STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

PETITIONER

APPELLATE CASE NO. 2013-002224

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ryan P. Deleston, Appellant.

Appellate Case No. 2013-002224

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2016-UP-055
Heard January 4, 2016 – Filed February 10, 2016

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Ryan P. Deleston appeals his convictions for murder, attempted armed robbery, possession of a handgun with an obliterated serial number, and possession of a weapon during the commission of a violent crime. Appellant contends (1) pursuant to Rule 404(b), SCRE, the third-party guilt doctrine, and due process laws, the trial court erred in refusing to allow cross-examination of two witnesses regarding an armed robbery that occurred two weeks prior to the instant murder; and (2) the trial court erred in instructing the jury that the trial was "a search for the truth in an effort to make sure that justice is done." We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts . . . may . . . be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), *cert. denied*, 135 S. Ct. 400 (2014) ("Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan."); *id.* ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." (quoting *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); *id.* at 338 n.4, 748 S.E.2d at 205 n.4 (noting we must look at the commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); *id.* at 341, 748 S.E.2d at 206 ("The admissibility of evidence of third-party guilt is governed by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941)."); *Gregory*, 198 S.C. at 104–05, 16 S.E.2d at 534 ("[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; *evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.*" (emphasis added)); *Cope*, 405 S.C. at 339, 748 S.E.2d at 205-06 (addressing a similar due process argument in which the appellant relied on *Holmes v. South Carolina*, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from *Holmes*; holding "[i]t was not the strength of the State's case that led to exclusion of evidence of [the alleged guilty third party's] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible").

2. As to whether the trial court erred in stating the trial was "a search for the truth in an effort to make sure that justice is done": *State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998) (alteration provided in *Aleksey*))); *id.* at 27, 538 S.E.2d at 251 ("However, jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."); *id.* ("The standard for review of an ambiguous [or improper] jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.").

AFFIRMED.

SHORT, GEATHERS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

APPELLANT

APPELLATE CASE NO. 2013-002224

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2016-UP-055

PETITION FOR REHEARING

Petitioner seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that cross-examination regarding Bryan Rivers having committed a similar armed robbery and shooting two weeks before with the same gun in this case was *not* "evidence **which can have (no) other effect than to cast a bare suspicion upon another**, or to raise a conjectural inference as to the commission of the crime by another." The third party guilt evidence as to Bryan Rivers was compelling – he had also pled guilty -- and it certainly, respectfully, cannot be characterized as "having no other effect than to cast bare suspicion" upon

Rivers. State v. Ryan P. Deleston, 2016-UP-055 (filed February 10, 2016) at p. 2. (emphasis added).

In addition, the trial court's instruction to the jury that a criminal trial was "*a search for the truth*," and not a determination of whether the state *had proved Ryan Deleston guilty beyond a reasonable doubt* was prejudicial because it erroneously instructed the jury on its core purpose and duty. This Court may have overlooked that fact.

As stated at oral argument, the trial judge was simply stubborn for giving this instruction over objection, and refusing to cure it. Respectfully, as long as this Court affirms despite the giving of this horribly improper "seek the truth" instruction – which our Supreme Court has ruled and warned is improper – the improper instruction will continue to be charged. When the Supreme Court warned that this instruction was **disfavored**, a trial judge should not subsequently instruct it over objection. See State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

A. The prior shooting where Ryan Deleston was also merely present.

The solicitor informed the court pretrial that it anticipated the defense would "attempt to argue that the Chopper shooting two weeks prior [to the murder of Marley Lion in this case] should come in because the same gun was used in the Chopper shooting as was used to kill Marley Lion." The solicitor argued the crimes were not sufficiently similar. The defense would counter that the solicitor was largely missing the point since this was admissible evidence of third party guilt.

Referencing Rule 404(b), SCRE, the solicitor further argued, "In more ways than not, the shooting of Chopper is just not the same thing." She stressed several differences she perceived between the two incidents including (1) "Chopper" was someone who was known by Bryan Rivers and the other codefendants and the men had set out to rob him, whereas "Marley Lion just happened

to be in the wrong place at the wrong time" and was not the "intended target" and (2) George Brown drove the men to the "Chopper shooting" while the men walked to Famous Joe's [where the victim was shot inside his car in the parking lot]. R. 5, ll. 1-20.

Additionally, the solicitor argued that under Rule 403 "putting in the evidence that Bryan Rivers shot someone else is more prejudicial than it is probative. It's not probative, because it's nothing like the shooting of Marley Lion." R. 5, l. 21 – 6, l. 1.

The defense argued that: "[T]his doesn't reach the Lyle analysis because its evidence of third-party guilt. We are submitting the Chopper shooting as evidence that somebody else used this weapon in the very same manner that it was used in the Marley Lion shooting, and that this evidence shows that somebody else was the shooter in the Marley Lion murder. That's exactly what third-party guilt evidence is . . . there for, is to allow Mr. Deleston [Appellant] to present a defense that he, in fact, did not do this, and that somebody else was the trigger man. And we think that this other robbery is very relevant." R. 6, ll. 8-20.

The defense further argued that presenting evidence of the "Chopper shooting" does not prejudice the state and certainly does not "prejudice Mr. Rivers in any way. He's already pled [guilty] to charges related to this." R. 6, ll. 21-25. However, the evidence is "probative that somebody else committed this murder. That is the most probative thing that it could possibly stand for. It does not prejudice anybody, and it is probative. It is probative of Mr. Deleston's [Appellant's] innocence and [shows] a third party is guilty." R. 13, ll. 1-6.

Additionally, the defense argued that due process and Deleston's *right to present a complete defense* mandated the admission of this third-party evidence. "This is . . . a person [Bryan Rivers] who puts himself there, and essentially says, Well, Ryan [Appellant] did it. I didn't do it. So it's not that we're just casting mere suspicion on him. He puts himself there. **And to not allow that**

evidence, they're [the state] essentially saying that the Defense can't put up a defense, if we're not allowed to bring in evidence that somebody else was the shooter. That is our defense, is that Bryan Rivers was the shooter, and they're trying to preclude us from saying that." R. 9, l. 14 – 10, l. 1. (emphasis added). Defense counsel reasoned that the testimony regarding the "Chopper shooting" is "relevant to the fact [that] it makes it more likely that he [Bryan Rivers] was the individual with the gun. *He was in the first armed robbery. He was in the second armed robbery. And then the third armed robbery, he says, Well, I didn't have the gun.* And that's just rather convenient in this case." R. 10, ll. 5-11. (emphasis added).

In response to the state's Rule 404(b) argument, defense counsel argued that both of the shootings occurred in the Ardmore area "less than a mile apart. So they're in the same location, using the same weapon, the same individuals, and [the] same plan. It's a common plan." R. 9, ll. 7-12. He later added that both robberies were planned by Julius Brown and executed by the same person, Bryan Rivers, again with the same firearm. R. 11, l. 25 – 12, l. 8. Additionally, the defense pointed out that George Brown was the driver in both shootings. R. 13, ll. 16-24.

The trial judge ruled that the evidence merely casted suspicion on Rivers, and that the crimes were not sufficiently similar to prove a common scheme or plan. R. 20, l. 1 – 22, l. 24. R. 26, l. 7 – 27, l. 16. The next day the defense asked for a more specific ruling on its argument that the exclusion of this evidence violated Appellant Deleston's due process right to present a complete defense. R. 28, l. 13 – 29, l. 14. The judge stated she had already addressed the due process issue, and refused to alter her ruling. R. 31, ll. 5-10.

As this Court will recall, Appellant proffered Julius Brown's testimony regarding the Chopper shooting. Julius testified that George Brown's gun was used in the Chopper shooting, in the robbery of the couple downtown, and in the murder of Marley Lion. R. 138, l. 24 – 139, l. 7; R.

