendant picked up the gun for the driver to see in the rear view mirror; (8) the defendant lost his nerve to shoot; and (9) the driver eventually shot the victim. Id.

Appellant's case lacks evidence of any of the type of planning that was present in Dickman. In Dickman, it is clear that the two men were acting together where there was direct evidence that the driver asked the defendant to kill the victim for him, told the defendant it was time to "do it," and left a gun for the defendant under a seat in the car in which they had picked the victim up for a ride. There is no such evidence in this case.

In State v. Thompson, 374 S.C. 257, 263-64, 647 S.E.2d 702, 706 (2007), this Court held that the State presented sufficient evidence under the "hand of one is the hand of all" theory of accomplice liability to impute acts committed by a co-defendant to the defendant.

The two co-defendants in the Thompson case were both charged with first degree burglary and attempted armed robbery. Id. at 261, 647 S.E.2d at 704. The court found sufficient evidence of defendant Thompson's guilt under the theory of accomplice liability where Thompson had discussed the robbery with others prior to it occurring, had appeared at the crime scene with his co-defendant, and may have viewed the attempted robbery. Id. at 263, 647 S.E.2d at 705. The court also found that at a minimum, Thompson aided the commission of the crime by driving his co-defendant to the scene and encouraged the crime by setting the events in motion earlier that day through his meetings with others about a potential target for a robbery. Id. at 260, 263, 647 S.E.2d at 704-706.

Unlike the facts in Thompson, the State presented no evidence at trial that Appellant and Wise ever planned or discussed killing Mayers. The only evidence at trial showed that one or the other killed Mayers and the other was simply present at the scene with no knowledge of what was about to occur. Cf. State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007) (holding evidence that defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion positing that there was insufficient evidence to show that the two defendants were acting in concert); State v. Condrey, 349 S.C. 184, 194-95, 562 S.E.2d 320, 324-25 (Ct. App. 2002) (concluding evidence supported accomplice liability charge where State presented direct evidence that the defendant and a retail shoe store delivery driver acted together to steal shoes by showing that the defendant

approached the driver about getting some shoes, the two men planned several meetings where the driver unloaded shoes off his truck onto the defendant's vehicle, the defendant paid the driver for the shoes, and the defendant sold the shoes at a flea market).

The Trial Court's charge to the jury on the theory of accomplice liability was not harmless. The jury asked to hear and have written charges on the hand of one is the hand of all. R. 1041, ll. 12-18; R. 1099 (Court's Ex. 3). The jury then asked the Trial Court, "In agreeing that she is guilty, is that saying we think she actually shot [Mayers]?" R. 1046, ll. 7-10; R. 1110 (Court's Ex. 4). The jury then ultimately found Appellant not guilty of possession of a weapon during the commission of a violent crime, indicating that it most likely believed that Appellant was not the shooter. R. 1052, ll. 17-19. Therefore, it is reasonable to infer that the jury convicted Appellant under the theory of accomplice liability.

The evidence did not support a theory of accomplice liability, and the Trial Court committed a reversible error of law in giving the jury the "hand of one is the hand of all" instruction. The Trial Court's error in giving this jury instruction was not harmless. Accordingly, this Court should reverse the Trial Court's decision to instruct the jury as to the "hand of one is the hand of all" as to the murder charge and remand for a new trial.

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

Major Boland testified that prior to Appellant's arrest, she called him on Sunday, May 22 and advised him that she would turn herself in on Monday but stated that she wanted to retain an attorney to come with her before she turned herself in to the police. R. 271, l. 19-273, l. 7; see also R. 92, ll. 19-21. However, before she could retain an attorney, Appellant was arrested around midnight on May 24, 2011, told she needed to "come clean" by Major Boland during the trip to the detention center, taken to jail where she was put in a prison jumpsuit and shackles, and then sent in on May 26, 2011 to give a statement to Captain Dennis. R. 30, ll. 15-22; R. 34, ll. 14-16; R. 47, l. 16 – 81, l. 19; R. 92, ll. 22-24; R. 93, l. 23 – 94, l. 1; R. 95, l. 18 – 97, l. 13. While Appellant was read her Miranda[1] rights, the investigators never adhered to her previous request for an attorney. R. 30, ll. 19-22; 55, ll. 6-19.

Following both the Jackson v. Denno[2] hearing and during trial when the State introduced Appellant's May 26, 2011 statement, Appellant objected to the admissibility of the statement where Appellant had informed police that she wanted a lawyer present before she spoke to them. The Trial Court denied the motion to suppress the May 26, 2011 statement. R. 122, l. 9 – 130, l. 9; 588, l. 25 – 590, l. 4.

Law enforcement's interrogation of Appellant after she advised them that she wanted to retain an attorney before she turned herself in and spoke with them and the Trial

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Jackson v. Denno, 378 U.S. 368 (1964).

Court's subsequent refusal to suppress Appellant's May 26, 2011 statement violated long-standing precedent of the United States Supreme Court. In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that where a defendant had invoked his right to have counsel present during custodial interrogation, valid waiver of that right could not be established by showing only that he responded to police-initiated interrogation after being again advised of his rights; thus, use of defendant's confession against him at his trial violated his rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.

In Edwards, the Court observed that "Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'" 451 U.S. at 485 (quoting Miranda, 384 U.S. at 474). In Fare v. Michael C., 442 U.S. 707, 719 (1979), the United States Supreme Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

Edwards stands for the principle once an accused expresses a "desire to deal with the police only through counsel, [the accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, 451 U.S. at 484-85.

In Montejo v. Louisiana, the United State Supreme Court recognized:

> The Edwards rule is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights. It does this by presuming his post-assertion statements to be involuntary, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This prophylactic rule thus

> protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence.

556 U.S. 778, 787 (2009) (internal citations omitted).

Major Boland confirmed at trial that Appellant advised him that she wanted to retain an attorney before she turned herself in to speak to police. R. 272, l. 24 – 273, l. 7. Therefore, under Edwards, the police were prevented from interrogating Appellant without an attorney present. The signing by Appellant of a form waiving her Miranda rights is presumed involuntary. The use of her May 26, 2011 confession against her at her trial violated her rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. The Trial Court erred in refusing to suppress the statement, and Appellant is entitled to a new trial.

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

Counsel for Appellant requested the Trial Court to charge the lesser included offense of voluntary manslaughter, arguing that the statements of Appellant and Wise that the State had introduced as evidence supported the charge of voluntary manslaughter. R. 953, ll. 9-19. The solicitor responded that the charge of voluntary manslaughter was inappropriate because the defense had indicated that it was standing on Appellant's second statement that Wise was the shooter. The solicitor argued that Appellant was not entitled to inconsistent defenses. R. 953, l. 22 – 954, l. 8.

Counsel for Appellant argued in response that the State, by introducing all the statements, was the party who introduced different theories of how the murder happened and that at least one of the State's theories supported the charge of voluntary manslaughter. Appellant pointed out to the Trial Court that the only issue was whether there was any evidence in the record that would support the voluntary manslaughter charge. R. 954, l. 10 – 955, l. 3. The Trial Court, while recognizing that Appellant could present inconsistent defenses, nevertheless ruled that there was neither evidence of sufficient legal provocation nor sudden heat of passion to warrant the charge of voluntary manslaughter. R. 956, l. 15 – 957, l. 6.

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no

evidence whatsoever tending to reduce the crime from murder to manslaughter." Cole, 338 S.C. at 101, 525 S.E.2d at 513.

