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

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by refusing to allow Appellant to cross-examine witnesses about an armed robbery and shooting that occurred approximately two weeks before the murder where it was undisputed that Bryan Rivers was the shooter in the prior robbery and that the same firearm was used in both cases, since this prevented Appellant from fully developing and presenting his defense at trial, namely that Bryan Rivers was the shooter who killed the decedent, Marley Lion, and that Appellant was merely present at the scene, in violation of Rule 404(b), SCRE, the rule on third party guilt, and Appellant's due process right to present a defense?

2. Whether the court erred by informing the jury during the court's opening instruction that a trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and decimated the proper standard and jury inquiry of whether the state had proved Appellant's guilt beyond a reasonable doubt?

RESPONDENT'S COUNTER QUESTIONS PRESENTED

1. Whether the trial judge abused her discretion in 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. Whether 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 introduced through the Appellant's statement and commented upon by the Solicitor in her closing statement to the jury?
    b. Whether any error in its exclusion was harmless beyond a reasonable doubt where 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?

2. Is a new trial is 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, is a new trial warranted based upon "search for the truth" language in an opening remark where no request for a mistrial was made and only a modification of the opening remarks was requested and denied, but the issue was not preserved

for an appeal where the requested language of the specific modified charge does not appear in the record?

b. Further is a new trial warranted when any alleged error in the opening remarks is harmless beyond a reasonable doubt?

RESPONDENT'S STATEMENT OF THE CASE[1]

Procedural Statement

The Appellant, Ryan P. Deleston, was indicted by the Court of General Sessions for Berkeley County at the October 2012 term for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime and at the December 2012 term for possession of a handgun with an obliterated serial number. R.p. 924-931. The Appellant was represented by Ninth Circuit Public Defender D. Ashley Pennington and Assistant Public Defender John J. Kozelski. The prosecution was represented by Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Bruce DuRant. On October 7, 2013 the case was called before the Honorable Kristi Lea Harrington and a jury. On October 11, 2013, the jury found the Appellant guilty of all the charges. R.p. 859, l. 23 – p. 860, l. 17, Tr.p. 1142, l. 23 – p. 1143, l. 17.

Judge Harrington sentenced the Appellant to life without parole for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for possession of a handgun with an obliterated serial number. R.p. 865, ll. 2-16, Tr.p. 1164, ll. 2-16. The trial court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Appellant was sentenced to life without parole. R.p. 865, ll 13-15; p. 861, l. 12, Tr.p. 1164, ll 13-15; p. 1160, l. 12.

The Appellant filed a timely notice of appeal on October 14, 2013. This briefing follows.

RESPONDENT'S STATEMENT OF FACTS:

This case involves a senseless murder stemming from an attempted robbery. On the night of June 15, 2012, Marley Lion, a recent high school graduate, attended a house party with a

[1] This brief was written with the assistance of Morgan D. Page, an extern student from the University of South Carolina School of Law.

friend. [R.p. 78, l. 7- p. 79, l. 1; p. 80, ll. 13-18, Tr. 274, 1. 7- p. 275, 1. 1; p. 276, 11. 13-18.] Marley had been drinking that night. He drove his friend Katherine Ridgeway home around 3:00 a.m. and then "said he was heading home." [R. p. 81, 1. 7- p. 82, 1. 7, Tr. 277, 1. 7- p. 278, 1. 7.] Before making it to his destination Marley decided he was too intoxicated to drive and pulled into the parking lot of Famous Joe's to get some sleep. [R. p. 101, 11. 12-18; see R. p. 108, 11. 3-14, Tr. 298, 11. 12-18; see Tr. 305, 11. 3-14.] While parked in the parking lot of Famous Joes, Marley was shot five times and killed.[2] The state's version was that Appellant shot Marley during an attempted robbery with Bryan Rivers and Julius Brown. The jury was instructed and the State argued his guilt under accomplice liability, although it also asserted that Deleston was the triggerperson.

[2] Marley Lion's death was ruled a homicide by the forensic pathologist and the cause of death was determined to be a gunshot wound to the chest with perforations or injuries of the abdominal aorta, the spleen, and the liver. [R. p. 683, 11. 3-6, Tr. 934, 11. 3-6.] Marley also suffered several gunshot wounds to the left thigh and groin region, and a gunshot wound to the right arm. [See R. p. 683, 1. 11 – p. 696, 1. 21, See Tr. 934, 1. 11 – p. 947, 1. 21.]

ARGUMENT

I. The trial judge did not abuse her discretion in 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. Further, 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 introduced through the Appellant's statement and commented upon by the Solicitor in her closing statement to the jury.

b. Further, an error in its exclusion was harmless beyond a reasonable doubt where 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 that 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[3] 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 Admission of Evidence of the Shooting of Chopper by Rivers with the Murder Weapon through the Appellant's Own Statement and the Solicitor's Comment in Closing Renders the Limitation on Cross-examination Harmless Error.

At the outset, Respondent submits that the record reflects that any exclusion of evidence through cross-examination of Rivers and Brown that Rivers was the triggerperson in the shooting and attempted armed robbery of "Chopper" was harmless error because similar evidence was actually admitted within the statement of the Appellant and directly commented upon by the Solicitor in her closing statement to the jury. For this initial reason, the issue must be dismissed.

Deleston's admitted Statement about the Chopper Shooting by Rivers.

Near the conclusion of the state's case in chief, the State introduced State Exhibit 30, a

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[3] 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.

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).

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.

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. Hutto, 159 S.C. 185, 156 S.E. 355 (1931), the Court found that the refusal to permit defendant to deny statements made by witness held not reversible error, where court and solicitor admitted that defendant had already denied statements. 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 prosecutor confirmed that the Appellant's statement included his assertion that Rivers shot Chopper with the murder weapon - the information he sought to develop through the 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.[4]

STANDARD OF REVIEW

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

HOW THE ISSUE WAS INITIALLY RAISED BELOW

Prior to the trial, on October 7, 2013, the State made a written motion *in limine* regarding excluding from the record evidence that Bryan Rivers shot Leroy 'Chopper" Townsend two weeks earlier the same weapon used in the Marley Lion killing as inadmissible under Rule 404(b) and third party guilt. R.p. 3, Tr.p. 124. See *Motion In Limine Re: Reverse*

[4] 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 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.

404(B) Evidence by State. R. p. 866-873. The defense had made a companion "Motion to Reveal" Rule 404(b) Evidence to determine what information about Appellant's past criminal acts the state intended to use on October 1, 2013. R. p. 3, Tr. p. 124. *Motion to Reveal.* R. p. 874-876. On October 7, 2013, the defense filed a "*Defense's Response to the State's Motion in Limine Re: Reverse 404(B), SCRE Evidence.*" R. p. 877-890.