142, ll. 7-10. Julius said that he, Bryan Rivers, George Brown, Rayshawn Milligan, Appellant, and a man named Valentino Hayward were all involved in this shooting. R. 125, l. 6 – 126, l. 10. Valentino Hayward and Bryan Rivers got out of the car with George Brown's gun, but he did not actually see the shooting. Rivers and Hayward eventually ran back from Saint Andrew Garden Apartments through the Shires and into Ardmore where they got back into George's car who then drove the group back to Cashew Street. R. 127, l. 3 – 130, l. 13. The solicitor agreed the following defense proffer regarding Rivers was accurate although he said Rivers did not have immunity, and maintained they could prove Rivers was guilty through other witnesses:

> [W]hat I would cover with him [Rivers] in the context of an overall Cross-Examination would be that . . . about six days after the Marley Lion murder, there was an opportunity for Detective Osborne to have a formal meeting, sit down with Bryan Rivers where they talked on tape and Osborne asked him about being involved in a robbery at the Saint Andrews Garden Apartments with Tino, which he denied, and which was not truthful . . . I would use that to show that . . . when he needed to lie, he knew how to lie.
>
> With regard to the follow-up conversation that he had after his arrest on these charges on July 30th and 31st, I would cover the fact that he now admits that he, on June 1st, rode along on the preplanned robbery of Leroy Townsend, a.k.a. "Chopper," in the Saint Andrews Garden Apartments; that he got $1,300 in cash and drugs; he used the Marley Lion murder weapon to rob Townsend; He shot Townsend in the leg; it was George Brown's gun; that he's not been charged with this armed robbery pursuant to his proffer agreement; and he has not also been charged with attempted armed robbery pursuant to his agreement. And that's the sum and substance of what I would cover with Bryan Rivers.

R. 144, l. 12 – 145, l. 11; R. 145, ll. 14-20; see also R. 243, l. 14 – 244, l. 22.

This Court should respectfully reconsider its opinion that the trial court did not err when it refused to allow the defense to cross-examine Julius Brown and Bryan Rivers about the armed robbery and shooting of Leroy "Chopper" Townsend that occurred approximately two weeks before Marley Lion was murdered. It was undisputed that Bryan Rivers was the shooter in this prior armed robbery, as well as the armed robbery of the couple downtown, and that the same firearm was used

in all three cases. The court's erroneous ruling prevented Appellant from fully developing and presenting his defense that Bryan Rivers was the shooter who killed Marley Lion and that Appellant was merely present at the scene. This evidence should have been admitted pursuant to the rule on third party guilt, Rule 404(b), SCRE, and Appellant Deleston's due process right to present a complete defense.

Third party guilt evidence reconsideration

Evidence of Bryan Rivers' involvement and identity as the armed robber and shooter during the robbery of Leroy Townsend approximately two weeks before the murder of Marley Lion coupled with the evidence that he also robbed a couple at gunpoint in downtown Charleston merely hours before Marley Lion was shot "tends clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot into his car five to six times. See Gregory, 198 S.C. 98, 104–105, 16 S.E.2d 532, 534–535 (1941). This evidence also "raise[s] a reasonable inference" of Appellant's own innocence, especially when considering Appellant's alleged role in both the armed robbery of Leroy Townsend and the robbery of the couple downtown. See Id. According to witnesses, during the robbery and shooting of Townsend, Appellant merely went along for the ride and remained in George Brown's car the entire time. Moreover, when Rivers held the couple up at gunpoint in downtown Charleston, the testimony was that Appellant, while he did get out of the car, merely walked in the opposite direction and had no involvement in the robbery. Based on Rivers' and Appellant's undisputed roles in these two prior armed robberies, both which were extremely close in time to the murder of Marley Lion, again clearly tends to point to Rivers as the guilty party during the attempted armed robbery and shooting of Marley, not Appellant.

Furthermore, Appellant should have been able to present this evidence regarding the armed robbery and shooting of Leroy Townsend because of the clear "train of facts or circumstances" between the three known armed robberies. See Id. When Bryan Rivers was released from prison on June 1, 2012, a train of events began involving the same players (Julius Brown, Rayshawn Milligan, George Brown, Bryan Rivers, and Appellant), the same firearm (George Brown's gun), and a similar plan of robbing individuals who the defendants suspected had cash. Because of the evident connection between the robbery and shooting of Townsend and the attempted armed robbery of Marley Lion, Appellant respectfully requests that this Court reconsider its holding that it was not error for the trial court to rule this evidence of third party guilt was inadmissible. See State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941); Holmes v. South Carolina, 547 U.S. 319 (2006); Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Rule 404 (b), SCRE reconsideration

Again, it was undisputed at trial that Bryan Rivers was the shooter during the armed robbery of Leroy Townsend on June 1, 2012, approximately sixteen days before the murder of Marley Lion. The trial court also found Bryan Rivers' involvement and identity as the shooter in this prior armed robbery was proved by clear and convincing evidence. See R. 20, ll. 15-16.

This Court may have overlooked the fact that there was a close degree of similarity between the attempted armed robbery and murder of Marley Lion and the armed robbery and shooting of Leroy Townsend. Both offenses involved the same people: Bryan Rivers, Julius Brown, George Brown, Rayshawn Milligan, and allegedly Appellant, and were planned by the same person: Julius Brown. Additionally, both robberies occurred near the Ardmore neighborhood within about a mile of each other and George Brown acted as the driver. See R. 9, ll. 7-12. Moreover, the same firearm, which belonged to George Brown, was used in both

shootings. Finally, Stephanie Brown and Appellant's residence on Cashew Street was used as a home base, where the group originated from and returned to after each armed robbery and shooting.

On the other hand, the only noticeable dissimilarities between the two acts were that an additional person, Valentino Hayward, was involved in the robbery and shooting of Leroy Townsend, and that Townsend was known to the men where Marley Lion was not.

This Court should respectfully reconsider its holding that this evidence was not admissible. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013).

Due Process reconsideration

Appellant submits this Court may have overlooked the fact that the trial judge violated Appellant's right to a "meaningful opportunity to present a complete defense" by excluding evidence regarding Bryan Rivers' use of the murder weapon during the armed robbery and shooting of Leroy Townsend two weeks before Marley Lion was killed. See Crane v. Kentucky, 476 U.S. 683, 690 (1986). Based on the United States Supreme Court's holding in Holmes and Crane, and Appellant's due process right to present a defense, Appellant should have been permitted to question Julius Brown and Bryan Rivers about the "Chopper shooting" in front of the jury and fully develop his defense that Rivers was the shooter. Rehearing should be granted.

B. A trial is not "a search for the truth in an effort to make sure that justice is done"

Again, this Court acknowledged in the opinion that "seek the truth" instructions are disfavored, and should be avoided because run the risk of unconstitutionally shifting the burden of proof to the defendant. See State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

As this Court will recall, in the judge's opening instructions to the jury she erroneously told the jurors their purpose:

> Most people do not have the opportunity to come to court as you are doing now, and most people think that from watching television or movies or reading books, that trials are fully of intense drama and riveting circumstances. While all of these things are true at some times, please remember this trial is not for your entertainment. It is a fundamental part of our democracy. **It is a search for the truth in an effort to make sure that justice is done before the parties before you. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or movies or read in books.**

R. 34, l. 3 – 35, l. 2 (emphasis added).

The judge also instructed the jurors:

> Ladies and gentlemen, after the arguments of counsel, and after you have heard the testimony in this case, and I have charged you in the law applicable to this case, **you will be in a position to determine the true facts, and render a true and just verdict.**

R. 40, ll. 17-22. (emphasis added).

Defense counsel objected to the judge's instruction that a trial was "a search for the truth." Counsel objected because this instruction could mislead the jurors into thinking their job was to be "evaluators of the quality of the evidence" which was confusing because a juror would believe "*this was not a question of purely, have they proven their case, but a search for the truth*, this could result in, I think, a more – inappropriate burden for those jurors." Defense counsel asked the judge to modify her instructions to cure this defect. The judge stood by her instructions and denied relief. R. 73, l. 3 – 74, l. 5. (emphasis added).

