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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of General Sessions

W. Jeffrey Young , Circuit Judge

Appellate Case № 2015-000718

The State, ... Respondent,

vs.

Michael Vernon Beaty, Jr. ..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
Rauchwise@gmail.com
S.C. Bar No. 006188

E. CHARLES GROSE, JR.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
Charles@groselawfirm.com
S.C. Bar No. 66063

Attorneys for Michael Beaty

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Question I

Did the State present substantial circumstantial evidence to prove that Michael Beaty committed the crime of murder with malice aforethought when the ligature mark only on the front of Ms. Asbill's neck was inconsistent with the State's theory of strangulation by wrapping a USB cord completely around her neck, and the State could not prove Mr. Beaty's DNA was on both ends of the USB cord as would be required by their theory of his holding both ends?

As noted in the opening brief, the appellate courts of our state have frequently stated that in a circumstantial evidence case, the appellate court should determine if there is substantial circumstantial evidence to determine if the jury could find the defendant guilty. What has been missing from the opinions is either a definition of "substantial circumstantial evidence" or a method by which the circumstantial evidence cases are analyzed by the appellate courts. As a result, the decisions of the appellate courts offer virtually no guidance in making a determination as to whether the facts are sufficient to convict. The Respondent's brief offers no guidance in this area as to how to determine if there is in fact substantial circumstantial evidence to determine guilt.

The Respondent elects to pick and choose among undisputed physical facts. As to these facts they then elect which physical facts to emphasize in urging the facts are sufficient to convict. A reviewing court simply cannot pick and choose among undisputed physical facts. A proper analysis has to consider all the undisputed physical facts and the undisputed physical facts have to be consistent with guilt. Mr. Beaty urges this Court to review this matter by first determining the physical facts that are beyond dispute. Next the Court should decide what are the reasonable inferences to be drawn from the disputed facts. The mere fact that a proven fact can be interpreted in two or three different ways is not sufficient to establish the proof of a circumstance that is

substantial. Inferences from undisputed physical facts are not credibility questions a jury is to decide. Two or three equal inferences from an undisputed physical fact simply cannot mean the proof of guilt is established with substantial circumstantial evidence.

In this case the physical facts beyond dispute are as follows:

1. Emily Anna Asbill attempted to jump from the automobile.

2. Both hands of Ms. Asbill came in contact with the road of the automobile.

3. She did not fall out of the automobile while it was moving.

4. The hair of Ms. Asbill was up off her neck when she was found.

5. The ligature mark did not go completely around her neck and was only in the front.

6. The SLED crime scene investigator used the same swab to collect DNA materials from each end of the USB cord.

7. The pathologist for the State did not measure or compare by measurement the mark on the neck to the USB cord the State introduced.

8. Virtually no blood was found inside the automobile.

9. The cause of death was asphyxiation.

Neither side can dispute these physical facts. The question for this Court is, accepting the undisputed physical facts, and the reasonable inferences from the disputed facts, can a reasonable inference be drawn that would enable a jury to find substantial circumstantial evidence to sustain the conviction. In analyzing the facts, this Court, as should the trial judge, determine if the facts justify the result. This Court should not look at the result and analyze backwards to see if the decision of the jury can be justified. Looking at the result and making an analysis backwards does not determine reasonable

inferences. Under such an analysis, the reviewing court would look at the result and then see if the facts can be manipulated in such a manner so as to reach that result. If this were the criterion, then virtually no conviction based upon circumstantial evidence would be overturned on appeal nor directed verdict granted.

The Respondent has argued there is substantial circumstantial evidence to establish that Michael Beaty, with malice aforethought, intentionally strangled Emily Anna Asbill. The State incorrectly argues that the DNA on State's Exhibit 46 is consistent with the State's theory of the case. Br. of Resp. at 18. By the means used to collect the DNA from Exhibit 46, there is no evidence from which reasonable jurors could conclude beyond a reasonable doubt that the DNA of Mr. Beaty had to be on both ends of the USB cord. As discussed in the opening brief, the same swab was used to collect the DNA sample from both ends of the USB cord. This is an undisputed physical fact. Thus, three possibilities exist. One, the DNA of Mr. Beaty was on the small end. Two, the DNA of Mr. Beaty was on the large end. Three, the DNA of Mr. Beaty was on both ends. Only the third theory is in keeping with the State's theory. What substantial circumstantial evidence makes the third theory substantially more likely than the first two? Simply because the facts can be manipulated to reach that result, is not substantial circumstantial evidence. Under the facts of this case, the jury could only guess or draw straws as to which is correct. Substantial circumstantial evidence simply cannot be based on guesses or the drawing of straws.