In the state's motion in *limine*, the State initially sought to prohibit the Appellant from offering remote and irrelevant testimony regarding Bryan Rivers's use of a murder weapon during an armed robbery two weeks before the murder of Marley Lion. The motion urged that Appellant would not be prejudiced by the exclusion because it anticipated that Bryan Rivers would admit that he used and possessed the weapon within hours of the shooting of Lion's. [5]

In the pretrial motion, the State declared that the anticipated facts of the case as follow:

> During the early morning hours of July 16, 2012, Bryan Rivers, Julius Brown, Appellant Ryan Deleston and others left Defendant's house in the Ardmore area to find someone to rob. They made their way downtown where George Brown's gun was used by Rivers and Defendant to rob a couple walking near Rutledge Avenue. The two stole the woman's purse but did not get any cash. The crew left downtown and discussed robbing the Famous Joe's bar in the West Ashley area of Charleston County. As they approached Ardmore, they pulled through the Famous Joe's and continued to discuss the Famous Joe's robbery.
>
> Shortly before 4AM, Defendant, Rivers and Julius Brown walked down the street with plans to rob Famous Joe's employees as they left the bar with money. They were staking-out the area as Marley Lion pulled into the parking lot of Famous Joe's. Lion was concerned that he had too much to drink so he parked his white Nissan Pathfinder and climbed into the backseat to "sleep it off."
>
> Within 10 minutes of Marley's climbing in the backseat, a surveillance video shows Julius Brown walking at a fast pace by Marley's car in the parking lot. The video shows that approximately 12 minutes later, Defendant approached the car and appeared to attempt to open the door to the backseat. When Marley's car alarm sounded, Defendant backed out of camera view for several seconds then re-approached the car and began shooting. In all, he struck Marley 5 of the 6 times he shot at Marley.
>
> An investigation ensued and Defendant, Rivers and Julius Brown were

[5] At trial, Rivers did in fact testify and he confirmed that he had the murder weapon earlier that night when they robbed the couple. R.p. 259, l. 6- p. 262, l. 18, Tr.p. 479, l. 6- p. 482, l. 18. ("I had the gun").

> developed as suspects. An undercover operation secured the purchase of the murder weapon from the Defendant. As a result of the undercover operation, George Brown gave information that Julius Brown, Rivers and Appellant were involved in Marley's murder. Upon his arrest, Defendant gave a statement implicating Julius Brown, Rivers and himself-- though he claimed Rivers was the trigger man. Since their own guilty pleas, Julius Brown and Rivers have confirmed their own involvement in the attempted armed robbery of Marley Lion after the Joe's plan fell through. They confirm that the Defendant shot Marley Lion using George Brown's firearm. Julius Brown and Rivers also admitted their involvement in the robbery of the couple downtown. According to both of them, Rivers used the same George Brown firearm that later was used to kill Lion.

State's Motion in Limine Re Reverse 404(B) Evidence, p. 1-3. R. p. 866-868.

Pertinent to this question, the prosecution pointed to the "Chopper" shooting evidence that they initially sought to exclude:

> Julius Brown, George Brown and Rivers also revealed that the Marley Lion murder weapon was used on June 1, 2012, by Rivers and another man (Valentino Heyward) when they robbed and shot Leroy "Chopper" Townsend. Chopper survived. According to all of them, Chopper is a drug dealer who they knew would have cash. Furthermore, Rivers had disliked Chopper for years. They rode with George Brown in his SUV to an area where they had created a ruse in which Chopper believed he was meeting someone to buy drugs at an apartment. When Chopper came out of the apartment, Rivers and Heyward robbed him of $1300 and Rivers shot Chopper with George Brown's gun.

State's Motion in Limine Re Reverse 404(B) Evidence, p. 1-3. R. p. 866-868.

In the motion, the prosecution relied up the recent decision in *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) in which the defense attempted to put in evidence other crimes committed by James Sanders to support an assertion the Sanders had acted alone in the instant case without Cope. The Court concluded the trial judge was correct in excluding the evidence because they were not similar enough to the charged crime. As noted in *Cope*, "a close degree of similarity is required."

In their initial analysis as to why the "Chopper" shooting should be excluded, the prosecution's motion asserted that the Chopper robbery did not fall within the *State v. Lyle* exceptions of motive, identity, common scheme, the absence of mistake or accident or intent.

The state asserted that the defense had no need to show these items because "[P]roving that Bryan Rivers used the murder weapon a full two-weeks prior does not prove his identity as the shooter, and the facts of the two cases are so wildly different that there is no common scheme or plan and it does not establish identity (it is not a "signature" crime)." *State's Motion in Limine Re Reverse 404(B) Evidence*, p. 5. R. p. 870. Although it conceded that the evidence of the Chopper shooting was clear and convincing, its probative value was outweighed by the prejudicial effect. As the State asserted (and showed), the defense was able to show that Bryan Rivers used the murder weapon in an armed robbery downtown Charleston within hours of Lion's murder which was part of the *res gestae* of the Lion killing. In their motion the State asserted that the temporal proximity of the various crimes was key:

> The State's and Defendant's evidence will also show that the murder weapon actually belonged to George Brown. Others' access to the murder weapon will be obvious throughout the trial. The real and obvious reason that the Defendant seeks to introduce the robbery and shooting of Chopper is an attempt to prove that Rivers' acted in "conformity therewith" and, therefore, must have killed Marley Lion. This use of other bad acts is strictly prohibited by the Rule, even if offered in exculpation by a Defendant. The admission of this evidence is highly prejudicial to the state and the victim in this case and under Rule 403, SCRE, the evidence should be excluded.

State's Motion in Limine Re Reverse 404(B) Evidence, p. 6. R. p. 871. The prosecution asserted that the evidence was remote in time and would only cast clumsy aspersions that Rivers was the triggerperson. As stated therein, Deleston was not prejudiced by the exclusion of the Chopper shooting because there will be ample testimony that the gun did not belong to Appellant and others had ample access to the gun, including by Rivers during the robbery hours earlier.

In the motion, consistent with Cope, the State attached a summary of the similarities and differences between the crimes. *State's Motion in Limine Re Reverse 404(B) Evidence*, p. 8. R. p. 873.