As stated above, and during oral argument before this Court, the judge was being stubborn in her refusal to cure this erroneous damaging instruction that the jury had to determine the truth about what happened in this case. That was an impossible burden where the witnesses here, as in

many trials, had great incentives to say what they say -- their testimony, and not to say things that may incriminate them.

This Court may have overlooked the fact that this preliminary instruction is far more pernicious than "seek the truth" language in a closing instruction from the trial court, and Appellant continues to emphasize this fact. The reality that this occurred at the opening is all the more problematic, *in that throughout the trial the jurors were concentrating on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt.* Premature deliberations are prohibited but certainly individual jurors are evaluating the evidence as it is presented, and *the context* in which they are evaluating that evidence based on the judge's initial instructions is very important.

Again, **it is critical whether the jurors are listening to the testimony trying to determine what really happened (a search for the truth) rather than listening in terms of whether the state is meeting its burden of proving guilt beyond a reasonable doubt.**

Long ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), our Supreme Court strongly urged trial judges to avoid using any "seek" language. The Court noted that such "seek the truth" language was unnecessary, and it ran the risk of unconstitutionally shifting the burden of proof to the defendant.

Our Supreme Court recently in State v. Daniels, 401 S.C. 251, 737 S.E. 473 (2012) considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved the Supreme Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Such a charge could

effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt."

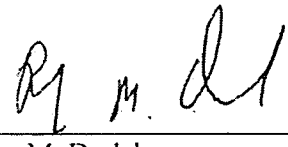
In this case, the judge also told the jury in her opening instruction that at the conclusion of the case they would be in a position to "render a true and just verdict." R. 40, ll. 17-22. This "true and just verdict" language reinforced in the jurors' minds that it was their duty to "seek the truth" and render a "true and just verdict," rather than do what the Constitution requires, determine if the state met its burden beyond a reasonable doubt. See, Jackson v. Virginia, 443 U.S. 307 (1979).

In State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000), our Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the court in Aleksey noted that the "seek" language was used in that case as an instruction on witness credibility. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. The Court in Aleksey therefore found there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt.

Here, conversely, the instruction in this case on the jury's duty being to "search for the truth" was not only included, but became the centerpiece of the judge's instruction to the jury on what a ***criminal trial is all about***. R. 34, l. 3 – 35, l. 2; R. 40, ll. 17-22. In the final analysis the instruction as a whole, such as in a closing instruction, does not save the trial judge from her own respectfully – stubborn – refusal to cure the improper opening instruction that the jury's purpose was to "seek the truth" so that "justice" is done. The jury's purpose was to determine if the state had proved Appellant guilty beyond a reasonable doubt. These two instructions are totally incompatible with each other. The bedrock principle of our criminal justice system is that the

government must prove a citizen's guilt "beyond a reasonable doubt." It is a jury that decides if the government has met that burden. The jury understanding -- **by the judge's opening instruction as a whole** -- that its purpose was to "search for the truth" – which means to decide what it believes really or most likely happened put an impossible wrongful burden on the jury, and it relieved the government of its true burden of proving to the jury Appellant's guilt beyond a reasonable doubt. What the jury believed most likely happened in its search for the truth was very inconsistent with the real burden of proof in a criminal case -- guilt beyond a reasonable doubt – and the instruction denied Appellant his right a fair trial. Rehearing should respectfully be granted on this most fundamental matter.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 25th day of February, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Ryan P. Deleston, #307106, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of February, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of February, 2016.

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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2013-002224
Opinion No. 2016-UP-055, filed February 10, 2016

THE STATE,

Respondent,

v.

RYAN P. DELESTON,

Appellant

RETURN TO PETITION FOR REHEARING

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ATTORNEYS FOR RESPONDENT

This matter comes before the Court by a Petition for Rehearing dated February 25, 2016 concerning the Court of Appeals order filed February 10, 2016, The State v. Ryan P. Deleston, Unpublished Opinion No. 2016-UP-055 (S.C. Ct. App. Filed February 10, 2016). On March 3, 2016, the Clerk requested a response to the Petition. This Return follows:

I.

In his Petition for Rehearing, Deleston asserts the following reasons why he believes rehearing is appropriate:

1. The Court may have overlooked the fact that cross examination regarding Bryan Rivers having committed a similar armed robbery and shooting two weeks before that the same gun in this case was *not* "evidence which can have no other effect than cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another." Petition, pp. 1, 2-8.

    a. Petitioner asserts that the Court should reconsider its opinion that the trial court denied their when it refused to allow the defense to cross-examine Julius Brown and Bryan Rivers about the armed robbery and shooting of Leroy "Chopper" Townsend that occurred approximately two weeks before Marley Lion was murdered. Petition, p. 5. He claims the ruling at trial prevented Appellant from fully developing and presenting his defense that Rivers was the shooter who killed Lion and that Petitioner was "merely present" pursuant the evidence of third party guilt, Rule 404 (b) and his due procees right to present a defense. Petition, p. 5-6.

2. The Court may have overlooked that "the trial court's instruction to the jury that a criminal trial was "a search for the truth," and not a determination is whether the State had proved Ryan Deleston guilty beyond a reasonable doubt was prejudicial" and the Supreme Court had warned that a trial judge should not instreuct it over an objection citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). Petition, p. 2, 8-12.

II.

Respondent submits that rehearing is not warranted. In summarily denying relief, the Court of Appeals concluded as to the first ground:

1. As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts ... may ... be admissible to show motive, identity, the existence of a common

scheme or plan, the absence of mistake or accident, or intent."); *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), cert. denied, 135 S.Ct. 400 (2014) ("Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan."); id. ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." (*quoting State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); *id.* at 338 n. 4, 748 S.E.2d at 205 n. 4 (noting we must look at the commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); id. at 341, 748 S.E.2d at 206 ("The admissibility of evidence of third-party guilt is governed by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941)."); *Gregory*, 198 S.C. at 104–05, 16 S.E.2d at 534 ("[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." (emphasis added)); *Cope*, 405 S.C. at 339, 748 S.E.2d at 205–06 (addressing a similar due process argument in which the appellant relied on *Holmes v. South Carolina*, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from Holmes; holding "[i]t was not the strength of the State's case that led to exclusion of evidence of [the alleged guilty third party's] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible").

State v. Deleston.

Concerning the opening instruction issue, the Court of Appeals concluded:

2. As to whether the trial court erred in stating the trial was "a search for the truth in an effort to make sure that justice is done": *State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.' "(*quoting State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998) (alteration provided in *Aleksey*))); id. at 27, 538 S.E.2d at 251 ("However, jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."); *id.* ("The standard for review of an ambiguous [or improper] jury instruction is

whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.").

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III. ARGUMENTS WHY REHEARING IS INAPPROPRIATE

I. **The Court of Appeals did not misapprehend the law or facts. The trial judge did not abuse her discretion in initially denying the Appellant the right to cross-examine accomplices Bryan Rivers and Julius Brown concerning the fact that Bryan Rivers was the shooter in an armed robbery two weeks prior with the Appellant being involved where the asserted purpose was to suggest that Rivers was the triggerperson in the death of Marley Lion and that Appellant was merely present.**

   a. **Any alleged error in the earlier exclusion of evidence of Rivers being the triggerperson in shooting of Leroy "Chopper" Townsend two weeks prior during the cross-examinations of Rivers and Julius Brown was not reversible error where evidence that Rivers shot Townsend was subsequently introduced through the Appellant's admiited statement and specifically commented upon by the Solicitor in her closing statement to the jury.**

   b. **Any error in its exclusion of the potential cross-examination was harmless beyond a reasonable doubt where similar evidence was presented that Rivers had possessed the weapon in a robbery on the day of the crime and had possessed and presented a weapon earlier the same day. In addition, evidence of Appellant's guilt was overwhelming, in light of the accomplice liability theory and his own statement.**

The Appellant contends rehearing is required when he claims he was deprived of his constitutional right to present a defense because he was precluded from presenting evidence on cross-examination of accomplices Bryan Rivers and Julius Brown those two weeks prior to the murder of Marley Lion, Rivers was a triggerperson involved in a shooting of Leroy "Chopper" Townsend with the same weapon that shot Lion. He contends that the evidence was admissible under S.C. Rule of Evidence 404(b), as evidence of third party guilt under the precedent of State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), and as his constitutional right to present a meaningful defense under Holmes v. South Carolina, 547 U.S. 319 (2006). The Appellant contends that this evidence of the other crime was relevant to his defense because he claimed that

Rivers was the triggerperson in Lion's death and that the excluded evidence would support that he was merely present at Lion's death.