Manslaughter is defined as "the unlawful killing of another without malice." S.C. CODE ANN. § 16–3–50. This Court has expounded upon the definition of voluntary manslaughter:

> Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.

Cole, at 338 S.C. at 101, 525 S.E.2d at 513 (internal citations omitted).

Viewing the evidence in the light most favorable to Appellant, a charge of voluntary manslaughter was warranted in this case. The State introduced both of Appellant's statements at trial. In her first statement to police made on May 26, 2011, Appellant advised Captain Dennis that on the night of May 7, 2011, she and Mayers were together but they began having an argument about her moving from her Wheeland School Road residence. Appellant stated she tried to calm Mayers down but that she snapped. She said that Mayers hit her numerous times and then she blacked out. When she "came out of blackness," she was holding the gun and Mayers was lifeless on the ground in front of her. R. 1080 – 1083 (State's Ex. 19); R. 593, l. 9 – 597, l. 21.

Were a jury to believe the facts as represented in Appellant's first statement, then she and Mayers were in a heated encounter and he had hit her numerous times before she shot him. It follows that a charge on voluntary manslaughter was required. See State v. Knoten, 347 S.C. 296, 306, 555 S.E.2d 391, 396 (2001).

In regard to what constitutes sufficient legal provocation, "This Court has previously held that an overt, threatening act or a physical encounter may constitute

sufficient legal provocation." State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). In her May 26, 2011 statement, Appellant asserted that she and Mayers were in the midst of an argument about her moving and that Mayers hit her numerous times. The physical violence used by Mayers on Appellant constitutes legal provocation.

In regard to what constitutes heat of passion, this Court has held, "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Knoten, 347 S.C. at 303, 555 S.E.2d at 395.

In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011), this Court wrote, "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)."

According to Appellant's first statement introduced by the State, Appellant shot Mayers during the course of a heated argument. Mayers had inflicted physical abuse upon Appellant in the past and was hitting her numerous times that night. Per her statement, she "snapped." This is precisely the types of circumstance that produces the uncontrollable impulse to do violence required for voluntary manslaughter. The

shooting, if a jury believed Appellant's first statement, was done in the heat of passion and not with malice.

Viewing the evidence in the light most favorable to Appellant, there is evidence of both sufficient legal provocation and heat of passion. The Trial Court therefore erred in refusing to charge voluntary manslaughter, and Appellant is entitled to a new trial.

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

During both Don Buford's and Appellant's testimony, counsel for Appellant wanted to introduce testimony that Wise had previously shot and killed two or three of Appellant's dogs without any justification. The Trial Court held that the testimony was not admissible under Rule 608, SCRE which prohibits "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility." R. 750, l. 10 – 752, l. 23; 864, l. 12 – 865, l. 18.

Appellant argued that she was not offering the evidence to attack the character or credibility of Wise, but rather to show Appellant's state of mind that she had a reasonable fear for her own safety and for her other dogs to explain her actions that occurred after the murder of Mayers on May 7, 2011. R. 864, l. 24 – 865, l. 4.

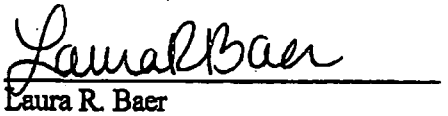
The testimony that Wise had previously shot and killed some of Appellant's dogs was not inadmissible under Rule 608. The United States Court of Appeals for the Fourth Circuit, in interpreting the counterpart federal rule, has recognized that while it is true that extraneous evidence of misconduct cannot be introduced to impeach a witness, United States v. Blackshire, 538 F.2d 569, 572 (4th Cir. 1976), it is equally true that Rule 608(b) should not be read so broadly as to disallow the presentation of extrinsic evidence that is probative of a material issue in the case. United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985). Interfering with the admission of such extrinsic evidence would be inconsistent with "the goal of ascertaining the truth in judicial proceedings." Id.

Rule 608 did not prevent the admissibility of testimony that Wise had previously shot and killed Appellant's dogs where Appellant was not offering such evidence to impeach Wise's credibility. Rather, Appellant intended to use this evidence to explain why she feared Wise and to explain her actions after the murder, including her not going forward to the police, her participation in the desecration of remains for which she was convicted and received a consecutive sentence, and her giving a false confession initially to police. The Trial Court therefore erred in ruling that the evidence was inadmissible under Rule 608, and Appellant is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Mandy Lenore Smith requests this Court to reverse her convictions for murder and desecration of remains and remand for a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of May, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

May 18, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT.

APPELLATE CASE NO. 2013-002209

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Kaycie S. Timmons, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of May, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of May, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA

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THE STATE,

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MANDY LENORE SMITH,

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APPELLATE CASE NO. 2013-002209

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ARGUMENT IN REPLY

The State concedes that under the applicable precedent of State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001), the trial court erred in failing to charge the jury on the law voluntary manslaughter. This error was not harmless.

The State concedes that the trial court erred in denying Appellant's request to charge voluntary manslaughter because the charge was warranted based on Appellant's first statement to law enforcement. Resp. Brief p. 29. Appellant's first statement, made May 26, 2011, was referenced in testimony, admitted into evidence, and referenced in the State's closing argument. However, the State argues that this Court should find the error harmless, arguing that there was "little development of the information provided by Appellant in her May 26th statement." Resp. Brief p. 31. The State further threatens that it will appeal any favorable decision of this Court and move to argue against the precedent of Knoten.

A. The State's admission into evidence of Appellant's first written confession alone necessitated the voluntary manslaughter charge.

The law to be charged must be determined from the evidence presented at trial. State v. Battle, 408 S.C. 109, 117, 757 S.E.2D 737, 741 (Ct. App. 2014). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Walker, 324 S.C. 257, 478 S.E.2d 280 (1996). Both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984). In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. Battle, 408 S.C. at 117, 757 S.E.2D at 741. "It is proper to refuse to instruct voluntary manslaughter in a murder case ***only*** when there appears ***no evidence***

whatsoever tending to show manslaughter." State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983).

In State v. Moore, 245 S.C. 416, 140 S.E.2d 779 (1965), the defendant was convicted of assault and battery of a high and aggravated nature after the trial court refused to charge on the lesser offense of simple assault and battery. Contradictory testimony was presented regarding the severity of the victim's injuries. Id. at 419, 140 S.E.2d at 780. The Court found that the defendant's presentation of an alibi defense "did not deprive him the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed." Id.

More recently, in Knoten, the State introduced Knoten's recanted statements, the second of which contained an admission to killing the victim after she cut him twice with a knife. 347 S.C. 296, 303-05, 555 S.E.2d 391, 395-96 (2001). The Court found that when taken in the light most favorable to the defendant, the content of the recanted statement was evidence supporting a conviction for the lesser included evidence of voluntary manslaughter such that the failure to instruct the jury on the lesser offense necessitated reversal. Id. at 305-08, 555 S.E.2d at 396-98. Likewise here, as the State concedes, its introduction of Appellant's first statement in which she confessed to shooting Mayers during a heated argument after he hit her repeatedly, was sufficient to necessitate a voluntary manslaughter instruction. See R. 1080 – 1083 (State's Ex. 19, Appellant's May 26, 2011 Statement); see also Appellant's Brief, Part III.

B. The State's admission into evidence of Appellant's first written confession created a factual dispute to be resolved by the jury and would support a verdict of voluntary manslaughter if the jury believed the content to be true such that the failure to charge voluntary manslaughter cannot be harmless beyond a reasonable doubt.