DATE: June 1	Chopper Shooting	Marley Lion's murder
Targeted victim	X	
Victim Known to Assailants	X	
"Bad Blood" with victim	X	
Victim b/m 30 yoa	X	
Victim shot once creating minor injury	X	
Victim forced to strip	X	
Victim robbed of $1300	X	
Assailants Driven to Crime scene	X	
Partner in Robbery. Valentino Heyward	X	
Shooting at Apartment complex	X	
Shooting not in Ardmore	X	
Shooting early-midevening approx. 9:30 pm	X	
George Brown's gun used	X	X
DATE : JUNE 16		X
Victim of Circumstance		X
Victim unknown to assailants		X
No bad blood with victim		X
Victim W/M 17 yoa		X
Victim shot 5 times fatally		X
Victim not actually robbed		X
Assailants walked to Crime Scene		X
Partners in Att. Robbery : Deleston and Julius Brown		X
Shooting in Parking lot businesses		X
Shooting in Ardmore		X
Shooting in early morning hours		X

State's Motion in Limine Re Reverse 404(B) Evidence, p. 8. R.p. 873. [6]

[6] The defense responded to the motion on October 7, 2013. He contended that the evidence was admissible as "third party guilt" as well as Rule 404(b). He contends that the admission of the Chopper shooting showed facts

The Motion Hearing

During the preliminary motions before Judge Harrington, the State made its argument as to why the potential evidence should be excluded consistent with their motion. R.p. 3– 6, Tr.p. 124-127. Solicitor Wilson noted the argument was undercut by the fact that Rivers used the gun an hour before the Lions shooting. R.p. 4, Tr.p. 125. The solicitor argued that if there is a need to show that someone else had used the murder weapon other than Deleston, the Defense has an armed robbery that occurred about one hour prior to the shooting using the same weapon. The solicitor claimed the two shootings were nothing alike. Chopper was someone who was known by Bryan Rivers and the other codefendants. They had set out to rob Chopper whereas "Marley Lion just happened to be in the wrong place and the wrong time" and were not the "intended target." Also, George Brown drove the men to the Chopper shooting while the men walked to Famous Joe's the night of the Marley Lion shooting. [R.p. 5, ll 1-20,Tr. 126, 11. 1-20.]. Additionally, the solicitor claims that the evidence is more prejudicial than it is probative. She asserted that was not probative because it's nothing like the shooting of Marley Lion. [R.p. 5, l. 21 – p. 6, l. 1., Tr. 126, 1. 21 – p. 127, 1. 1.].

"inconsistent with [the defendant's] own guilt . . . and raises a reasonable inference or presumption as to ... a defendant's own innocence", citing *State v. Gregory, supra. Defense Response to State Motion*, p. 3. R.p. 879. He contends that other crime standard for third party guilt should be a lower standard for admissibility. *Defense Response to State Motion*, p. 3. R.p. 879. The defense asserted that it must be reversible error to exclude evidence that Bryan Rivers was serially committing similar crimes at the time of the offense at issue in participated in the offense. *Defense Response to State Motion*, p. 6-7. R. p. 882-883. The defense further asserted that there was a sufficient similarity between the Chopper shooting and the liens shooting where he contends that the crimes were plan by the same individuals that there was a common plan to rob an individual which was executed under their theory by Bryan Rivers in the same manner to rob an individual at gunpoint and with the same weapon during the nighttime. The appellant further asserted in the motion that the two-week time difference does not preclude admission of other act evidence under *Lyle*. He contends that the admission of evidence of Rivers' other crimes is relevant evidence of intent and the identity of the person who really shot Lion's. He asserts that they passage of a mere 2 weeks did not make the June 1 shooting so remote to preclude them from being a common plan or scheme. Finally he contends that unlike *Cope*, the evidence was not being offered against a codefendant's rights on trial were trying to be protected. *Defense Response to State Motion*, p. 6-7. R.p. 882-883.

The defense contended that this doesn't meet the *Lyle* analysis because it is evidence of 3rd party guilt. They asserted that the evidence of the Chopper shooting was evidence that somebody else use this weapon in the very same manner as it was used in the liens shooting and that it showed that somebody else was the shooter in the Lion murder as third party guilt evidence. Ignoring "the hand of one hand of all" theory of the State, the defense urged that he should be entitled to present a defense and he in fact did not do this and that somebody else was the trigger man. R.p. 6, Tr.p. 127. The defense opined that the evidence was probative that somebody else committed the murder and did not prejudice anyone and was only probative of Deleston's innocence. He additionally contended that due process should allow him to present a defense saying that he was not the shooter and that it is more likely than not that Bryan was the shooter due to the earlier incident.

Solicitor Wilson responded that you have to look at the relevance of their request and that just because another armed robbery took place 2 weeks before does not automatically make it probative in this particular case. She pointed out that in the June 1 shooting the evidence would be that Chopper was called on the telephone told to be at a certain place under the ruse of buying drugs and there he was ambushed, robbed, and shot. She noted this is nothing like the shooting of Marley. It was her contention that under the defense analysis every armed robbery would involve a plan to hold someone at gunpoint which is what armed robbery is and that is not a sufficient similarity to allow the admission. However, the defendant cannot be prejudiced when there will evidence that the crimes that night began with a gun in Bryan Rivers' hand committing an armed robbery before Marley Lion attempted robbery. R.p. 11, Tr.p. 132. See also, R.p. 12-16, Tr.p. 133-137.

The Trial Court's Rulings.

Judge Harrington ruled to exclude the admission of the Chopper shooting by the defense. In its pertinent part, she stated in denying the admission under Rule 404(b):

> Rivers' armed robbery and the shooting of Leroy "Chopper" Townsend and the Marley Lion attempted armed robbery and shooting are not sufficiently similar, based upon the testimony that has been presented, to prove a common scheme or plan. The Chopper shooting involved a victim that was known and targeted by the assailants. The assailants created a ruse to lure him out of his apartment.
>
> The Marley Lion shooting involved a victim of circumstance who was unknown to the assailants. While there was bad blood, according to testimony, of the chart that was given, between the victim and the assailants, there was no bad blood between the victim and the assailants in the Marley Lion murder.
>
> The victim in the Chopper shooting was a 30-year-old African male, while Marley Lion was a 17-year-old white male. In the Chopper shooting, the victim was shot once, was forced to strip and received a minor injury. Marley Lion was shot five times fatally. In the Chopper shooting, they were driven to the crime scene.
>
> In the current case, the assailants walked to the crime scene. And Rivers' partner in Rodney Chopper was Valentino Hayward. Other partners in the attempted robbery of Marley Lion's were Rivers, Deleston, and Brown. Finally, the Chopper shooting occurred at 9:30 at an apartment complex. Marley Lion was killed at approximately 4:00 a.m. in the parking lot of a business.
>
> The similarities between the two shootings and the fact that the gun used belonged to George Brown, and that Rivers was present at that crime scene, accordingly, Rivers' prior bad act of shooting Chopper is not sufficiently similar to the shooting of Marley Lion to qualify for the common scheme or plan under Rule 404(b).

R.p. 21, l. 15- p. 22, l. 24, Tr.p. 211, l. 15- p. 212, l. 24.[7]

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[7] Solicitor Wilson clarified that George Brown drove Deleston, Julius Brown and Rivers to the apartment complex where the Chopper shooting took place, along with Valentino Heyward. She stated that Tino and Rivers were the ones that actually did the robbery of Chopper and Rivers is actually the man who shot Chopper. R.p. 24, l. 1-10, Tr.p. 214, l. 1-10. Further. Solicitor Wilson clarified that in the Lion case, an hour before the (Lion) robbery an attempted robbery, George Brown drove the perpetrators through a parking lot and they went home. Brown's truck stayed at the location. At some point after that the Appellant, Bryan Rivers, and Julius Brown discussed looking for people to rob and then walked the third of a mile down to Joe's where Marley interrupted the employees leaving. Solicitor Wilson clarifies that this meant George Brown did not drive anyone to the Lion robbery, unlike

Judge Harrington next addressed the issue concerning excluding the evidence under third party guilt.