In denying relief, the trial judge rejected the showing under Rule 404(b), South Carolina Rules of Evidence, concluding that there was not a close degree of similarity between the crimes and therefore did not demonstrate a common scheme or plan to establish Rivers as the shooter of Lion. The Court further rejected the claim that there was a due process violation. However, it also appears that during the trial there was a change in strategy by the prosecution[1] prior to the conclusion of the state's case when it placed similar information before the jury through the introduction of a partially self-serving statement of Deleston which included information about Rivers shooting Townsend earlier with the murder weapon. For all these reasons, a new trial is not warranted.

The summary order by the Court of Appeals suggests in its citations that the Court opined that the evidence of the other criminal act by Rivers was not relevant because it was not sufficiently similar to be admissible and lacked a sufficient degree of similarlity, citing *Cope*. Respondent submit that the conclusion is correct, but there are also additional reasons why a new

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[1] At the outset of the opening argument, Solicitor Wilson stated, although the State would show "that it was Deleston that pulled that trigger" that night (R.p. 42, ll. 1-4, Tr.p. 238, ll. 1-4), it was relying on the principle of the hand of one is the hand of all" liability and that "when we prove to you that Julius, 'Little B' [Rivers] and Ryan Deleston were acting together, who pulled the trigger will not be of importance to you." R.p. 42-43, Tr.p. 238-239. Importantly, throughout the opening statement by Solicitor Wilson, no mention is made of her intent to introduce the taped statements of Deleston of July 30, 2012. R.p. 41-51, Tr.p. 237-247. No mention is made of the Appellant's statement.

However, counsel Pennington does present his defense theory that Bryan Rivers "used the weapon at 2:45 am, one hour before this murder downtown on Rutledge Avenue, to rob that couple that you heard about downtown. And at 4:07 am, he used it again to murder Marley Lion." R.p. 57, ll. 16-20. Also R.p. 59. Tr.p. 253, ll. 16-20. Also Tr.p. 255. ("It is whether or not the State has truly removed all reasonable doubt to show that ---in this instance, that Ryan Deleston would have seen the crazy, irrational act of Bryan Rivers coming."). Counsel Pennington made no mention of Deleston's statement in his opening either. During the testimony of Detective Williams of the Charleston Police Department, the State introduced evidence that Deleston in the evening statement had indicated, among other things that Bryan Rivers had the firearm and went up to the vehicle and shot into the (Lion's) vehicle. R.p. 758, ll. 7-15, Tr.p. 1012, ll. 7-15.

trial would not be warranted.

A. The Admission of Evidence of the Shooting of Chopper Townsend by Rivers with the Murder Weapon through the Appellant's Own Statement (State Exhibit 30) and the Solicitor's Subsequent Comment Concerning the Evidence of the Shooting in Closing Argument Renders the Limitation on Cross-examination Harmless Error.

As briefed before the Court, the record reflects that any exclusion of suggested evidence through cross-examination of Rivers and Brown that Rivers was the triggerperson in the shooting and attempted armed robbery of "Chopper" Townsend was harmless error because similar evidence was actually admitted within the admitted statement of the Appellant in the State's case and directly commented upon by the Solicitor in her closing statement to the jury. For this initial reason, the issue must be dismissed.

1. Deleston's Admitted Statement about the Chopper Shooting by Rivers (State Exhibit 30).

Near the conclusion of the state's case in chief, the State introduced **State Exhibit 30**, a videotape of the July 30, 2012 evening session of the interrogation of Ryan Deleston. At the 9:33:40 portion of Exhibit 30, Deleston brings up about another robbery they did, but he claimed he did not participate in where they shot a drug dealer named Chopper. At the 9:45 PM portion of the tape, it reflects that Detective Osborne asks Deleston what he knows about the Chopper shooting. Deleston then tells Detective Osborne that Chopper was a big drug dealer and that he had stopped selling to them so they got someone else to call him. According to Deleston, Julius Brown, Bryan Rivers, George Brown and Valentino "Tino" Heyward jumped in the truck to go do the "lick." Deleston stated that they returned with money, dope and Chopper's cell phone. Deleston stated he heard that Rivers (Lil B) had shot Chopper. He said they had two guns with them which they put out beside the house. Deleston says that Tino and Lil B actually did lick

while Julius and George stayed in car. Deleston says one of the guns was the murder weapon and other was a 45. Deleston stated that they got about 5 grand and 2 cookies in robbery. R.p. 766- p. 767, Tr.p. 1036- p. 1037. State Exhibit 30 (9:30 – 9:50).

2. *Solicitor Wilson's Closing Comments Concerning Rivers Shooting of Chopper.*

Solicitor Wilson commented upon the "Chopper" shooting in her closing argument. In particular, Solicitor Wilson stated:

> Foreseeability? Y'all might not have caught this, or -- or thought about why it was so important to this case when you were watching those three and four hours of the Defendant's statement. Towards the end, just this morning, when Detective Osborne comes in, he tells Deleston, I want to talk to you about some other things, some other crimes. And he starts going through and asking him about other instances. **And some of them Deleston said, I don't know anything about. You might remember the one he did know something about or he claimed to. The shooting of a guy named Chopper. Remember that? He says Bryan Rivers shot a guy named Chopper with the murder weapon. Okay.**
>
> **So Bryan Rivers is now alleged to have shot someone with a murder weapon.** He knows about it, and he goes to an armed robbery with it? He buys into robbing Joe's, he helps out in attempting to rob Marley, and he's going to say it's an accident, it wasn't foreseeable?

R.p. 781, l. 3-21, Tr.p. 1064, l. 3-21. (emphasis added). See State Exhibits 29 and 30. (Statements of Deleston); R.p. 766-767, Tr.p. 1036-1037.

3. *Prejudice not shown when similar evidence is admitted.*

In order for this Court to reverse a case based on the alleged erroneous admission or exclusion of evidence, prejudice must be shown. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). "Whether error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.' " State v. Mitchell, 286 S.C. 572, 573, 336

S.E.2d 150, 151 (1985), citing State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971). In State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981), the Supreme Court concluded that while evidence which defendant, attempting to prove self-defense, offered for purpose of showing that he believed deceased owned a firearm, not for purpose of showing that deceased in fact owned a gun, should have been admitted, its exclusion was not prejudicial where other testimony showing that defendant had notice that deceased owned the gun was already admitted. See State v. Joseph, 328 S.C. 352, 371, 491 S.E.2d 275, 284 (Ct.App.1997) (stating where evidence is merely cumulative to other evidence admitted at trial, the exclusion of such evidence is not an abuse of discretion); State v. Golson, 349 S.C. 421, 429, 562 S.E.2d 663, 668 (S.C.App. 2002) (same); State v. Ferguson, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (finding exclusion of victim's prior inconsistent statement as substantive evidence was harmless error when other evidence was cumulative of statement).