Ordinarily, a circuit court commits reversible error if it fails to give a requested charge if there is evidence from which it could be inferred the defendant committed the lesser, rather than the greater offense. State v. Sprouse, 325 S.C. 275, 285, 478 S.E.2d 871, 877 (Ct. App. 1996). As noted supra, "[i]t is proper to refuse to instruct voluntary manslaughter in a murder case ***only*** when there appears ***no evidence whatsoever*** tending to show manslaughter." State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983). However, the State points to State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), in which the South Carolina Supreme Court found that notwithstanding the failure to charge on the lesser offense, the only conclusion established by the evidence was guilt of the greater offense such that the error was harmless. The trial court in Middleton erroneously failed to charge on the lesser-included offense of assault and battery in the first degree as to one of the victims because there was no evidence that the second victim was injured. 407 S.C. at 316-17, 755 S.E.2d at 434-35. The error was the result of the trial court's misinterpretation of S.C. Code Ann. § 16-3-600(C) as requiring an injury to the victim. Id. While subsection (a) requires an injury to the victim, subsection (b) provides an alternative means of committing first degree assault and battery by offering or attempting to injure another person with the present ability to do so by means likely to produce death or great bodily injury. Id.

The victims, Mack and Stephens were stopped at a school bus stop sign when Middleton approached the vehicle from the rear on the passenger side. 407 S.C. at 314,

755 S.E.2d at 433. As he approached, Middleton pulled out a gun and fired five to seven times, striking the vehicle and shattering glass. Id. Stephens jumped across Mack into the driver's seat and struck Middleton with the vehicle. Id. Neither of the victims were struck by a bullet – Mack's injuries were from broken glass and Stephens was not physically harmed. Id. at 314, 755 S.E.2d at 433-34. Middleton was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Id. In finding the error harmless, the Court determined that the following facts could be construed in "no other way" but that Middleton was attempting to kill Stephens and Mack: "Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road." Id. at 319, 755 S.E.2d at 436.

In response to Justice Pleicones' dissent, the Middleton majority wrote that it did not disagree with him "that the failure to charge on a lesser-included offense can be reversible error." Id. at 317 n.2, 755 S.E.2d at 435 n.2. However, the majority disagreed with the view that the failure to charge on a lesser-included was not subject to harmless error analysis. Id. Even so, harmless error "should be employed guardedly . . . on a case by case basis." See State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986). A review of this State's jurisprudence, as discussed below, reveals that Middleton was an outlier case, presenting an extremely rare, if not unique, circumstance where the harmless error analysis was applicable to the failure to charge on a lesser-included offense.

In State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014) this Court distinguished Middleton, finding that the evidence did not support "one clear-cut

conclusion." In Battle, there was conflicting evidence regarding whether the victim was shot during a struggle over the murder weapon. 408 S.C. at 122, 757 S.E.2d at 743. There was evidence presented, that if believed, would have supported a finding that the killing was unintentional. Id. at 743-44. Therefore, this Court could not construe the evidence "as only showing Appellant intentionally killed Victim" and accordingly found that the refusal to charge involuntary manslaughter was not harmless beyond a reasonable doubt. Id. at 744.

While the State contends that the present case "falls somewhere between Middleton and Battle," this case is markedly distinguishable from Middleton. In Middleton, the court found that there was "no other way to construe the evidence" but that Middleton was attempting to kill Stephens and Mack. 407 S.C. at 319, 755 S.E.2d at 436. Notably, Middleton did not involve conflicting evidence, but rather whether there was any way the evidence could be interpreted to support a finding of first degree assault and battery rather than attempted murder. Thus, the Middleton case involved an extreme situation and was not intended by the Court to have the State open a debate on the weight of the evidence every time a judge improperly fails to charge on a lesser included offense, or for that matter, a defense supported by any evidence.

In Battle, conflicting evidence was presented, such that this Court could not find that the evidence supported ***only*** the finding of an intentional killing. 408 S.C. at 122, 757 S.E.2d at 743-44. Similarly here, there were many conflicting statements given which the jury had to weigh and consider. Additionally, there was no forensic evidence to identify who was present at the time Mayers was killed much less who was the actual shooter. The firearm used to commit the crime was ultimately obtained from Wise, but he and Appellant

gave conflicting statements regarding who had possession of it on the day that Mayers was killed. Even the timing and content of the alleged text messages sent between Appellant and Wise could not be corroborated. Thus, the case focused on the multiple statements given by Appellant and Wise and their testimony at trial.

Specifically with respect to the evidence supporting the voluntary manslaughter charge, Appellant's first statement on May 26, 2011, introduced by the State, indicates that Appellant shot Mayers during the course of a heated argument. Appellant wrote:

> He [John Mayers] found out I was actually moving the night of May 7th 2011. Which started a one sided argument with me. I believe that it was him or me that night and it was almost me. I stayed away from everyone for the next week or so to hide my bruises and black eyes. I can never heal my mind and heart totally over this whole thing. The gun used I had gotten from Tim shortly after the restraining order was given. John knew I had the gun since then but I knew I did [sic] have the heart to use the gun. I don't remember a portion of what happen [sic]. I blacked out after John had hit me numerous times and when I came out of blackness I was holding gun [sic] and he was lifeless on the ground in front of me. I sat there crying and tring [sic] to figure out what I did for 15 mins or so before I left. I tried to revive him though [sic] mouth to mouth when I first realized what I had done and when I couldn't bring him back I was so scare so I left.

State's Ex. 19, p. 3 (Appellant May 26, 2011 Statement). Mayers had inflicted physical abuse upon Appellant in the past and was hitting her numerous times that night. Per her oral statement, she "snapped." R. 594, l. 12. This is precisely the type of circumstance that produces the uncontrollable impulse to do violence required for voluntary manslaughter. If a jury believed Appellant's first statement, it could have rationally found that the shooting was done in the heat of passion and not with malice.

Notably, neither Moore nor Knoten included any harmless error analysis. See also State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493(App. Ct. 2003). In Moore, the Court recognized that "in determining the issues to be submitted to the jury, however, all of the testimony, both for the State and the defense, must be considered." 245 S.C. at 420, 140 S.E.2d 781 (1965); see also State v. Gourdine, 322 S.C. 396, 399, 472 S.E.2d 241 (1996) (finding that the testimony of the state's witnesses provided "evidence from which the jury could have found petitioner was guilty of the lesser offense"). The Moore Court found that in light of the defense testimony regarding alibi and the mildness of the victim's injuries, "it became an issue for the jury to determine whether there was an assault and battery and, if so, whether it was simple or aggravated." Id. The Court further stated that "[t]he fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State." Id. at 421, 140 S.E.2d at 781.

In Knoten, the defendant initially told police that he had seen the victims for one hour on the night before they were discovered missing and that he spent the night at a co-worker's house afterward. 347 S.C. at 300, 555 S.E.2d at 393. The co-worker confirmed this story, but later said it was not true and that Knoten asked him to lie. Id. In Knoten's first written statement he again admitted seeing the victims the night before, but stated that he blacked out after that and woke up by a boat ramp the next morning. Id. at 301, 555 S.E.2d at 394. In his third written statement, Knoten confessed to raping Kim and to pushing the other victim into the river. Id.

The evidence which supported a voluntary manslaughter instruction as to victim Kim was Knoten's second recanted statement, in which he wrote that he had consensual sex with Kim, after which she became agitated and cut him with a knife. 347 S.C. at 301, 555 S.E.2d at 394. He further wrote that Kim chased him outside, while he was nude, and he retrieved a steel bar from his vehicle. Id. When he re-entered the apartment, the victim cut him again and he hit her over the head with the bar. Id. He cleaned up and disposed of her body the next day. Id. Knoten testified at trial that the content of his three statements were suggested to him by police and that a co-worker of his confessed to him that he killed Kim. Id. at 302, 555 S.E.2d at 394.