> As to the issue involving third-party guilt, the rule governing the admissibility of the evidence under third-party guilt doctrine provides that evidence offered by the accused as to the commission of the crime by another person must be limited to such facts that are inconsistent with his own guilt and to such facts as raise a reasonable inference of presumption as to his own innocence. Evidence that has no other fact other than to cast a suspicion upon another or to raise a conjectural inference as to the commission of the crime is not admissible. The evidence of third-party guilt may include facts that are inconsistent with the Defendant's guilt and evidence raising a reasonable inference as to the accused innocent.
>
> The evidence, again, to be sought by the Defendant's Motion to -- to Include Third-Party Guilt Evidence does not pass the same for admissibility. The evidence in question exceeds the scope of the facts that are inconsistent with his own guilt. It does not pertain to the commission of the crime currently before this Court or the Defendants involved in it whatsoever.
>
> Despite his contention that – despite Deleston's contention that Bryan Rivers was the shooter and that Bryan Rivers used the same weapon used in the submission of the crime currently before this Court, I do not find that the Defendant states a sufficient factual basis to cast more than a mere suspicion upon a third party. I find that the introduction of this evidence would also amount to solely a conjectural inference as to commission of a crime by third party.
>
> And I find that the evidence sought to be admitted is inadmissible as it pertains to the third-party guilt of Bryan Rivers. Again, noting your exception to my ruling.

R.p. 26, l. 7 – p 27, l. 16, Tr.p. 216, l. 7 – p. 217, l. 16.

The next morning, the defense pursued a ruling on the exclusion of the Chopper evidence under their due process argument. Counsel Pennington noted that in their response to the State's motion, they had also included a chart purporting to show similarities in the two crimes. R.p. 28-29, Tr.p. 224-225. Counsel Pennington noted that Rivers would testify that he was the shooter in

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the Chopper case where he did drive them to the apartment. R.p. 24, l. 1-24, Tr.p. 214, l. 1-24.

the June 1 incident and that it's the same gun that was used by him later on the night of this incident against two victims. He contended that this supports identity and intent and is consistent with targeting individuals in the nighttime at gunpoint.

Judge Harrington opined that the Appellant's due process arguments were addressed in her earlier orders. R.p. 30-31, Tr.p. 226-227.

The Trial Evidence Concerning "Chopper" Townsend's Shooting

During the trial, further discussion occurred about the Chopper incident prior to the testimony of Julius Brown. The State made a court exhibit the full incident report about the Chopper shooting. Court Exhibit 5. The State called Julius Brown in camera who testified concerning the Chopper shooting. R.p. 125-143, Tr.p. 329-347. In direct, he testified that Julius Brown, Rayshawn Milligan, Ryan Deleston, George Brown and Valentino went to where Chopper was. R.p. 125-126, Tr.p. 329-330. He stated that Chopper was a drug dealer known by Rivers and the witness and had bought drugs from him before. R.p. 126, Tr.p. 330. Julius recalled that George Brown drove them to Andrews Garden Apartments. He was aware that they decided they were going to rob Chopper that day. Valentino in Bryan Rivers was supposed to do the robbery. Julius Brown stated that George, Rayshawn **and Deleston** stayed in the truck and could not see the robbery take place. After they had let out Tino and Bryan Rivers, he next saw them running from the apartment and got in the car with them. Julius Brown testified that around $1300 was taken from Chopper and the 6th of them split it up between them. R.p. 129-130, Tr.p. 333-334. Julius Brown testified that he did not see who shot Chopper. R.p. 130, Tr.p. 334.

During the *in camera* cross-examination, Julius Brown testified that he had not been charged with the robbery of LeRoy Townsend. He stated that it was something that was planned in advance and agreed that Deleston actually knew there were going over the San Andrews Garden Apartments to commit a robbery. R.p. 138, l. 17-19, Tr.p. 342, l. 17-19. He stated that when Rivers and Tino got out they were carrying the same pistol that was later used to shoot Marley Lion. R.p. 139, Tr.p. 343. He also stated that it was in the nighttime and that they had approached Mr. Townsend on foot with the plan to rob him at gunpoint. He described Bryan and Tino returning to the Shires where they had parked and initially ran past the truck because the police had come through. R.p. 141, Tr.p. 345. He stated the plan was always that they would provide the transportation which they did. R.p. 143, Tr.p. 347. [8]

During Julius Brown's trial testimony before the jury, he confirmed that that they had agreed to "hit a lick" and drove in George's car with Bryan Rivers and Ryan Deleston in the backseat (on the night of Marley's shooting). R.p. 173, Tr. 378. He stated that they had George Brown's gun to use which they carried around often. R.p. 173, Tr.p. 378. He stated that they

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[8] Solicitor Wilson stated that she did not have anything further to add to the arguments other than if the court were to reconsider its position, this witness does not have enough facts about the shooting itself independently about who shot. R.p. 143, l. 17-23, Tr.p. 347, l. 17-23.

Counsel Pennington stated that he understood Bryan Rivers would be called that afternoon. He stated that he desired to cross-examine Rivers about the fact that in an interview with Detective Osborne he was asked about his involvement in the robbery at St. Andrews Garden Apartments with Tino which he denied which was not truthful. Counsel Pennington stated he sought to use that to show when Rivers needed to rely he knew how to lie. He also stated that with regards to a follow-up conversation that Rivers had on July 30 and 31, he admitted that on June 1 he rode along with a preplanned robbery of Mr. Townsend, that he got $1300 in cash and drugs, that he used the Marley Lion murder weapon to rob Townsend, that he shot Townsend in the leg, that it was George Brown's gun, that is not been charged with this arm robbery pursuant to his proffer agreement, and that he is also not been charged with attempted armed robbery pursuant to the agreement. R.p. 145, l. 1-11, Tr.p. 349, l. 1-11.