Because the admitted State Exhibit 30 (Appellant's statement) included his assertion that Rivers shot Chopper with the murder weapon - the information he previously sought to develop through the cross-examoination examination of Rivers and Brown – any exclusion or limitation was harmless because it was not prejudicial because it would be cumulative to other evidence. For this initial reason, the limitation on cross-examination does not warrant a new trial.[2]

[2] As noted in the oral argument vefire this Court, it is unclear why the defense did not specifically seek to have Rivers or Julius Brown recalled to further inquire as to the "Chopper" shooting specifically based on the admission of the Appellant's statements. Perhaps defense counsel, aware of the fact that the admission of this part of Appellant's statement likely "opened the door" to allow the further development of the evidence within the State's case and would allow witnesses to be recalled within the State's case or presented within the defense case in chief, the defense did not want the lose the right to make the final statement in closing argument. When a defendant in a criminal case offers no evidence, he is entitled to the final closing argument to the jury. State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397, 398 (Ct.App.2005); State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) (citing State v. Gellis, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930)). However, rather than seek to re-open the state's case based upon the statement, immediately after State Exhibit 30 is played and the state closes its case, counsel Pennington merely renewed his motion about the inability to cross-examine witnesses in relation to the prior shooting by Bryan Rivers of Chopper without even mentioning or arguing that the similar evidence was presented in

B. THE ARMED ROBBERY AND SHOOTING OF LEROY "CHOPPER" TOWNSEND AND THE MARLEY LION ATTEMPTED ROBBERY AND SHOOTING ARE NOT SUFFICIENTLY SIMILAR TO PROVE A COMMON SCHEME OR PLAN UNDER RULE 404(b) THAT ONLY BRYAN RIVERS POSSESSED A WEAPON.

Deleston contends that the trial judge erred that in excluding the evidence of the June 1, 2012 shooting of Leroy Chopper Townsend by Bryan Rivers. He contends it satisfies the requirement under rule 404(b) because there was a close degree of similarity between the attempted armed robbery and murder of Marley Lion. He draws this similarity from the fact that both offenses involved the same people (Bryan Rivers, Julius Brown, George Brown, Rayshawn, Milligan, and appellant) and were planned by Julius Brown. He asserts that both robberies occurred near the Ardmore neighborhood within about a mile of each other and under his description George Brown acted as the driver. Of importance he contends that the home base for the perpetrators as Stephanie Brown and appellant's residence was consistent. Further he contends that the same weapon was used in each. Contrary to the findings of the trial judge, the appellant contends the only dissimilarities in the acts where that Valentino Heyward was involved in the first event and not in Marley's robbery attempt. Because of the evident dissimilarities and limited probative value, the trial court did not abuse its discretion in excluding questioning of either Bryan Rivers or Julius Brown on this issue. The Court of Appeals summary acceptance of the conclsuions of the trial court are supported by the record.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; see State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and

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Appellant's statement. R.p. 768, l. 24- p. 769, l. 6, Tr.p. 1038, l. 24- p. 1039, l. 6. Judge Harrington denied the motion. R.p. 770, l. 1-25, Tr.p. 1040, l. 1-25. At that point the defense rested its case without further presentation of any witnesses.

firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged"). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b). As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b). Id. State v. Cope, 405 S.C. 317, 337-338, 748 S.E.2d 194, 204 - 205 (2013). "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Id. The evidence is admissible if the similarities outweigh the dissimilarities. Id. In *Cope*, the Court recognized that even though there was clear and convincing evidence about the facts of the other crime, sufficient similarity was still required for admissibility. The Cope in *Cope* assessed the nature of each sought crime. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Clasby, 385 S.C. at 155, 682 S.E.2d at 896. Cope, supra.

Appellant asserts that the trial court erred by failing to find there was a close degree of similarity between the Chopper Townsend shooting and the attempted armed robbery and murder of Marley Lion. Like the situation in *Cope,* there are sufficient dissimilarities to support the exclusion of the inquiries about the June 1 shooting during the examination of Rivers and Julius Brown. The appellant has asserted the probative value of the testimony would be to contend that

Rivers had possession of a weapon in each crime and therefore supported the inference that Rivers possessed the weapon during the killing of Marley. First, it is clear that the proffered testimony of Julius Brown revealed that he did not have actual knowledge of who possessed and shot Chopper Townsend during the initial event. R.p. 138-143, Tr.p. 342-347. Second, the probative value of the earlier robbery was limited because Appellant was a participant in the Chopper Townsend robbery and shared in the proceeds, although he was not the triggerperson. Here, the limited probative value that the Appellant was seeking to show was that Rivers was the triggerperson in the first incident two weeks before. However, it is also undisputed that it was George Brown's gun and that Brown gave the gun to Rivers even before the couple's robbery on June 16.

Further, as pointed out by the Solicitor, and adopted by the trial judge, there were several dissimilarities in the events. See Chart, *Final Brief of Respondent*, p. 11. The Townsend shooting was a conceived plan against a specific target that the perpetrators knew. Unlike Townsend, there was no conceived plan based upon any knowledge that Marley had a significant amount of cash or drugs in his possession, but that it was a spontaneous crime. Unlike Townsend, there was no pre-existing bad blood with Marley. Unlike Townsend, the victim was shot numerous times. Unlike Townsend, the perpetrators were not driven to the scene but walked from appellant's residence. Unlike Townsend, Tino was not involved. Unlike Townsend the appellant actually went to the scene of the crime. Unlike Townsend, in the Appellant's statement Deleston confirmed that he had possession of the weapon at one point at the scene when Rivers tried to give it to them. Unlike Townsend, the attempted robbery of Lion was not the planned target for the crime but was redirected after the employees with the money had left Famous Joe's.

Finally, as acknowledged in the Solicitor's statements, the evidence before the court showed that other individuals had possession of the weapon after the Townsend incident, including Bryan Rivers and George Brown. The probative value of the June 1 incident is minimized where there is uncontested evidence that Rivers possessed and presented the murder weapon within 2 hours before the Marley shooting and was seen waving a gun earlier that same day that the video shoot. More importantly, the probative value of the June 1 incident is limited because the state acknowledged that the criminal charge was based upon the hand of one hand of all concept of criminal liability. .

For these reasons, the Court of Appeals did not err in implicitly affirming that trial judge did not abuse her discretion in excluding inquiring of Bryan Rivers concerning whether he possessed the gun during the shooting of Townsend two weeks before. The probative value of the exclusion is further minimized when evidence from Appellant about the Townsend ("Chopper") shooting came in through his statement.

C. EVIDENCE OF THE "CHOPPER SHOOTING" DOES NOT PERTAIN TO THE COMMISSION OF THE CRIME CURRENTLY BEFORE THE COURT AND THUS IS NOT ADMISSIBLE UNDER A THEORY OF THIRD PARTY GUILT.

Deleston contends that he was entitled to present the evidence of the Chopper shooting by Rivers as evidence of third party guilt of Rivers in Lion's death. The foundation of his claim is that the Townsend evidence suggests that at the Lion crime, only Rivers possessed the weapon rather than Deleston. However, this assertion does not absolve Deleston of his criminal involvement in Lion's death. There was no dispute at the trial concerning Rivers was involved in the attempted robbery of Lion which led to his death. In fact, Rivers admitted his guilt to the jury under hand of one hand of all and had pled guilty to the Lion crime. Under the state's

version, although it could prove that Deleston was the triggerperson in Marley's death, under the theory of "hand of one hand of all," Deleston would have been guilty, even if Rivers shot the weapon because he had been a participant in the crime.[3] **In fact, the defense acknowledged in their closing argument that "Ryan was out there as a part of the plan to do a robbery of Marley." R.p. 823, Tr.p. 1106.** "Third party guilt" therefore was not at issue in the case. To the contrary, the Appellant also ignores that as to the Chopper Townsend shooting, Deleston would have been as guilty as Rivers of the Chopper crime even though he was not the triggerperson but was involved in the planning, went to the scene, and although he remained in the vehicle he shared in the proceeds. The third party guilt claim is a "red herring" in this case. Contrary to the bare assertion by the Appellant, the evidence of the Chopper shooting is not inconsistent with his guilt concerning the Marley Lion shooting. A new trial on this claim is without merit.

As recognized in the Court of Appeals opinion, the rule for the admissibility of evidence of third party guilt comes from State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, our Supreme Court stated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

[3] During the jury instructions, the jury was advised about "aider and abettor" (R.p. 844, l. 10-17, Tr.p. 1127, l. 10-17), mere presence (R.p. 844, l. 18-23, Tr.p. 1127, l. 18-23), and "the act of one is the act of all." R.p. 845, l. 8- p. 845, l. 2, Tr.p. 1128, l. 8 – p. 1130, l. 2.