In finding that a voluntary manslaughter charge was "clearly warranted," the Court stated that there could be little argument that an unprovoked knife attack constitutes sufficient legal provocation. Id. at 307, 555 S.E.2d at 397. It also noted that when viewed in the light most favorable to the defendant, there was no evidence that the defendant had sufficient time to cool as a matter of law. Id. Thus, there was evidence, even though introduced by the State, supporting a conviction for a lesser included offense of voluntary manslaughter. Id. at 307, 555 S.E.2d at 398. Knoten's convictions were reversed. Id.; see also State v. Taylor, 261 S.C. 437, 441, 200 S.E.2d 387, 388 (1973) ("If, however, there is any evidence in the record from which it can be reasonably inferred that the accused inflicted the mortal wound but justifiably did so in self-defense, then the accused is entitled to a charge on the law of self-defense, despite his denial of having inflicted the mortal wound. These principles seem to be clearly established by the weight of authority in this jurisdiction as well as elsewhere.").

Similarly, in the present case, Appellant's first written statement undisputedly supported an instruction on voluntary manslaughter. It would then be up the jury to decide whether to believe the content of Appellant's first written statement that she shot the victim during a heated argument in which he struck her. See State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006) ("To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense."). In assessing the truth of Appellant's first statement, the jury could also consider the evidence of the victim's prior violence toward Appellant and the restraining order Appellant placed against the victim almost one month prior to the fatal incident. Therefore, the failure of the trial court to charge on voluntary manslaughter in Appellant's case was not harmless beyond a reasonable doubt.

C. The harmless error analysis in the present case is unaffected by the purported strength of the State's case, whether and how the evidence was developed and argued by defense counsel, and the jury's notes and verdict.

The State invites this court to engage in a speculative analysis of weighing the evidence that should have been weighed by the jury. That is not this Court's standard of review. Rather, this Court must find only that there was ***any evidence*** to support the charge on voluntary manslaughter, ***which the State concedes***. As discussed supra, while harmless error was applied in Middleton to find that the failure to charge a lesser included offense, that was an extremely rare, if not unique, case and should be looked at as the exception rather than the rule.

In arguing that the failure to charge voluntary manslaughter in the present case was harmless, the State contends that the evidence "largely support[ed] a theory propounded by

the State, that Appellant and Timothy Wise acted in concert in killing victim." However, the standard for whether the jury should have been charged on voluntary manslaughter is "any evidence." State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) ("The trial [court] is to charge the jury on a lesser included offense if there is any evidence from which the jury could infer that the lesser, rather than the greater, offense was committed."); Gourdine, 322 S.C. at 398, 472 S.E.2d at 241 (stating that in determining whether there was any evidence that the appellant committed the lesser offense, "we are not confined to the State's version of the facts" but look to "the evidence presented at trial"). Thus, the issue of the purported strength of the evidence beyond the evidence of voluntary manslaughter is not properly before this court. Rather, such analysis should be left solely to the province of the jury.

Further, though the trial court allowed the State to argue "hand of one, hand of all," the State's primary theory was that Appellant shot Mayers and that "maybe Tim Wise knew what was going to happen that night... [or] [m]aybe he was the perfect fall guy to borrow a gun from and invite out to the scene of the crime, help her dispose of the evidence ten days later." R. 1018, ll. 5-9. No actual evidence was presented of any common scheme or plan between Appellant and Wise. See Appellant's Brief, Part I. Rather, Appellant and Wise each blamed the crime entirely on the other party. The State contends, as did the solicitor at trial, that the State's own witness, Timothy Wise, may not have been completely truthful. See Riddle v. Ozmint, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) ("A 'prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" (quoting Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763 (1972))). However, the solicitor made no effort to

impeach Wise on the stand and the solicitor's argument is not evidence. Sosebee v. Leeke, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987).

Moreover, the State's perceptions of the strength of its case do not deprive Appellant of her constitutional right to present a complete defense. See Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 1735 (2006) ("by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"); see also Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (internal citations and quotations omitted)).

The State admits that there was also evidence presented that Appellant or Wise killed Mayers acting alone. However, the State then refers to the failure of the defense to "develop" the information in Appellant's first statement. Under Knoten, the State's admission of Appellant's first recanted statement alone was sufficient to require the voluntary manslaughter instruction. 347 S.C. at 309, 555 S.E.2d at 398 (rejecting the state's contention that defendant's recantation of his confession precluded an instruction on voluntary manslaughter and holding "[b]ecause there was evidence — in this case introduced by the State — supporting a conviction for the lesser included offense of voluntary manslaughter, we reverse Appellant's conviction in the slaying of Kimberly Brown."). Even so, the evidence supporting voluntary manslaughter is mischaracterized as "miniscule" by the State. In addition to Appellant's first statement, the defense presented

evidence of Mayers' past abuse toward Appellant, including a restraining order that Appellant placed against Mayers on April 8, 2011. Though Wise denied hearing any argument between Appellant and Mayers, this was a further avenue pursued by the defense that would have lent support to Appellant's first statement.

In any event, every case that involves the trial court's violation of Article V, section 21 of the State Constitution by failing to instruct the jury on lesser-included offenses should not deteriorate into a weighing of the evidence. See S.C. Const. art. V, 21. The South Carolina Supreme Court has unequivocally held that the reviewing court has ***no jurisdiction*** to weigh the evidence in a law case. E.g. State v. Primus, 312 S.C. 256, 258, 440 S.E.2d 128, 129 (1994) (holding that the appellate court could not affirm the admission of appellants statements based on the State's argument that appellant was not "in custody" such that Miranda rights were not required because "whether appellant was 'in custody is a factual issue that cannot be resolved by this Court. Cf. State v. Barrs, 257 S.C. 193, 184 S.E.2d 708 (1971) (Supreme Court has no jurisdiction to weigh evidence in a law case)."); State v. Rector, 166 S.C. 312, 164 S.E. 872, 873 (1932) ("The Supreme Court is without jurisdiction to weigh contradictory evidence or review findings thereon in a law case.").

The State also points to defense counsel's presentation of only one theory of the case – that Wise acted alone. However, the necessity of a jury charge arises from the evidence presented, not the argument of the defense. See Battle, 408 S.C. at 117, 757 S.E.2D at 741 ("The law to be charged must be determined from the evidence presented at trial."). The law of South Carolina is clear that the arguments of counsel are not evidence. In re Gonzalez, 409 S.C. 621, 636 n.3, 763 S.E.2d 210, 218 n.3 (2014) ("[A]rguments made by counsel are not evidence."). The jury in Appellant's case was accordingly advised

that that the attorney's argument is not evidence. Tr. 167, ll. 11-12 ("Now during opening arguments what the attorneys tell you is not evidence in the case."); R. 1025, ll. 4-7 ("You are to consider only the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record in the case and any stipulation of counsel.").