Solicitor Wilson stated that she took issue with the assertion that Rivers not being charged with the Chopper shooting was not pursuant to any agreement with the Solicitor's office. She stated that their agreement was only that they could not use Rivers words against him and that they could make a case from other folks against them and that he does not have immunity from that prosecution. R.p. 145, Tr.p. 349. See also, R.p. 243-244, Tr.p. 451-452. Solicitor Wilson reaffirmed that even the limited testimony of Julius Brown shows the stark difference between the Chopper shooting and the Lion shooting. R.p. 146, Tr.p. 350. Counsel Pennington renewed his objection concerning the Chopper shooting proffer. R.p. 146-147, Tr.p. 350-351.

spotted a boy and girl who were walking. He stated that Rivers and Deleston got out and Bryan had the gun. R.p. 175, Tr.p. 380. He saw Bryan Rivers point the gun and get the pocketbook from the couple. R.p. 175-176, Tr.p. 380-381. At that time he said while Bryan ran back to the car, Deleston walked the other way and they met Deleston at McDonalds after he called George to pick him up there. R.p. 176, Tr.p. 381.[9]

He stated that next plan was to rob Famous Joe's which the appellant had discussed robbing before. Julius testified that they drove through the parking area and then Julius told Ryan he did not think it was a good idea. R.p. 179, Tr.p. 384. Julius Brown said the gun was under the driver's side mat after Bryan gave it to George. Julius testified that when they got back to Cashew, Deleston wanted to go back and check out Famous Joe's again. Julius stated that he was to be the lookout in the wonder robbed them was going to be the appellant. R.p.181, Tr. p. 386. Julius recalled the George gave the list and the gun before they left and he put it inside his pants on his hip. R.p. 181, l. 12-13, Tr.p. 386, l. 12-13. He stated that he walked down to Famous Joe's with Rivers and the appellant. The plan was to wait for the people inside Joe's to come out with the money bag. He stated that Rivers role was also to be a lookout. R.p.182, Tr.p. 387.

Julius testified there was a discussion and a decision was made to change the plan after Marley Lion pulled up into the area. He said Deleston was going to try to see what Marley had. R.p. 183-184, Tr.p. 388-389. He stated that he later then saw Deleston and Bryan discussing

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[9] Chris McLandish testified about the initial robbery on Rutledge Avenue. R.p. 700-712, Tr.p. 953-965. He described walking with his girlfriend on June 16 between 2:45 AM and 3:00 AM. He stated that they heard a man behind them and then the person came in front of them with a gun. He testified he pointed the gun at him and that they only saw one man. He stated that after his girlfriend gave the purse to him the man ran off to the right and he heard a car door but did not see anything. R.p.702-704, Tr. 955-957. See also R.p. 707, Tr. 960. He confirmed that he only saw one person attempting to rob him. R.p. 711, Tr. 964.

who was going to do what and passing the gun back and forth. R.p. 187-188, Tr.p. 392-393. Julius testified that he then saw Deleston approach Marley's truck and tell him to open the door and Marley set off the alarm, which caused him to run back. At that time Julius testified he told the appellant to "bust the window" and Deleston turned back around and started shooting. R.p. 188, Tr.p. 393. He stated after the appellant shot 5 times he took off running. R.p. 189, Tr.p. 394. When they got back to Cashew Street, both Julius and Rivers cussed at Deleston for shooting for nothing. Deleston stated that he thought Julius had told him to shot. R.p.192, Tr.p. 397. Julius confirmed that Exhibit 23 was the gun used to kill Marley Lion owned by George Brown and that Deleston had it and that it was also used by Bryan Rivers that date to rob the couple. R.p. 212, Tr.p. 417. Julius confirms that on the video he is telling Deleston with the white shoes and striped shirt to bust the window. R.p. 213-214, Tr.p. 418-419.

On cross-examination, Julius confirms that Rivers got out with the gun to rob the couple and that Ryan had gone away from the robbery. R.p. 223, Tr.p. 440.

At the conclusion of the cross-examination, counsel Pennington renewed his request to go further, implicitly concerning the Chopper case. The court denied the motion. R.p. 240, Tr.p. 447. There was a further discussion about no further need to proffer Rivers testimony concerning the Chopper incident. R.p. 243-244, Tr.p. 451-452.

Bryan Rivers testified about his involvement in the couple's robbery and the Marley Lion incident. He stated he was involved in the shooting of Marley Lion with Julius Brown, George Brown and Ryan Deleston. R.p. 246-247, Tr.p. 466-467. He testified that he pled guilty to voluntary manslaughter for the killing of Marley Lion because the hand of one is a hand of all. R.p. 255, Tr.p. 475. He testifies on that night that he went downtown with Deleston, Julius,

George, and Rayshawn looking for robberies to be done with George Brown's gun. He stated that he had seen a couple that looked like they had been drinking which would be a good target. He thought George spotted them first and they pulled over in part. He stated that George gave him the gun and that he and Deleston got out. Although the appellant was supposed to help him, Rivers thought he didn't help him and that he walked the other way. Rivers stated that he approach the couple and held them at gunpoint and the female victim gave her purse to him. R.p. 260-261, Tr.p. 480-481.

He stated that he later picked up the appellant when they ran into him at McDonalds. R.p. 263, Tr.p. 483. Then, they drove around some more and scope the scene at Famous Joe's parking lot. Rivers stated that everybody was planning on robbing the people coming out of Joe's. R.p. 264, l. 9-11, Tr.p. 484, l. 9-11. He stated in on this planning was himself, Deleston, Julius and George. Because they didn't see anybody in the parking lot, Rivers thought that gave them the idea to continue on with the robbery. R.p. 265, Tr.p. 485. They returned to Cashew Street and then Rivers left with Deleston and Julius. R.p. 265, Tr.p. 485. Rivers stated that they walked and that Deleston had the gun he had gotten from George Brown. R.p. 266, Tr.p. 486. Rivers stated that after the earlier robbery, he had given the gun back to George Brown. He saw that Deleston had the gun before they left for Famous Joe's because he tucked it under waistline. R.p. 267, Tr.p. 487. Deleston had on a striped shirt. R.p. 267, l. 2-22, Tr.p. 487, l. 2-22.

Rivers stated he saw Marley Lion pull up while the employees were leaving. R.p. 269, Tr.p. 489. The big fish money was leaving according to Rivers. He stated that Julius check out the scene while Deleston had the gun. Rivers stated that Deleston tried to pass the gun to him, but he pushed it back. R.p. 270-271, Tr.p. 490-491. Also R.p. 309-310, Tr.p. 529-530. He said

his attention was not to rob the boy, but to get the person with the bag coming out of Joe's. R.p. 270-271, Tr.p. 490-491. He told Deleston to go ahead. R.p. 271; R.p. 310, Tr.p. 491; Tr.p. 530. ("to rob Marley Lion"). He described Deleston walking up to the window and knocking on it and the alarm went off. R.p. 271, Tr.p. 491. Deleston then initially ran back towards them and Rivers heard Julius say "get him" to continue with the robbery, but not as to shot the man. R.p. 272, Tr.p. 492. However, instead of robbing the man, the appellant started shooting the man about 5 times. Rivers stated he knew that the appellant hit him because the way the victim was yelling and screaming. At that point he turned and started running. He also thought the appellant turned and start running also and caught up with them. On the way back Deleston hid the gun under a pool. R.p. 274, Tr.p. 494. Rivers confirmed to this on the video of the crime scene. R.p. 282–283, Tr. 502–503. Rivers admitted that he was wearing all black and testified that Appellant was wearing a striped shirt and white sneakers called Willie Dee's. [R.p. 261, ll. 9-12; Tr. 267, ll. 1-17,Tr. 481, 11. 9-12; Tr. 487, 11. 1-17.]