198 S.C. at 104-105, 16 S.E.2d at 534-535 (internal citations omitted). In Gregory, the Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. 198 S.C. at 105, 16 S.E.2d at 534. See 20 Am.Jur. Evidence § 265 (1939)); State v. Burgess, 391 S.C. 15, 23, 703 S.E.2d 512, 517 (Ct.App.2010) (stating Holmes v. South Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third-party guilt).

Here, the evidence of Bryan Rivers' involvement with the Chopper shooting coupled with the evidence that he robbed a couple at gunpoint hours before the Marley Lion shooting does "tends clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot into his car. It ignores the facts that Appellant was also involved. It ignores the fact that Appellant conceded in his statement that he was present and aware of the intended robbery. It ignores that fact that proof of possession by Rivers of the weapon in not inconsistent with Appellant's guilt for the crime of murder. Appellant failed to show that there was a clear "train of facts or circumstances" between all three known armed robberies – the Townsend shooting two weeks before and the admitted robbery of the couple by Rivers and Lion on the same date.

Although the similar perpetrators were involved and the same gun was used, the Chopper shooting differs greatly from the circumstances surrounding the Marley Lion shooting and the armed robbery of the couple downtown. The shooting of Leroy "Chopper" Townsend was one which was targeted and involved "bad blood." The armed robbery of the couple downtown and the attempted robbery and shooting of Marley Lion were both acts toward random victims who the codefendants did not know.

The trial court's holding that the "evidence in question exceeds the scope of the facts that are inconsistent with his [Appellant's] own guilt. It does not pertain to the commission of the crime currently before this Court" was not an abuse of discretion. The evidence of the Chopper would only cast "a mere suspicion upon a third party" and "the introduction of this evidence would . . . amount to solely conjectural inference as to commission of a crime by [a] third party." [R.p. 26, l. 7- p. 27, l. 16, Tr. 216, l. 7-p. 217, l. 16.]. Under the discrete circumstances of the case where the proffered evidence is not inconsistent with Appellant's guilt, a new trial is not warranted.

D. APPELLANT'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE HAS NOT BEEN VIOLATED BY THE EXCLUSION OF THIS EVIDENCE.

The Appellant finally asserts that his constitutional right to present a defense was violated by the trial court's failure to allow him to put in evidence that Rivers possessed the murder weapon and shot Townsend two weeks before in a robbery in which Deleston actually has assisted and shared the proceeds. The Constitution guarantees "a meaningful opportunity to present a complete defense," Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quotation marks omitted), but "not an unlimited right to ride roughshod over reasonable evidentiary restrictions," Rockwell v. Yukins, 341 F.3d 507, 512 (6th Cir.2003) (en banc). The right to present a complete defense - including the purported third-party culpability defense raised here - thus does not mean that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be "arbitrary" or "disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 325–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Here, the defense was allowed to explore the fact that Rivers had possessed the murder weapon prior to the Lion incident. The assertion that Rivers had possessed the murder weapon in an armed robbery immediately prior to the Lion killing was an uncontested fact. The robbery of the couple just two hours before was documented throughout the trial by evidence from each of the perpetrators – Julius Brown, Bryan Rivers, George Brown, and the victim. In addition, evidence was presented that during the day before the two robberies, Rivers was waving a gun at the video shoot. Further, Rivers conceded that prior to Lion's killing he had a discussion with Appellant where they attempted to pass the gun between each, a discussion that was documented within the testimony of Rivers, Julius Brown and Appellant's own evening statement. Simply put, the exclusion of the Chopper evidence did not prevent Appellant from articulating that Rivers had used the weapon in a robbery, a robbery that in fact had close temporal proximity to the Lion crime.

Appellant looks to Holmes v. South Carolina, 547 U.S. 319 (2006), to argue that the standard for presenting evidence of third party guilt has been lowered. In Holmes, the defendant "sought to introduce evidence that another man, White, had actually perpetrated the crimes for which he was charged. He proffered several witnesses who testified White had been in the neighborhood where the crime occurred on the morning it was committed. He also presented testimony of witnesses who claimed White had admitted committing the crimes. The evidence that Appellant wishes to enter creates only the mere suspicion that Rivers may have held the weapon at the time of Lion's death. Unlike Holmes, the evidence that Appellant wishes to enter here is evidence of a previous crime not directly related to the Marley Lion shooting. The Holmes case involves very different circumstances than our present case.

In *Cope*, Cope's third party culpability evidence was excluded under the standard rules of admissibility which apply to all evidence by application of Rule 404(b). The attempted showing for using the other act evidence against Sanders was minimally relevant to prove what the defense was seeking it to prove, that Sanders was able to secure entry for his other crimes without a showing of forced entry. The reasoning behind Rule 404(b) is one of relevance balanced against undue prejudice and confusion of the issues. In the state Supreme Court and trial court's reasoning that the other acts were not sufficiently similar, the trial court reasonably applied standards that did not violate the Constitution and thereby did not deprive him of a meaningful defense.

Similarly, in this case, the evidence that Rivers had possessed George Brown's gun two weeks before during a robbery that Deleston was a participant in was minimally relevant to prove that Rivers possessed the weapon at the Lion robbery, in light of the more temporally probative evidence supporting that defense theory. Here, the exclusion did not undermine his right to present a defense. There was extensive evidence presented about Rivers prior possession of weapons during a robbery. See United States v. Lucas, 357 F.3d 599, 606–07 (6th Cir.2004) (exclusion of third party's prior conviction did not violated defendant's right to present a defense where defendant "was able to explore her theory that [another individual] was in fact the culprit" through other evidence). The Court "may exclude marginally relevant evidence and evidence posing an undue risk of confusion of the issues without offending a defendant's constitutional rights." United States v. Alayeto, 628 F.3d 917, 922 (7th Cir.2010) (citing Holmes v. South Carolina, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The trial court did not abuse its discretion in the exclusion. [R.p. 31, ll. 5-10, Tr. 227, 11. 5-10.]. This is particularly

true when the evidence to support the common scheme would have supported Deleston' guilt as part of the earlier scheme as well.

E. Any error in the alleged exclusion was harmless error.

As noted above, evidence about the Chopper robbery and shooting by Rivers was developed in the admitted statement of Deleston the evening of July 30 and commented on by the Solicitor in her argument. In addition, evidence that Rivers possess the weapon within two hours of the Lion shooting was presented, as well as evidence that Appellant and Rivers were conferencing with each other at the Lion crime on who would have the weapon. Nevertheless, there was overwhelming evidence of Appellant' participation in the Lion incident through the testimony of Julius Brown, the surveillance videos which identified similarities with Deleston as opposed to the other perpetrators, and portions of Appellant's own statement where he acknowledged involvement in the Lion attempted robbery. Under accomplice liability theory, any alleged error could only be harmless error as to murder.

Under these circumstances, a new trial is not warranted.