Additionally, the defense is not bound by the theory or theories it presents in its opening statement, before it knows the full extent of the evidence to be introduced. Further, closing arguments were made only after the charge conference in which the trial court unequivocally ruled that it would not give a voluntary manslaughter instruction. Therefore, there was no reason for the defense to argue the alternative theory of voluntary manslaughter to the jury. In fact, such argument would likely have garnered an objection from the State based on the trial court's prior ruling. Not only was defense counsel not required to risk contempt of court, it would have been nonsensical of him to argue a theory upon which he knew the jury would not be instructed. Had the trial court indicated that the voluntary manslaughter instruction would be given, then it would have been proper for the defense to argue both that Appellant was not the shooter and was not a part of any scheme or plan to kill Mayers and alternatively that if the jury found that she was the shooter that the act was done in the heat of passion with sufficient legal provocation. See State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (2003) (finding that trial court erred in refusing to charge the jury on the law of voluntary manslaughter where the evidence, including one of defendant's prior statements, supported inconsistent defense theories, one of which was that the victim pushed and punched the defendant in the eye prior to her shooting him). Moreover, even if defense counsel had argued voluntary manslaughter, such argument would not be a

substitute for the instructions of the court. Lee v. Clarke, 2015 WL 1275344 at *9 (4th Cir. Mar. 20, 2015) ("As an initial matter, it is well established that arguments of counsel generally carry less weight with a jury than ... instructions from the court. To be sure, jurors are not lawyers; they do not know the technical meaning of legal terms such as heat of passion. Accordingly, the other trial instructions and arguments of counsel that the ... jurors heard at the trial cannot substitute for an explicit instruction. A court issued jury instruction carries the command and force of law in a way that a statement by counsel cannot, and thus prejudice that arises from a flawed or omitted jury instruction is not cured by mere argument.")

The jury's notes[1] during deliberations and verdict on the possession of a weapon charge are also not dispositive. With respect to the murder charge, the jury was clearly presented with only three options: (1) Appellant shot Mayers with malice aforethought; (2) Timothy Wise shot Mayers with malice aforethought acting in concert with Appellant; or (3) Timothy Wise shot Mayers and Appellant was merely present. The jury was not presented with the other alternative that Appellant shot Mayers in the heat of passion with sufficient legal provocation, despite this theory of the case being presented by the introduction and discussion of Appellant's first statement. Complicating matters further, as argued more fully in Appellant's Brief, "hand of one, hand of all" was not a proper instruction. Appellant's Brief, 24-32. Appellant was constitutionally guaranteed a properly

[1] See R. 1099 (Court's Ex. 3, Jury Note) ("Can we have a copy of the statement regarding the hand of one, hand of all?); R. 1110 (Court's Ex. 4, Jury Note) ("In agreeing that she is guilty, is that saying we think she actually shot John?").

charged jury; questions from one not so charged are hardly evidence that the failure to charge was proper or harmless.

In the present case, there is no dispute that the trial court erred in refusing to give the voluntary manslaughter instruction due to the admission of Appellant's first statement, which constituted the "any evidence" to necessitate the charge. It should have then been left to the jury to consider all of the evidence, including the admitted first written statement of Appellant, and to determine during its deliberations if they believed that Appellant killed the victim in a sudden heat of passion with sufficient legal provocation. This analysis is unaffected by the purported strength of the State's other evidence and the failure of defense counsel to argue voluntary manslaughter, which was after the trial court indicated during the charge conference that it would not give a voluntary manslaughter instruction. Now we are beyond weighing the evidence already improper, and using irrelevant and speculative matters to excuse an ***admitted*** constitutional error. Therefore, Appellant's convictions should be reversed.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Mandy Lenore Smith requests this Court to reverse her convictions for murder and desecration of remains and remand for a new trial.

Respectfully submitted,

Laura R. Baer
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ATTORNEY FOR APPELLANT

This 18th day of May, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

May 18, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT.

APPELLATE CASE NO. 2013-002209

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Kaycie S. Timmons, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 18th day of May, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of May, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
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Appeal from Newberry County

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THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

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

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

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

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

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

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

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

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

RESPONDENT'S STATEMENT OF THE CASE

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

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

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

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

RESPONDENT'S STATEMENT OF FACTS

The State's Theory of the Case

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

Appellant's Relationship With Victim

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

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

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

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

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

The Events of May 7, 2011

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

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

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

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

The Investigation Into Victim's Disappearance

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

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

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

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

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

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

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

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

Police Find Victim's Body

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

Introduction

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

How the Issue Was Raised at Trial

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

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

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

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

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

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

Standard of Review

As this Court has stated,

> "In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* If any evidence supports a jury charge, the

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

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

State v. Niles, 400 S.C. 527, 533, 735 S.E.2d 240, 243 (Ct. App. 2012), *overruled on other grounds by* App. Case No. 2012-213592, 2015 WL 1325887 (S.C. Mar. 25, 2015). "An appellate court will not reverse the trial judge's decision absent an abuse of discretion." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2008).

Analysis

Under "the hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). The evidence presented at trial, as described above, supported a reasonable inference that Appellant and Wise conspired to murder Victim. *See State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) (noting the State need not show a "formal expressed agreement" to prove that parties agreed and combined to achieve an illegal purpose, but may prove the agreement "by circumstantial evidence and the conduct of the parties" (citing *State v. Condrey*, 349 S.C. 184, 193, 562 S.E.2d 320, 324 (Ct. App. 2002))).

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

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

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

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

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

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

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

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

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

Introduction

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

How The Issue Was Raised at Trial

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

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

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

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

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

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

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

(R. p. 128, lines 10–15).

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

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

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

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

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

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

Standard of Review

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

Introduction

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

How the Issue Was Raised at Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. p. 956, line 16–p. 957, line 6).

Standard of Review

> A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Burriss*, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999). An appellate court will not reverse the trial judge's decision absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Id.* The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 390, 529 S.E.2d at 539. The law to be charged must be determined from the evidence presented at trial.

State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2008). The erroneous denial of a requested manslaughter jury instruction is subject to a harmless error analysis. *State v. Battle*, 408 S.C. 109, 121, 757 S.E.2d 737, 743 (Ct. App. 2014). "When considering whether an error with respect to a jury instruction [is] harmless, [an appellate court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction

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

How the Issue Was Raised at Trial

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

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

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

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

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

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

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

(R. p. 752, lines 8–21).

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

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

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

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

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

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

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

(R. p. 909, line 24–p. 910, line 5).

Standard of Review

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

Analysis

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

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

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

CONCLUSION

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

Respectfully submitted,

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May 18, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

CERTIFICATE OF COMPLIANCE

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

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RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

PROOF OF SERVICE

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

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

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

This eighteenth day of May, 2015.

Kaycie S. Timmons
Assistant Attorney General
SC Bar No. 100237

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

PETITION TO ARGUE AGAINST PRECEDENT

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

January 19, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.

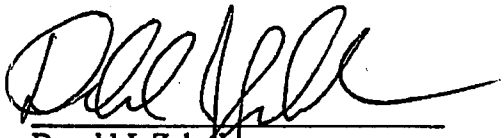
PROOF OF SERVICE

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

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

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

This nineteenth day of January 2016.



Donald J. Zelenka
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The South Carolina Court of Appeals

The State, Respondent,

v.

Mandy Lenore Smith, Appellant.

Appellate Case No. 2013-002209

The Honorable R. Knox McMahon
Newberry County
Trial Court Case No. 2010GS3600503, 2011GS3600505

ORDER

Respondent has filed a motion to argue against precedent. After careful consideration, the motion is granted.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Carmen Vaughn Ganjehsani, Esquire
Laura Ruth Baer, Esquire
David Matthew Stumbo, Esquire
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FILED
Feb. 1, 2016

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mandy Lenore Smith, Appellant.