On cross-examination, Rivers confirmed he had the weapon earlier that night and robbed the lady of her purse. R.p. 293, Tr. 513. As to the 2nd robbery, Rivers testified that he didn't know the appellant was going to do something like that. R.p. 297, Tr. 517.

At the conclusion of his examination, counsel Pennington renewed his motion pursuant to the motion in limine. R.p. 308-309, Tr. 528-529.[10]

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[10] George Brown, the gun owner, testified consistently with Julius and Rivers. He testified that during the first robbery that he had the gun in his vehicle and gave it to Rivers. R.p.457, Tr.p. 686. After the robbery of the couple, Rivers returned with the purse. He stated that Deleston had gotten out with Rivers, but they had split up. He said Deleston called him on his cellphone and they picked him up at the McDonald's. R.p.458-459, Tr.p. 687-688. After they returned to Cashew Street after casing out Famous Joe's, George stated he did not want to be part of robbing Joe's. However, he stated that Rivers had returned the gun to him after the first robbery, but gave it to Deleston who put it in his waistband when he left. R.p. 462-463, Tr.p. 691-692. He saw Deleston, Rivers and Julius

The state further introduced the video of the Appellant's statements. On the day of his arrest, Appellant was interviewed twice. On the day of his arrest, Appellant was interviewed twice. In the morning interview, he denied involvement in the crime. State Exhibit 29 (9:48-9:54, 10:59 -11:03, 2:19-2:20, 2:49). In the evening interview, State Exhibit 30, he initially named "Tino" as the perpetrator. State Exhibit 30 (8:00:12). Subsequently, in the interview, he named Bryan Rivers as the person who shot Marley Lion. State Exhibit 30 (8:16:25). He admits being with Rivers and Julius and described how it occurred. State Exhibit 30 (8:16 – 8:30). He claimed that Julius and Rivers were the ones who went up to rob the employees of Famous Joe's but then decided to rob Marley. He "identified Julius Brown as the person walking across in front of . . . Marley Lion's vehicle, and said that Bryan Rivers had the firearm and went up to the vehicle and shot into the vehicle." R.p. 756, l. 23- p. 759, l. 1, Tr. 1010, 1. 23 – p. 1013, l. 1. State Exhibit 30. Deleston also stated at some point during the event at Joe's, Rivers gave the gun to him and wanted him to go up to the car but he did not want any part of it and gave the gun back to Rivers. State Exhibit 30 (8:17 – 8:30).

At the conclusion of the state's case, counsel Pennington renewed his motion to thoroughly cross-examine witnesses in relation to the prior shooting of Chopper. R.p. 769, l. 4-6, Tr.p. 1039, l. 4-6. The Court denied the motion asserting that it had heard nothing to change its ruling. R.p. 770, Tr.p. 1040.

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leave. When they returned, they were made with Deleston. R.p.463-464, Tr.p. 692-693. George stated he did not know what happened but gleaned that Ryan had shot someone because he came back and washed his hands. R.p. 465, Tr.p. 694. George learned the next day that someone had been killed from the news. R.p. 467, Tr.p. 696. When he viewed the footage, George Brown identifies Deleston as the shooter from the video he viewed. R.p. 467-468, Tr. p. 696-697. He described the person as wearing the clothes that appellant had on that day and he had the physical characteristics of Deleston, as opposed to Rivers (too skinny). R.p.468-469, Tr.p. 697-698. State Exhibit 1 (Video). R.p. 469, 1. 9-10, Tr.p. 698, l. 9-10. Detective Osborne testifies that Deleston fit the description of the shooting on the video, not Julius or Rivers. R.p. 611-615, Tr.p. 857-861. State Exhibit 1 (Mantek Video).

In his defense closing argument, counsel Pennington urges the jury to accept that Rivers was the shooter. The factors he points out are that Bryan had the gun that night, he had the gun earlier that day at Shawn Turner's video production and was waving it around,[11] that Rivers was the gunman during the robbery on Rutledge Avenue when Deleston walked away. R.p. 808-809, Tr.p. 1091-1092. He also described the tip that the police had received from Leroy Townsend that Bryan was involved in the shooting. R.p. 812, Tr.p. 1095.[12] In addition, counsel Pennington argued that Appellant was not wearing black or a striped shirt when he is stopped riding the bicycle shortly after the crime. R.p. 813, Tr.p. 1096. [13] However, counsel stated that "we're not disputing that Ryan was out there as a part of a plan to do a robbery of Marley." R.p. 823, Tr.p. 1106, l. 2-4. Counsel also thought a moment of revelation during the examination of Rivers was when the question was asked about what set off the alarm and whether it was set off by Lion. R.p. 825, Tr.p. 1108.[14] Counsel claimed that this proved that he was close enough to see the cell phone light. Id. Counsel further asserted that he indicated that his involvement in trying to hide the pistol. R.p. 826, Tr.p. 1109. Counsel described that the Appellant's statement was what really happened and that it was unforeseeable and did not fit the plan. R.p. 829, Tr.p. 1112.

After the verdict, counsel renewed his motions, which were denied. Tr.p. 1148-49.

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[11] Bobby Warthaw testified that on the day of the murder, he had been up in Ardmore earlier in the day. Shawn Turner was doing a music video shoot and Bryan Rivers was out there and had pulled the pistol out, waiving it around. Rivers was intoxicated & acting a little crazy. R.p. 535-536, Tr.p. 765-766. Accord, R.p. 664, Tr.p. 915 (Det. Osborne testifies about the tip he had received from Warthaw about Rivers waving the gun around at the video shoot).

[12] Two days after the murder, Leroy Townsend contacted police & named Bryan Rivers as a suspect. R.p. 654-655, Tr.p. 905-906.

[13] Officer Vance testified that he stopped Deleston for not having a light on his bicycle around 4:20 am with another person and they were both wearing white shirts. R.p. 152, 155-157, Tr.p. 357, 360-362.

[14] See R.p. 271, l. 21-24, Tr.p. 491, l. 21-24.

A. 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 RIVERS POSSESSED A WEAPON.

In the brief before the court, the appellant contends that the trial judge erred that in excluding the evidence of the June 1, 2012 shooting of Leroy 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.