II. **The Court of Appeals reasonably concluded a new trial is not warranted where the trial court stated during the court's opening remarks that a trial was "a search for the truth in an effort to make sure that justice is done" and the "State has the burden of proving each of the elements beyond a reasonable doubt" when viewing the instructions as a whole in the opening and in final instructions on the law which do not dilute the jury's responsibility to determine whether the State had met its burden of proof beyond a reasonable doubt.**

a. **Further, where no request for a mistrial was made and only a modification of the opening remarks was requested and denied, the issue was not preserved for an appeal where the requested language of the specific modified charge does not appear in the record.**

b. **Any alleged error in the opening remarks is harmless beyond a reasonable doubt.**

During Judge Harrington's **opening charge to the jury** she used the phrase concerning a trial that "it is a search for the truth in an effort to make you sure that justice is done." In his appeal before this court, the appellant contends that this "seek the truth" language was an inaccurate instruction and should require a new trial. He contends that this instruction at the opening of the trial would have allowed the jury to concentrate on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual task of determining whether the state had proved its case beyond a reasonable doubt. He states in his brief before this court that the South Carolina Supreme Court one year before the trial in appellant's case had instructed courts to remove similar language from their instructions which may potentially alter to the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt, citing State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

Respondent respectfully submits that a new trial is not warranted where the opening charge to the jury by Judge Harrington and use of "search for the truth and making sure that justice is done" language viewed with the opening instructions as a whole did not dilute the

jury's sense of responsibility where the jury was specifically instructed in the opening instructions that the instructions were only intended to serve as an introduction to the trial of the case and that the remarks were not a charge on the law which would be instructed at the close of the trial before the jury retires to consider the verdict. R.p. 35, l. 10-15, Tr. p.231, l. 10-15. Further, the appellants claim is ameliorated by the language stated by Judge Harrington that "the defendant has pled not guilty to this indictment. The state has a burden of proving each of the elements of the indictment beyond a reasonable doubt it is your duty, ladies and gentlemen, to determine whether the State has met that burden." R.p. 36, l. 3-8, Tr. p. 232, l. 3-8. Furthermore, when viewed with the closing instructions to the jury where the burden of proof was fully and properly charged, the Appellant's claim that the brief mention of seek the truth in the opening charge does not minimize the jury's responsibility to determine if the State met its burden of proof under the instructions as a whole. A new trial is not warranted. See State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

A. THE ISSUE IS NOT PRESERVED

Respondent submits this matter is not preserved for review because the precise language of the requested "modified charge" by counsel Pennington after the objection does not appear in the record. R.p. 73, l. 14-16, Tr.p. 269, l. 14-16. An appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record. See Wren v. Kirkland Distrib. Co., 250 S.C. 178, 181–82, 156 S.E.2d 865, 866 (1967) State v.

Jenkins, 249 S.C. 570, 155 S.E.2d 624 (1967); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct. App. 1993).

Here, the request at trial that was denied was actually a request for a modified charge and not a request for a new trial. R.p. 73-74, Tr.p. 269-270. At no point was the precise language of the instruction as requested made a part of the record. There is nothing for this Court to act upon concerning the failure to give the requested modification because the particular modification was not stated on the record. The issue must be dismissed for lack of preservation. The Appellant has the burden of presenting a sufficient record to allow review. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); State v. Hutto, 279 S.C. 131, 303 S.E.2d 90 (1983). Due to the lack of specificity as to the charge Appellant sought as a modification to the opening remarks, the Court should find no prejudicial error in the trial court's failure to charge the same.

B. THE OPENING REMARKS TO "SEEK THE TRUTH" WERE NOT REVERSIBLE ERROR

In the brief before this Court, the Appellant challenges the fact that Judge Harrington in her opening remarks described a jury trial as a search for the truth which Appellant's trial counsel admitted that he had used himself and heard in other trials. Although the record does not reflect the modified instruction he sought to have the judge use instead, even if the issue is preserved, a new trial is not warranted. The central function of the trial process in both criminal and civil cases is to discover the truth. See Portuondo v. Agard, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); see also State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"). As part of the truth-seeking process, the State is constitutionally required to prove a criminal defendant's guilt for every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358,

364 (1970); see also Burr v. Florida, 474 U.S. 879, 880 (1985) ("[T]he **beacon of the truth-seeking process** in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]" (emphasis added)). As a result, it is essential that the trial judge identify the State's burden of proof to the jury by instructing on the necessity that the defendant's guilt be proven beyond a reasonable doubt. Victor v. Nebraska, 511 U.S. 1, 5 (1994). However, the trial judge must avoid defining reasonable doubt in a manner that could lead the jury to convict on a lesser degree of proof than proof beyond a reasonable doubt. Id. at 22.

Significantly though, our Supreme Court has cautioned trial judges to avoid using language that instructs the jury to "seek the truth" due to the risk that such language could potentially shift the burden of proof to the defendant in an unconstitutional manner. State v. Aleksey, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000). Additionally, the Supreme Court has instructed that trial judges should not instruct jurors that their verdicts "would represent truth and justice for the parties" due to the risk that such language could distract the jury from its core functions. State v. Daniels, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring for the majority). However, our Supreme Court has specifically declined to hold any mention of "the truth" in jury charges is unconstitutional or require a new trial. See Aleksey, 343 S.C. at 28, n. 2, 538 S.E.2d at 252 ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."). Accord, State v. House, 2014 WL 2579659 (S.C. App. 2014)(unpublished); State v. Partain, 2012 WL 10841837 (S.C.App.,2012) (unpublished); State v. Cordle, 2005 WL 7084790 (S.C. App. 2005) (unpublished). See State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

In State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251-253 (2000), the Court held that there was no reasonable likelihood the jury applied trial court's instructions in an unconstitutional way when an instruction related to witness credibility contained truth seeking language but was "prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof"). Similarly, in Deleston's case, the "truth" language in the opening remarks was not given in conjunction with other "confusing or burden shifting language." Cf. Needs, supra. ("seek the truth" language is also troublesome when given in conjunction with other confusing or burden shifting language such as a reasonable doubt 'is a doubt for which you can give a real reason). The majority in Daniels, like the Court in Aleksey, found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. State v. Daniels, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012)(Toal, C.J., concurring for the majority).

Respondent agrees that this current case law presented shows a general disfavor for the "seek the truth" language, however, does not require a new trial here where the opening remarks were ameliorated by surrounding instructions and where the closing instructions repeatedly expressed the correct burden of proof and was not burden shifting.

Appellant claims that a preliminary instruction of this type is far more harmful than when the same language is used in a closing instruction from the trial court. Appellant makes a speculative claim that with this preliminary instruction, throughout the trial the jurors were concentrating on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt. Petition, p. 10. However, he ignores that the trial

judge also instructed that they were to be guided by the instructions at the conclusion of the case in their decision and that the state's burden of proof was beyond a reasonable doubt. R.p.35, l. 16- p. 36, l. 8; R.p. 38, l. 11-15, Tr.p. 231, l. 16- p. 232, l. 8; Tr.p. 234, l. 11-15.

Deleston's further suggests this challenged language would lead to prohibited premature deliberations. Petition, p. 10. Appellant's contention that the jury was inappropriately evaluating the evidence as it is presented is defeated by the clear language in the opening remarks of Judge Harrington. She stated her remarks were only an introduction to the trial and not a charge on the law which would be done at the close of the case. R.p. 35, l. 10-17, Tr.p. 231, l. 10-17. This additional qualification places that challenged language in its proper context. A reasonable juror with these opening remarks would understand that the juror needed to hear all of the evidence before considering whether or not the state has met its burden of proof, not some speculative on-going premature conclusion about the evidence before the conclusion of the trial.

Appellant mistakenly argues that the challenged language became the centerpiece of the opening remarks by the trial court. Petition, p. 11. Appellant highlights language from the opening remarks stating that at the conclusion of the case the jury would be in a position to "render a true and just verdict." [R.p. 40, ll. 17-22, Tr. 236, ll. 17-22.] Using this language, Appellant again makes a speculative claim that this reinforced in the jurors' minds that it was their duty to "seek the truth" and render a "true and just verdict," rather than do what the Constitution requires, determine if the state met its burden of proof beyond a reasonable doubt. However, at no time does he point out the critical fact – the jury was instructed in the opening remarks that "the state has the burden of proving each if the elements beyond a reasonable doubt" and that "it is your duty . . .to determine whether the State has met that burden." R.p. 36,

l. 4-8, Tr.p. 232, l. 4-8. Furthermore, an important salient factor is that the court had earlier stated that it would not tell them the elements of the crimes until the conclusion of that case "at a later time." R.p. 35, l. 24-25, Tr.p. 23[illegible] l. 24-25. Viewing the opening remarks as a whole, a reasonable juror would not interpret it in the manner that Appellant suggests.