Appellate Case No. 2013-002209

Appeal From Newberry County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2016-UP-073
Heard February 9, 2016 – Filed February 24, 2016

REVERSED

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA, and Appellate Defender Laura Ruth Baer, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald Zelenka, and Assistant Attorney General Kaycie S. Timmons, all of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

PER CURIAM: Appellant Mandy Lenore Smith appeals her convictions for murder and desecration of human remains. Smith argues the trial court erred by (1) charging the jury on the "hand of one is the hand of all" theory of accomplice liability, (2) admitting her confession into evidence, (3) refusing to charge the jury on voluntary manslaughter, and (4) excluding evidence regarding a witness's prior act of unjustifiably killing Smith's dogs.

We find the trial court committed reversible error by refusing to charge the jury on voluntary manslaughter. Respondent admits the trial court erred in this regard under current South Carolina law but argues the error was harmless. We find the error was not harmless. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." (internal quotation marks omitted)). Accordingly, we reverse Smith's convictions and remand for a new trial.

Because we reverse and remand for a new trial due to the trial court's refusal to charge the jury on voluntary manslaughter, we decline to address Smith's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive).

REVERSED.

FEW, C.J., and SHORT and THOMAS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.
Unpublished Opinion No. 2016-UP-073
Heard February 9, 2016 - Filed February 24, 2016

PETITION FOR REHEARING BY RESPONDENT

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ATTORNEYS FOR RESPONDENT

The Respondent State of South Carolina makes a petition for rehearing pursuant to Rule 221(a), SCACR from the opinion in *The State v. Mandy Lenore Smith*, Appellate Case No. 2013-002209, Unpublished Opinion No. 2016-UP-073 (S.C.Ct.App. filed February 24, 2016). In particular, Respondent respectfully submits that the Court of Appeals overlooked or misapprehended the record related to the showing of harmless error concerning the failure to instruct on voluntary manslaughter. For purposes of potential certiorari pursuant to Rules 242 and 217, SCACR where the Court of Appeals granted the Respondent's Petition to argue against the precedent of *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), Respondent submits that although a voluntary manslaughter instruction may have been appropriate under existing Supreme Court precedent in *Knoten*, as acknowledged, *Knoten* was wrongly decided and under the discrete facts of the case, the trial court did not commit error in denying the request. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) aff'd as modified, 408 S.C. 198, 758 S.E.2d 715 (2014).

For each of these reasons, rehearing is appropriate.

RESPONDENT'S STATEMENT OF THE CASE

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

On October 7, 2013, Appellant's case was called to trial before the Honorable R. Knox McMahon. (R. p. 1). Appellant was represented by Public Defender Charles

Verner during the trial. (R. p. 1). Solicitor David Stumbo and Assistant Solicitor Dale Scott represented the State. (R. p. 1). On October 12, 2013, the jury returned verdicts of guilty as to murder and desecration of human remains and not guilty as to possession of a weapon during the commission of a violent crime. (R. p. 1052, lines 13–22).

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

Appellant filed a timely notice of appeal. (R. pp. 1101–02). In the briefing before the Court the following issues were presented:

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

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

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

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

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

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

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

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

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

Final Brief of Respondent, p. 1.

Petition to Argue Against Precedent Granted

On January 19, 2016, counsel for Respondent made a Petition to argue against precedent pursuant to Rule 217, SCACR Rule. Respondent asserted the precedent of State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) which allows a jury charge on a lesser included offense based upon a criminal defendant's previous statement that has been recanted, repudiated by the defendant, and held out by both the prosecution and defense to be false is unworkable as it fails to recognize the legal waiver of the lesser included offense instruction by the completely inconsistent defense and creates a windfall loophole by which the defendant could potentially escape liability altogether based upon a false premise. On **February 1, 2016**, the South Carolina Court of Appeals **granted** the State's petition to argue against precedent.

Opinion

Oral argument was held on February 9, 2016. On February 24, 2016, the Court of Appeals reversed and remanded that case for a new trial due to the trial court failure to

instruct on voluntary manslaughter. In its unpublished opinion, the Court of Appeals set for forth the following summary reasons:

> We find the trial court committed reversible error by refusing to charge the jury on voluntary manslaughter. Respondent admits the trial court erred in this regard under current South Carolina law but argues the error was harmless. We find the error was not harmless. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." (internal quotation marks omitted)). Accordingly, we reverse Smith's convictions and remand for a new trial.

The State v. Mandy Lenore Smith, Appellate Case No. 2013-002209, Unpublished Opinion No. 2016-UP-073 (S.C.Ct.App. filed February 24, 2016). The Court of Appeals Declined to address Smith's three remaining issues in light of the granting of a new trial, citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive).

This Petition for rehearing follows.

The State's Theory of the Case

The State argued at trial that Appellant killed John Henry Mayers (Victim) in a deserted area off Judy B. Road in Newberry County. (R. p. 1016, lines 13–15). However, the State did not argue that Appellant definitely acted on her own in murdering Victim; the evidence proved that there was another person out on Judy B. Road the night Victim was shot and killed, a man named Timothy Wise, and the State argued that it was up to the jury to decide whether Wise "knew what was going to happen that night" or whether "he was [just] the perfect fall guy . . . ." (R. p. 1018, lines 5–9). Though Wise

was not on trial with Appellant, the State noted, "his day is coming." (R. p. 1021, lines 1–3). In closing arguments, the State asked the jury to focus on Appellant's conduct, and if they were "firmly convinced that Mandy Smith had a hand in the death of [Victim,]" to find her guilty. (R. p. 1021, lines 3–6). The jury found appellant guilty of murder and of desecration of human remains. (R. p. 1052, lines 13–22). Respondent incorporates by reference its further statement of the State's theory of the case set forth in the Final Brief of Respondent, pages 3-14.

WHY REHEARING UNDER SCACR RULES 221 AND 243 IS APPROPRIATE.

1. **Harmless Error is evident from a reasonable reading of the record concerning the failure to instruct on voluntary manslaughter based upon the assertions by the defense and State concerning their theories of the case.**

In granting a new trial in its summary order, the Court of Appeals concluded the error was not harmless. Respondent respectfully submit that the Court misapprehended the record which strongly supports a conclusion that any arguable error in the failure to instruct on "voluntary manslaughter" was harmless error. The Court of Appeals, unlike Appellant, recognized that the failure to instruct on voluntary manslaughter is subject to harmless error analysis, citing *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis.") and *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict"). However, the record does not support the Court of Appeals' conclusion that the instructional error was not harmless.

B. Harmless error exists where the only evidence to support such a voluntary manslaughter charge was in Appellant's first statement, which she later recanted and also denied while testifying at her trial and which was inconsistent with her defense that another person committed the crime and that it was not the result of sudden heat of passion or sufficient legal provocation.

Though Respondent concedes that the trial court erred in refusing to charge voluntary manslaughter under the precedent of *State v. Knoten*, [1] such error was harmless where there was very little probative evidence to support that charge and neither Appellant nor the State pursued a theory that would support a voluntary manslaughter finding by the jury. To the contrary, the Appellant's theory was that she was uninvolved in the killing according to her testimony at trial and completely repudiated the underlying statement as a completely false statement.

How the Instructional Issue Was Raised at Trial

Appellant's May 26th, 2011 written statement was introduced by the State during Newberry County Sheriff Captain Robert Dennis's testimony as he described Appellant's first statement to police concerning what happened the night of May 7, 2011. (R. p. 590, line 20–p. 599, line 4). In that statement Appellant describes the night of Victim's murder as follows:[2]

> Saturday May 7th 2011 around 11 pm I picked John up hoping to have a nice time. After picking John up John did his normal mental and hitting abuse. I tried to take him back home but he would not let me. He said he did not leave house for nothing and he wanted sex . . . .
>
> I did NOT want to end his life but I felt that it was me or John that night. He had been smoking crack and drinking that night . . . . He found out I was actually moving the night of May 7th 2011. Which started a one sided arguement with me. I beleive that it was him or me that night and it

[1] This is assuming the instruction issue was adequately preserved. See Petition, infra, p. 11-12 n. 5. p.