"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 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).[15] 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. at 155, 682 S.E.2d at 896. "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. "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). [16]

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[15] Some jurisdictions lower the standard of similarity necessary for admission of evidence of "other crimes," as here, a defendant is attempting to introduce the evidence. See State v. Garfole, 76 N.J. 445, 388 A.2d 587, 591 (1978) (stating lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State). See also United States v. Stevens, 935 F.2d 1380, 1403 (3d Cir.1991) (applying a lower standard and quoting Garfole);United States v. Cohen, 888 F.2d 770, 776 (11th Cir.1989) (finding standard for admission relaxed when the evidence is offered by a defendant). This is sometimes called the "Reverse 404(b) Rule." Jessica Broderick, *Comment and Casenote, Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U.Colo.L.Rev. 587, 587 (2008). Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature. See Rivera v. State, 561 So.2d 536, 539-40 (Fla.1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence).

[16] The foundation for admissibility transcends mere similarity, for the admission of such evidence under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498

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 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 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 robbery and shared in the proceeds, although he was not the triggerperson. Here, the limited probative value that the Appellant was seeking 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.

U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted").

Further, as pointed out by the Solicitor, and adopted by the trial judge, there were several dissimilarities in the events. See Chart, infra. The Townsend shooting was a conceived plan against a specific target that the perpetrators knew. Unlike Townsend, there was no conceived plan based upon the knowledge that Marley had a significant amount of cash or drugs in his possession, but a spontaneous crime. Unlike Townsend, there was no 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 he confirmed that he had possession of the weapon at one point when Rivers tried to give it to them. Unlike Townsend, the attempted robbery 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 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.

B. 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.

The appellant 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 evidence would suggest that at the Lion crime, Rivers possessed the weapon rather than Deleston. This 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.[17] 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 ignores that as to the Chopper Townsend shooting, Deleston would have been as guilty as Rivers of the crime even though he was not the triggerperson but was involved in the planning, went to the scene, although he remained in the vehicle and 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

[17] 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.

of the Chopper shooting is not inconsistent with his guilt concerning the Marley Lion shooting. A new trial on this claim is without merit.

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.

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 involved. It ignores the facts 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.

Although the same people 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, 1. 7-p. 217, 1. 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.

C. 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). A defendant must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to present a complete defense - including the 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), citing United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)(quotation marks omitted). See United States v. Lucas, 357 F.3d 599 (6th Cir.2004).[18]

What was true in Lucas is true today. Just as Federal Rule 404(b) permissibly limited Lucas's right to introduce propensity evidence directed toward a third party, so the same kind of state law evidentiary rule - indeed essentially the same rule, see South Carolina Rule of Evidence Rule 404(b) permissibly limited Deleston's right to introduce propensity evidence about Rivers.

Here, as in *Lucas*, 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

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[18] In United States v. Lucas, 357 F.3d 599 (6th Cir.2004), the defendant tried to introduce propensity evidence-a previous conviction for cocaine possession-to prove that a third party, not the defendant, committed a drug crime. Id. at 604. Relying on Federal Rule 404(b), which likewise bars evidence about a person's character "in order to show action in conformity therewith," the district court excluded the evidence. In affirming, the Sixth Circuit first explained that Federal Rule 404(b) applies to all propensity evidence, whether used to show that the defendant or another individual acted in conformity with their prior misconduct. Id. at 606. The Court then rejected Lucas' constitutional argument. The Sixth Amendment right to present "a complete defense" the Court explained, "does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." Id. And "[t]he exclusion of [the third party's] prior conviction," it explained, "did not violate Lucas's constitutional right to present a defense," because "Lucas was able to explore her theory that [another individual] was in fact the culprit" through other evidence. Id. at 606-07.

murder weapon in an armed robbery 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 Wynne v. Renico, 606 F.3d 867, 871 (6th Cir.2010) (petitioner not denied right to present a defense by trial court's exclusion of Rule 404(b) evidence where petitioner was able to introduce "considerable non-propensity-based evidence in support of the Peckham-did-it defense."); 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.

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

Even if considered as "constitutional error" an examination of the record in this case reveals that any alleged error in excluding Petitioner's excluded evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Chapman announced that constitutional errors are harmless only if the reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id.

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. **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. 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. Finally 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.").

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). The ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. State v. Bell, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); see also, e.g., State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction

must be viewed in the context of the overall charge."). The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood that the jury applied the charge in a way that violated the Constitution. Estelle v. McGuire, 502 U.S. 62, 71 (1991). " 'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.' " State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). Additionally, erroneous jury instructions are subject to a harmless error analysis. State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

How the issue was raised at trial.

In Judge Harrington's opening instructions to the jury, she included the following statements:

> Ladies and gentlemen, I wanted to take this opportunity to tell you that this trial probably will be different from what you might expect. 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 full 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.p. 34, l. 3- p. 35, l. 2, Tr. 230, 1.3 – p. 231, 1. 2 (emphasis added in Initial Brief of Appellant, pg. 36).

However, the trial judge also commented that these instructions were not as "charge on the law." R.p. 35, l. 10-12, Tr.p. 231, l. 10-12. She stated that "I will instruct you on the law that is applicable to this case throughout the trial and at the close of the case before you retire to

consider the verdict." R.p. 35, l. 10-15, Tr.p. 231, l. 10-15. In addition, in the opening charge, the trial judge stated:

> I simply wanted to take this opportunity to explain the procedure so that you will be better able to understand what is happening before you. The defendant is charged with indictments and he is charged in each indictment separately with the crime of murder, attempted armed robbery, possession of a handgun with an obliterated serial number, and possession of a firearm during the commission of a violent crime.
>
> I will explain the elements of each of these charges to you at a later time. The indictment is simply the charge by which this case is brought into this court the indictment is not in any sense evidence of the allegations it contains. **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.**
>
> It is your duty, ladies and gentlemen, to determine whether the State has met that burden. Your purpose as jurors as to find and determine the facts. He was the sole judges of the facts in this case.

R.p. 35, l. 16- p 36, l. 8, Tr.p. 231, l. 16- p. 232, l. 8 (emphasis added). Judge Harrington further charged in her opening instruction that "it is important that you keep an open mind and not decide any issue in this case until all the evidence has been presented, the parties have made their closing arguments, and I have instructed you on the law applicable to the case." R.p. 38, l. 11-15, Tr.p. 234, l. 11-15. Judge Harrington also concluded the instructions with the following:

> 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.p. 40, ll. 17-22, Tr. 236, ll. 17-22. (emphasis added in Initial Brief of Appellant pg. 36-37).