More importantly, his speculation about burden-shifting evaporates when viewed with the actual instructions on the law at the conclusion of the case. First, there was no similar "search for the truth language" included in the actual jury charge at the conclusion of the case. R.p. 833-856, Tr.p. 1116-1139. Further, during the actual instructions on the law, the jury was charged with the presumption of innocence including proof beyond a reasonable doubt (R.p. 836, l. 8 – p 837, l. 1, Tr. p. 1119, l. 8 – p. 1120, l. 1) and the explanation of the state's burden of proving defendant guilty beyond a reasonable doubt. R.p. 837, l. 2-21, Tr.p. 1120, l. 2-21. In addition, the jury was charged that the burden of proving the defendant guilty beyond a reasonable doubt "rests with the state regardless of whether the state relies on direct evidence, circumstantial evidence or some combination of the two."[4]

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[4] The jury was also charged concerning credibility that it meant believability and "it becomes your duty as jurors to analyze the evidence and determine which evidence convinces you of its truth." R.p. 838, l. 21-23, Tr. p. 1121, l. 21-23. The jury was charged that the defendant is not required to prove his innocence and "the burden of proof remains on the State to prove guilt beyond a reasonable doubt." R.p. 841, l. 4-6, Tr. p. 1124, l. 4-6. The jury was also instructed concerning determining the admissibility of defendant's statement that the "the state has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary." R.p. 842, l. 11-13, Tr.p. 1125, l. 11-13.

Similarly, the jury was instructed concerning evidence of the identification of the defendant as the person who committed the crime, "the state is a burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant." R.p. 843, l. 2-9, Tr. p. 1126, l. 2-9. The jury was additionally reinstructed concerning the fact that "the burden of proof on the state extends to every element of the crime charged and this includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed or participated in the crime. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you

Concerning accomplice liability, the jury charge included that "the State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is a hand of all." R.p. 846, l. 8-12, Tr. page 1129, l. 8-12. The jury was also advised that "intent" must be proved "beyond a reasonable doubt." R.p. 847, l. 6-9, Tr.p. 1130, l. 6-9.

Judge Harrington then proceeded to charge on each of the elements of the crimes. As to murder, she instructed "the State must prove beyond a reasonable doubt that the defendant killed another with malice aforethought." R.p. 848, l. 21-24, Tr. p. 1131, l. 21-24. As to attempted armed robbery, Judge Harrington went through each of the elements that "the state must prove." R.p. 850, l. 18 – p 851, l. 9, Tr.p. 1133, l. 18 – p. 1134, l. 9. See e.g. R.p. 850, Tr.p. 1133, l. 24 ("the state must show"); R.p. 851, Tr. p. 1134, l. 9-10 ("the state must prove"); R.p. 851, Tr.p. 1134, l. 15-16 (the State must also prove"); R.p. 852, Tr.p. 1135, l. 2-3 (the State must prove"). As to possession of a handgun with an obliterated serial number that jury was charged the "state must prove beyond a reasonable doubt" the particular elements of that crime. R.p. 852, Tr.p. 1135, l. 10-17. Similarly, the requirement that "the state must prove beyond a reasonable doubt" was charged on the particular elements of the crime of possession of a firearm during the commission of a violent crime. R.p. 852, Tr.p. 1135, l. 18- R.p. 853, Tr. p. 1136, l. 7.

Viewing the instructions as a whole, there is no reasonable likelihood that a juror would conclude that the burden of proof was other than upon the state to prove each of the elements

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must find the defendant not guilty." R.p. 844, l. 10-17, Tr. p. 1127, l. 10-17. The jury was also charged concerning mere presence that the burden was on the State to prove every element of the crime charged. R.p. 844, l. 24-25, Tr. p. 1127, l. 24-25. The instruction further required if "the State's prove the defendant was only present at the scene of the crime and that they had not proved beyond a reasonable doubt any other participation in the crime, then you must find the defendant not guilty." R.p. 845, l. 2-7, Tr. p. 1128, l. 2-7.

beyond a reasonable doubt. Appellant claims that the judge's initial instruction to the jury regarding the jury's function is burden shifting due to the lack of instruction on the duty of the jury to find the defendant guilty beyond a reasonable doubt, and its emphasis that a criminal trial was a "search for the truth" and also that it was the jury's "solemn responsibility to determine the guilt or innocence of the Defendant. . ." Contrary to the claim in the Appellant's petition for rehearing , even in the opening remarks the jury was advised "the defendant has pled not guilty to this indictment. The State has the burden of proving each of the elements of the indictment beyond a reasonable doubt." The Appellant's claim is grounded upon a misstatement of the record of the opening remarks of Judge Harrington. [5]

Significantly, the trial judge thoroughly and repeatedly explained to the jury that Appellant was presumed to be innocent and the State had the burden of proving Appellant's guilt beyond a reasonable doubt for every element of the indicted offenses before he could be convicted. Furthermore, at no point in his jury instructions did the trial judge suggest to the jury that it was required to "seek" some reasonable explanation of Appellant's innocence. See State v. Raffaldt, 318 S.C. 110, 115-116, 456 S.E.2d 390, 393 (1995)(finding a jury charge instructing the jury to "seek some reasonable explanation other than the guilt of the accused" was erroneously burden-shifting but determining any error with that instruction was harmless because

[5] Additionally, Appellant asserts that the judge's statement to the jury that her opening instructions were not instructions on the law should be disregarded. According to Appellant, the reality, and not the legal fiction, is that the jury "naturally looks up to the trial judge and expects guidance from her on how they should act and what their responsibility were." (Appellant Brief pg. 39-40). Appellant refers to instruction as giving the antithesis of the jury's real function "which was to determine whether the state proved the defendant's guilt beyond a reasonable doubt.

However, the Court and the Appellant should not ignore that Judge Harrington's remarks in the opening statement were expressly stated to them as not being the charge on the law which would be done later. The judge was essentially telling the jury to wait to act until the conclusion of the case when the judge would tell them what their responsibility is in determining a proper verdict. The attempt to enhance the instruction by isolating the language and ignoring the context it is in with the surrounding instructions is not how a reasonable juror would have viewed it.

the charge as a whole properly explained the State had the burden of establishing Raffaldt's guilt beyond a reasonable doubt). Accordingly, because the trial judge's opening remarks and jury instructions thoroughly explained the State's burden of proof and Appellant's presumed innocence, the jury charge as a whole was not erroneous and does not warrant reversal. See State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

As an alternate ground, any alleged error in the opening remarks is harmless beyond a reasonable doubt. Aleksey, supra. State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 478 (2012) (Toal, C.J., concurring for the majority). First, like in Aleksey, the "seek the truth language did not appear in either the reasonable doubt or circumstantial evidence instructions. Second, as in Daniels, as stated in the Respondent's statement of the facts, the state presented substantial evidence that Appellant was involved in the criminal act that led to the death of Marley Lion through the testimony of his accomplices in crime. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Based on the overwhelming evidence of guilt presented to the jury and the breadth of the instructions on reasonable doubt, the trial court's allegedly erroneous opening remarks could not have contributed to the guilty verdict. See Lowry v. State, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008)("From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' ")(internal citation omitted).

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the Petition for Rehearing should be denied and judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 14, 2016
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2013-002224

THE STATE,

Respondent,

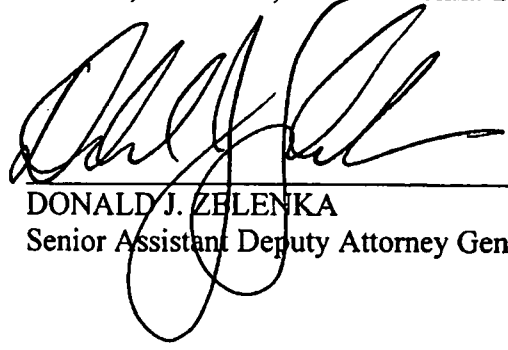
v.

RYAN P. DELESTON,

Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Return to the Petition for Rehearing in the foregoing action by depositing two copies of same in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, and Laura M. Caudy, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 14th day of March, 2016.



DONALD J. ZELENKA
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The South Carolina Court of Appeals

The State, Respondent,

v.

Ryan P. Deleston, Appellant.

Appellate Case No. 2013-002224

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.

Carol E. Short, Jr. J.

John D. Geathers J.

J.

Columbia, South Carolina

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