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

> was almost me. I stayed away from everyone for the next week or so to Hide my bruses and black eyes . . . . The gun used I had gotten from Tim shortly after the restraing order was given. John knew I had the gun since then but knew I did have the heart to use the gun. I don't remember a portion of what happen. I blacked out after John had hit me newmous times and when I came out of blackness I was holding gun and he was lifeless on ground in front of me. I sat there on my knees cring and tring to figure out what I did for 15 mins or so before I left. I tried to revive him though mouth to mouth when I first realized what I had done and when I couldn't bring him back I was so scared so I left . . . .

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

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

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

(R. p. 594, lines 12–19).[3]

Capt. Dennis further testified that on **June 10, 2011**, he spoke with Appellant again, at her request, and at that time she completely recanted her May 26th statement and gave a new statement implicating only Wise in Victim's murder. (R. p. 599, line 7–

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

p. 605, line 13). On that date, she recanted her earlier statement and gave the following statement:

> May 7th, 2011 I Mandy Smith texted Tim Wise around 10 pm to call John Mayers so he would come hang out with me. I picked John up about a hour and half later. I texted Tim and let him know where I was going. I always let Tim know where I was going. Always!! When John and I got there Tim was there. I asked Tim why he was there and he said he had a feeling of a need to be there. I just thought he was being protective. John, Tim and I talked and laughed for awhile John and I was standing together John was behind me holding on to me and we was talking and looking up at the night sky. From out of nowhere I was pushed and I fell to the ground and I heard a shot when I looked up John and Tim was struggling with each other. I screamed out to Tim "No TC NO". John took off running. He went between the trucks and down the road. I got to my feet and ran after them Tim chased him down. when I came past the trucks there was a second shot. I seen Tim in the woods. I ran to where Tim was and seen John on the ground laying on his back. I went to where John was on the ground. I was so scared and cring and screaming. Tim grabbed me and pulled me away from John. I tried to go back to John but Tim wouldn't let me. He kept pulling me away. Tim pulled me to Don's truck and told me to get in. I was so scared and in shock. Tim closed the door of the truck and went back to where John was. I don't know what he did when he went back. When Tim came back to the truck Tim told me that he would kill me and my kids (animals) if I told anyone and that I had to be ready to sleep in the shed at his house by Sunday night. Tim followed me out of that place and I am sure he followed me home. I had given Tim the gun back a couple of weeks before the 7th of May. I have never shot that gun before. Around the 18th of May or so Tim took me for a ride which ended up back at the place where John was and he made me get his head and put it in a bucket then went to a river and Tim tossed it in. Tim was not suppose to be there that night. Was suppose to be just John and I. I love John and yes he was a mean mean person most of the time but he did not deserve to die by Tim's hand. This whole situation has caused me a lot mental harm. This past week I found out that Tim is "in love" with me and has been working at destroying my life over the past 3–4 months. He destroyed my relationship with my landlord, my boyfriend (Kris), my relationship with Don and he hated John. When Tim first met my mom he took her out for breakfast and asked as if almost drilled her for information about me and my past. My mom told him many things about my past such as my moms dad sexually abusing me and the trouble I went thur with that she told Tim about me being in Epworth Children's home and the struggle with that. I feel as though Tim has preyed on my mental status when it comes to men and he "played" me. I never knew he was in

> love with me. If I would have I would not of been so close of friends with him. Tim used me for some sick twisted game.

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

At trial, Appellant's testimony was substantially similar to her June 10th statement that Wise was the shooter and implicitly that the killing did not occur as a suggested in the May statement. She also specifically denied that her May 26th statement was true, and she stated that she only made that statement because she believed Wise "was still out and he had my dogs and he knew where my family was." (R. p. 917, line 19–p. 919, line 25). However, she provided additional information about her actions immediately following Victim's death. Appellant testified that after Victim was shot she and Wise both got in their cars and left. (R. p. 874, line 7–p. 875, line 22). Neither of them went to the police about what happened that night—Appellant testified that Wise threatened her family and her pets if she told, and Wise testified he did not report the murder because he "was in shock" and scared of what might happen. (R. p. 407, line 11–p. 408, line 11; R. p. 874, line 22–p. 875, line 5). According to Appellant, Wise followed her home, but Wise testified that he went back to his parents' home. (R. p. 407, line 4–p. 408, line 18; R. p. 875, lines 6–22). Appellant spent the night at her home on Wheeland School Road with Buford[4] and her pets. (R. p. 875, line 17–p. 877, line 23). The next morning she continued moving to Wise's property. (R. p. 877, line 10–p. 879, line 7).

[4] Buford confirmed at trial that he and Appellant spent the night together at her Wheel and School Road home. (R. p. 758, line 17–p. 761, line 16). He and Appellant got into an argument that night, and he attempted to leave, but she stopped him and said, "[D] on't leave, I need you now more than ever." (R. p. 759, line 8–p. 760, line 11). When asked if Appellant seemed emotional when she got back that night, Buford responded, "Mandy has many emotions sometimes. It is hard to figure out which emotion she has. But she didn't seem, the only thing that was out of the ordinary of that whole sequence that I just said was her coming, running out to me and stopping me." (R. p. 760, lines 19–24).

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

The Request and Denial of the Voluntary Manslaughter Instruction

Prior to closing arguments, defense counsel requested that voluntary manslaughter be included in the jury instructions. (R. p. 953, lines 9–19). In particular, defense counsel only argued, "[T]here is some evidence both from T.C. Wise's testimony and from the statements that Mandy and John Henry were engaged in smoking crack cocaine. Something happened and she shot him at that instance." (R. p. 953, lines 11–15). Counsel for the State argued that there was no evidence to support such a charge, stating, "We don't believe at this point that there was sufficient, any kind of provocation that would necessitate a voluntary manslaughter." (R. p. 953, line 22–p. 954, line 8).

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

and Victim walked off and smoked crack together and evidence that smoking crack changed Victim's temperament. (R. p. 955, line 23–p. 956, line 11).

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

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

(R. p. 956, line 16–p. 957, line 6).

Based only upon the South Carolina Supreme Court's opinion in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), Respondent has conceded that the trial court erred in denying Appellant's request to charge voluntary manslaughter as the charge was warranted based upon Appellant's first statement to law enforcement that she later repudiated. In Appellant's first written statement to police (R. pp. 1080–83), she indicated that she shot Victim after he hit her numerous times. Those facts, combined with Dennis's testimony that Appellant told him in her first oral statement to police that "she thought she pretty much snapped [,]" were sufficient to warrant a voluntary manslaughter charge.[5] Though Appellant recanted her first statement and expressly

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

denied that it was true at trial, under South Carolina law, she was still entitled to the voluntary manslaughter instruction. *See Knoten*, 347 S.C. at 306, 555 S.E.2d at 396 (finding there was evidence to support a voluntary manslaughter charge where the defendant's second statement to police supported the charge though the defendant recanted his second statement and testified that it was a fabrication). Accordingly, Respondent is constrained to concede that it was error to deny Appellant's request to charge voluntary manslaughter even though this lesser offense was repudiated by Appellant's later statements and the defense theory presented at trial.