The Objection and Request for a Modified Instruction and Ruling

After the jury left the courtroom the judge allowed the Defense counsel to put on the record his objection to the court's opening instruction. The Defense counsel objected to the

judge's instruction that a trial was "a search for the truth." Counsel Pennington stated that although he had used the language himself before, he had heard at a seminar that he "this could mislead a juror into thinking that their job is to be investigators instead of to be evaluators of the quality of the evidence and whether or not it proves beyond a reasonable doubt the indictments that have been brought by the state against the individual on trial." R.p. 73, l. 3-13, Tr. page 269, l. 3-13. Counsel stated that he had objected after the trial judge had finished her remarks and asked the court then to consider a modified instruction. R.p. 73, l. 14-17, Tr.p. 269, l. 14-17.[19]

However, counsel never states what language he sought the trial judge to include in a modified instruction. Rather, he continued and stated his concern is that he believes the jurors place enormous weight and importance on what judges say. He was concerned that if a juror was to believe that this was not whether the State had proven its case but asserts for the truth this could result in an inappropriate burden for them. R.p. 73, l. 14-p. 270, l. 3, Tr. page 269, line 14 – page 270 line 3. Judge Harrington noted the objection. **[The record does not reveal what modification of the instruction counsel Pennington requested].** No request for mistrial was made. At the conclusion of the state's case, defense counsel renewed his earlier objections specifically to evidentiary issues, but not to issues related to the opening remarks of Judge Harrington. R.p. 768-769, Tr.p. 1038-1039. At the conclusion of the trial, counsel Pennington asserted that he was renewing all motions based on objections that he asserted earlier. Tr.p. 1148, l. 12-21.

[19] This is reflected in the record where counsel Pennington approached the court and his objection was noted and that he would be allowed to articulate his reasons outside the jury's presence at the first break. R.p. 41, l. 6-16. Tr.p. 237, l. 6-16.

ANALYSIS

THE ISSUE IS NOT PRESERVED

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.

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."); see also State v. Hoffman, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994)(holding a reasonable doubt jury charge that included "in seeking the truth" language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant).[20] 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 (2000), the Court held "[T]he standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution."). Accord

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[20] Courts have held that seek the truth and similar language used by counsel and the courts does not necessarily dilute the juror's role. In U.S. v. Harper, 662 F.3d 958, 961 (7th Cir. 2011), the Seventh Circuit stated:

> We do not find any error in the attorneys' closing statements, much less plain error. There was nothing wrong with referring to trials as "searches for truth": As we commented at oral argument, trials are searches for the truth; the burden of proof is just a device to allocate the risk of error between the parties. Indeed, both the Supreme Court and this court have repeatedly noted that criminal jury trials serve an important "truth-seeking" function. E.g., United States v. Mezzanatto, 513 U.S. 196, 204–05, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995); Jones v. Basinger, 635 F.3d 1030, 1040–41 (7th Cir.2011). The attorneys here did no more than to repeat that uncontroversial proposition.

U.S. v. Harper, 662 F.3d 958, 961 (7th Cir. 2011). See United States v. Gonzalez–Balderas, 11 F.3d 1218, 1223 (5th Cir.1994)("There is no reasonable likelihood that the jury inferred that the single reference at the end of the charge to 'seeking the truth,' rendered as it was in the context of an admonition to 'not give up your honest beliefs,' modified the reasonable doubt burden of proof."). See United States v. Winn, 948 F.2d 145, 159–60 (5th Cir.1991). As in Winn, the trial judge repeatedly instructed the jury that it had to reach its conclusions beyond a reasonable doubt, and there is no indication from the Appellant that the "seek the truth" reference here was uniquely injurious. See id. at 160. Similarly, the Ninth Circuit rejected the argument that instructing the jury to seek the truth would lead the jury to infer that it did not have to find guilt beyond a reasonable doubt. United States v. Goodlow, 597 F.2d 159, 163 (9th Cir.1979). The Fourth Circuit has disposed of similar challenges in unpublished decisions.[20] United States v. Farkas, 474 F. App'x 349 (4th Cir.2012); U.S. v. Forde, 407 Fed.Appx. 740 (4th Cir. 2011) (district court's statement to jury that its sole function "is to seek the truth from the evidence received during the trial" did not negate or undermine otherwise proper reasonable-doubt instructions).

State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct.App.2009)("If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."). In Aleksey, 343 S.C. at 28–29, 538 S.E.2d at 252–53, the Supreme 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").[21] 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).

In State v. Daniels, 401 S.C. 251, 737 S.E. 473 (2012), the Supreme Court considered a similar closing 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, Justice Pleicones in his opinion instructed trial judges '[to] remove any suggestion from his general

[21] In Aleksey, 343 S.C. at 28 n. 2, 538 S.E.2d at 252 n. 2, the Court also held that "[A]lthough 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. Needs, 333 S.C. 134, 154, 508 S.E.2d 857, 867 (1998)("In [State v. Manning, 305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991)], the [c]ourt pointed to the 'in search of the truth' language contained in the reasonable doubt charge as contributing to its defective nature. However, appellate courts since have seemed to allow the use of the phrase -at least when it is not combined with other offending terms outlined in Manning." (citation omitted)); Todd v. State, 355 S.C. 396, 402–03, 585 S.E.2d 305, 308–09 (2003)(holding there was no reasonable likelihood jurors applied a trial court's instructions in an unconstitutional way, despite the use of "truth" language, because the trial court "used alternative methods of describing the [reasonable doubt] standard" and gave a "careful and exhaustive articulation of the reasonable doubt" standard).

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.'" 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. 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.

His suggestion is this challenged language would lead to prohibited premature deliberations. Appellant's contention that the jury is inappropriately evaluating the evidence as it is presented is defeated by the clear language in the opening remarks. Judge Harrington stated the 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 remark 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 argues that this language became the centerpiece of the opening remarks by the trial court. 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. 231, 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 charge 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 2."

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 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.

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 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 brief, 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." See Initial Brief of Appellant, p. 39 (" . . .it is remarkably clear that it is burden shifting due to its lack of n instruction on the duty of the jury to find the defendant guilty beyond a reasonable doubt . . ."). The Appellant's claim is grounded upon a misstatement of the record of the opening remarks of Judge Harrington. [22]

[22] 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 Appellant cannot 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

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 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

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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.

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. The Respondent's statement of facts and summary of the testimony are incorporated herein by reference. 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 judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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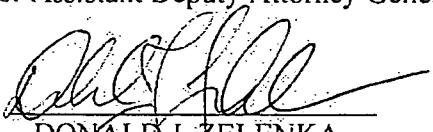
BY: 
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July 27, 2015
Columbia, South Carolina.

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,

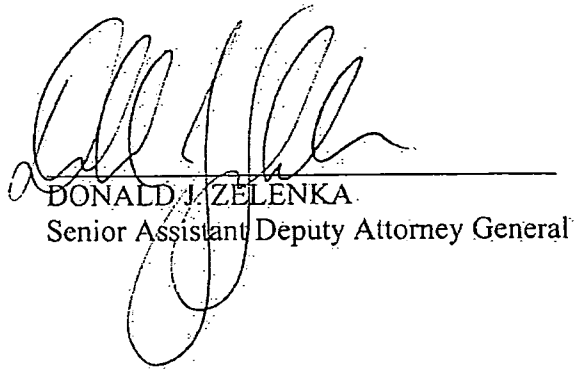
v.

RYAN P. DELESTON,

Appellant

CERTIFICATE OF 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 entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Final Brief of Respondent 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 27th day of July, 2015.

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