The theory of the State that Mr. Beaty used the USB cord to strangle Ms. Asbill is further complicated by the amount of DNA found on the cord. *See,* Opening Brief of App. at 18. The amount of DNA found is also inconsistent with the State's theory. The

State in its brief has not attempted to explain where the USB cord was found simply because its location is not known. Thus, the State has totally failed to establish that the DNA could have only come from the cord being in contact with Ms. Asbill's neck and Mr. Beaty's hands. The DNA expert conceded that the DNA could have come from transfer touching when the cord was in contact with other items in the automobile containing the DNA of the parties. Also, a person must hold the end of a USB cord to put it into a computer. This simple act could transfer DNA.

An undisputed physical fact is that the ligature mark did not go completely around the neck of Ms. Asbill. To explain this, the Respondent adopts two theories that are inconsistent. They contend, "[T]he absence of the ligature mark on the back of the neck indicated either the ligature was pulled from behind, or EA's hairline prevented the ligature from leaving a mark." Br. of Resp. at 19. But which? The two are inconsistent, one of which—pulling from behind—is consistent with the defense's theory. When the State is forced to suggest two possible theories as to how Ms. Asbill was strangled, then the State has conceded that they have not proven the case with substantial circumstantial evidence.

The theory of being pulled from behind is completely inconsistent with the demonstration used by the State in the courtroom. *See* Exhibit A attached at the end of this brief.[1] In fact, in that demonstration the cord was wrapped completely around the neck with the big end being pressed against the neck with one hand and the smaller end

[1] This photograph appeared in *The Clinton Chronicle* on February 4, 2015. *The Clinton Chronicle* ran the photograph with a different caption on January 27, 2016. This Court can take judicial notice of newspapers. Rules 201 and 902(6), SCRE. *And see State v. Arnold*, 361 S.C. 386, 390 (fn. 3), 605 S.E.2d 529, 531 (fn. 3) (2004) (Supreme Court took judicial notice of distance between locations).

being pulled from above with the other hand. The State claimed that the hair of Ms. Asbill prevented the ligature mark from being made on the neck. But this second theory is contrary to the evidence presented by the State that the hair of Ms. Asbill was up off her neck when she was found. This is an undisputed physical fact. A reasonable jury cannot reject an undisputed physical fact. The State simply cannot adopt a theory that is contrary to the facts they elected to prove. In fact, Dr. Ross adopted a theory that was not based upon the information available to her or proven at trial—that the hair of Ms. Asbill was down when it was actually up. Again, what substantial circumstantial evidence supports the theory of the State as to why there was no ligature mark on the back of the neck?[2]

The State argues that the absence of blood in the automobile is substantial circumstantial evidence that Mr. Beaty fought with Ms. Asbill and his statement is not true. The virtual absence of blood inside the automobile is an undisputed fact. First, the State has admitted that Ms. Asbill tried to jump from the moving automobile and scraped her hands and arm on the road. Br. of Resp. at 49; Rec. on App. at 801, ll 14-14-16. When the State argues the absence of blood inside the automobile, they argue against the position asserted at trial. The solicitor argued that Ms. Asbill was strangled because she was argumentative and crying in pain. He argued Mr. Beaty strangled her to "shut her up." Rec. on App. at 801, l 25. If that were true, the logical result would be that blood would have been all through out the front of the car as she fought off her attacker. Her

[2] This Court would never say a jury in this case could infer that Mr. Beaty pulled up the hair of Ms. Asbill and placed it in a bun after he killed her in the total absence of any affirmative fact to prove such. But for the State's theory to be correct, they would have to argue this is what he did. Juries simply cannot convict on speculation.

bloody hands would have left blood on her neck and on the USB cord. Rec. on App. at 494, ll 10-22. None of this was found. How then can the jury find from the absence of blood in the automobile, the struggle described by the solicitor happened in such a fashion? The absence of blood actually supports the fact that Ms. Asbill was dead or near death when she was finally pulled back into the automobile.[3] The absence of blood is simply no circumstantial evidence that Mr. Beaty violently strangled Ms. Asbill.

The State further argues that the jurors were able to look at the picture and draw their own conclusions as to whether the large end of the USB cord caused the mark on the neck of Ms. Asbill. This would be correct only if the jury conducted its own experiment as to the size of the marking on the neck and the size of the large end of the USB cord.[4] "[I]t is improper for the jury to conduct its own experimentation." *State v. Lindsey*, 372 S.C. 185, 193, 642 S.E.2d 557, 562 (2007). Dr. Ross never attempted to make a measurement based upon the pictures introduced into evidence. She made no measurement at the time of the autopsy. The State simply cannot tell this Court the exact size of the end of USB nor the exact size of the bruise mark. Whether the mark on the neck of Ms. Asbill matched the large end of the USB cord is simply speculation. In fact to even a casual observation the mark is not consistent with the large end of a USB cord that has a tapered end.