Though the trial court erred under *Knoten* in refusing to charge voluntary manslaughter, such error was harmless. The Court of Appeals misapprehended the record in summarily conclude otherwise. The erroneous denial of a requested manslaughter jury instruction is subject to a harmless error analysis. *State v. Battle*, 408 S.C. 109, 121, 757 S.E.2d 737, 743 (Ct. App. 2014). "When considering whether an error with respect to a jury instruction [is] harmless, [an appellate court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Whether an error with respect to a jury instruction was harmless is a very fact-intensive inquiry. *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435. And a court's "'inquiry is not what the verdict would have been

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court had heard extensive testimony about a history of physical abuse, the only evidence that Victim was hitting Appellant immediately before she blacked out was in the written statement. And it does not appear that her written statement was read into the record. (R. p. 597, line 6–p. 598, line 17). It is clear that the trial court did not understand the argument that defense counsel was making to be the same one Appellant now raises in this Court. *See State v. Frieburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an argument advanced on appeal was not preserved for review because it was not raised to and ruled on below). Respondent submits that the trial court was not able to rule after considering "all relevant facts, law, and arguments[,]" *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 281–82 (Ct. App. 2005) (quoting *I'ON, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)), because defense counsel did not draw the trial court's attention to those specific facts that supported a voluntary manslaughter charge.

had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.'" *Id.* (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

Respondent submit that the Court of Appeals misapprehended the record because the failure to instruct on manslaughter did not contribute to the verdict. The facts of this case, as outlined in the Final Brief of Respondent, pages 3-14 Statement of Facts section, largely support a theory propounded by the State, that Appellant and Wise acted in concert in killing Victim, but noting to support that it was the result of heat of passion upon sufficient legal provocation. However, depending on the weight that the jury gave the testimony of Wise and Appellant, the jury also could have found that either of them acted on their own in shooting Victim but not based upon sufficient legal provocation. Of course, there was extremely little development of the information provided by Appellant in her May 26th statement—the only evidence under which the jury could have found Appellant guilty of voluntary manslaughter—because neither side nor witnesses to the crime – Wise or Appellant - represented that the May 26th statement was the truth in their testimony or argument.

The State argued that Appellant's May 26th statement was just another example of her "lies and manipulations"—that it was her plan B after she initially told police to look at Hill. (R. p. 1010, lines 21–24; R. p. 1013, line 1–p. 1014, line 16; R. p. 1016, line 15–p. 1017, line 20). The State also told the jury during closing arguments, "It has not been the State's contention all week that you should believe every word that comes out of Tim Wise's mouth. I don't think that just because we called him as a witness, folks." (R. p. 1013, lines 10–13).

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

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

While the *Knoten* case is most similar to the instant case as it also deals with evidence in a recanted statement that supports a lesser-included offense, our Supreme

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

Respondent submits that this case falls somewhere between *Middleton* and *Battle*. Though the evidence presented at trial does not necessarily "support one clear-cut conclusion [,]" *Battle*, 408 S.C. at 122, 757 S.E.2d at 737, the only evidence that would support a voluntary manslaughter conviction was thoroughly repudiated by both the State and defense compared to the entirety of the other evidence presented by both Appellant and the State. Simply put both sides urged that the May statement was **false**. Simply put the theories presented at trial do not support any conclusion of manslaughter. Since they do not, the Court of Appeals erred in concluding the failure to charge "contributed to the verdict."

The defense was particularly forceful when denying the truth of the May 26th statement (which was the sole basis for a suggestion of manslaughter). Appellant recanted her May 26th statement on June 10th and placed the entire blame for Victim's death on Wise. (*See* R. pp. 1084–87). She also explicitly denied shooting Victim in her testimony at trial. (R. p. 932, lines 12–21). She stated that her June 10th statement was the truth, (R. p. 934, lines 11–14), and she also testified that she only confessed to shooting Appellant in her May 26th statement because "[a]s far as [she] knew Tim was still out and he had [her] dogs and he knew where [her] family was." (R. p. 918, lines 3–4). Additionally, defense counsel asked the jury to consider "who had the gun"—not a very good argument if voluntary manslaughter was a possibility.

Further, the jury's note during deliberations and their verdicts indicate that they likely did not believe that Appellant pulled the trigger. The jury's note read, "In agreeing that she is guilty, is that saying we think she actually shot John?" (R. p. 1100). They also found her guilty of murder but not guilty of possession of a weapon during the commission of a violent crime. (R. p. 1052, lines 13–19). These verdicts may be inconsistent—even if she did not shoot Victim, it was undisputed that Victim died from a gunshot wound, and if the jury thought she was guilty of murdering Victim with Wise's help, she also should have been guilty of the possession charge under "hand of one, hand of all." The jury's note and their inconsistent verdicts indicate that the jury rejected the notion that the gun was in Appellant's hand when Victim was shot. As such, it is clear that the erroneous lack of a voluntary manslaughter instruction did not contribute to the verdict. Accordingly, the trial court's error is harmless beyond a reasonable doubt and rehearing is appropriate.

2. The State made a Petition to Argue against Precedent to overrule *State v. Knoten* which was granted. The Court may have misapprehended that the State's concession that that the manslaughter instruction should have been given was conditional based its position with *Knoten*.

In its Final Brief of Respondent, p. 34 and its Petition to Argue Against Precedent, it was the State's Position that absent the precedent of *State v. Knoten*, because the defense repudiated the May statement which was the basis for any evidence to support manslaughter and the State's sole purpose in its instruction, albeit never read to the jury was to show the Appellant's consciousness of guilt – but not the theory of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). "A false exculpatory statement is probative of a defendant's consciousness of guilt." *People v. Milka*, 211 Ill.2d 10, 181 (2004).

Absent *Knoten*, there would have been no duty to request an instruction that was inconsistent with the defendant's theory (and the state's theory) and would only suggest a false and repudiated compromise verdict possibility which is not in the interest of justice. Respondent submits that this precedent set forth by Knoten is unworkable as it fails to recognize the legal waiver of the lesser included offense instruction by the completely inconsistent defense and creates a windfall loophole by which the defendant could potentially escape liability altogether despite a jury's finding the defendant guilty of a lesser-included offense based as a compromise arising from evidence known to be false. Simply put when the repudiated statement by a criminal defendant is contrary to both the defense case at trial and the state's theory of the case, a lesser included offense instruction should not be based solely upon that repudiated statement. The precedent of *Knoten* suggests that this may be appropriate albeit suggests reliance on a statement known to be false by both parties. The precedent further impedes the administration of

justice by requiring instructions based upon false evidence which neither side is relying upon as the truth.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted Petition for Rehearing be granted and that the judgment, conviction, and sentence of the trial court should be affirmed. Further, in the opinion, because the Court of Appeals reversed and remand for a new trial due to the trial court's refusal to charge the jury on voluntary manslaughter, it declined to address Smith's remaining issues, citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive). Should rehearing or certiorari be granted, the three remaining issues also need to be addressed.

Respectfully submitted,

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March 10, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

V.

MANDY LENORE SMITH,

Appellant,

Appellate Case No. 2013-002209.

PROOF OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Respondent's Petition for Rehearing by depositing copies of the same in the InterAgency Mail addressed to her attorney of record:

Laura Ruth Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
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I further certify that all parties required by Rule to be served have been served.

This 10th day of March, 2016.

Donald J. Zelenka
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The South Carolina Court of Appeals

The State, Respondent,

v.

Mandy Lenore Smith, Appellant.

Appellate Case No. 2013-002209

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
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FILED
4/22/16