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[3] At the trial, the medical personnel explained the pool of blood near the automobile as being caused by gravity when the medical personnel placed Ms. Asbill on the ground. Rec. on App. at 159, ll 19-25 to 160, ll 1-5.

[4] Interestingly, Dr. Ross upon noticing the marking, referred to it in her autopsy repot as an abrasion rather than a bruise. Rec. on App. at 504, ll 24-25 to 525, l 1. Her testimony at trial was it could be both. Rec. on App. at 504, ll 3-21. If the big end of the cord caused either an abrasion or bruise, the amount of DNA should have been considerably higher.

Thus, the undisputed facts of this case do not support proof of substantial circumstantial evidence that Mr. Beaty, with malice aforethought, intentionally strangled Emily Anna Asbill. The undisputed physical facts simply do not support, and in fact disprove, the theory the State used at trial to prove the case. When the State can only urge a theory that is inconsistent with the undisputed physical facts, then substantial circumstantial evidence has not been established. The State has not shown substantial circumstantial evidence that the hair of Ms. Asbill was down to prevent the ligature mark on the back of her neck. The State has not shown substantial circumstantial evidence to prove that the DNA of Mr. Beaty was found on both ends of the USB cord. The State has not shown substantial circumstantial evidence that Ms. Asbill was fighting her attacker in the front seat of the automobile as they allege. Without any one of these three factors, the theory of the State simply collapses.

The State has argued strongly that the statements of Mr. Beaty prove he is lying and therefore covering up the murder he committed. The quick answer is that Mr. Beaty could have as easily been covering up his causing the death of Ms. Asbill because of his gross negligence. Regardless, Mr. Beaty's inconsistent statements, none of which admit to murder, cannot be used to establish substantial circumstantial evidence that he committed a murder with malice aforethought.

This Court should reverse the trial court and enter a directed verdict of acquittal.

Question II

Did the trial court judge err by denying Michael Beaty's request to charge involuntary manslaughter when Michael Beaty's statement to law enforcement and expert testimony supported giving the instruction, and prejudice resulted not only from omitting the instruction but also because the Solicitor equated recklessness with malice?

This Court should note the fact that, in both his New Trial Motion, at pp. 1-3, and opening brief, at p. 26, Mr. Beaty relied on *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999). The State does not mention or address this case in its brief. In *Chatman*, "the evidence establishe[d] that appellant was not attempting to strangle Victim with his hands." Chatman "testified that while on the ground he and Victim were facing one another and appellant had his shoulder pressed into Victim's neck." The "medical findings were consistent with sufficient force being applied to Victim's neck and further [these] findings were consistent with the Victim and appellant being face-to-face and appellant pressing his shoulder into Victim's neck." As a result, our Supreme Court held, as noted in Mr. Beaty's new trial motion, "Under the facts of this case, we think appellant was entitled to a charge on involuntary manslaughter." 336 S.C. at 153, 519 S.E.2d at 101-02.

The State, nevertheless, argues, "There was simply no evidence by which the jury could have found Defendant guilty of the crime of involuntary manslaughter." Initially, the State contends, "Under Appellant's theory of the case, there was no unlawful act." Br. of Resp. at 20. But later in its brief, the State acknowledges Beaty sought the instruction under the prong of the offense that provides, "Involuntary Manslaughter is . . . the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." Br. of Resp. at 21 (citing *State v.*

Pitman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008)). The State's argument then becomes:

> Appellant's argument he was entitled to an involuntary manslaughter charge hinges on the perceived ambiguity on which reckless behavior the manslaughter charge intends. Assuming EA's death was the result of positional asphyxiation following Appellant's efforts to pull her back into the car, which was the defense's sole theory of the case, nothing about his actions in saving her were reckless.[5]

Br. of Resp. at 24. The State, parroting the Solicitor's closing argument, Br. of Resp. at 28, further contends, "The jury was presented with an alternate theory by Appellant [that] he acted ***heroically*** in defense of EA's life which resulted in her accidental and unpredictable asphyxiation." *Id.* at 28 (emphasis added). No matter how many times the State mocks the defense theory, neither Mr. Beaty nor his trial counsel ever contended that he acted ***heroically.*** In fact, nothing about the defense theory suggests that Michael Beaty was a hero that night. Mr. Beaty was driving a car while highly intoxicated. The State presented this evidence at trial and acknowledges it in its brief. Br. of Resp. at 4-5. Ms. Asbill tried to jump out of the car while it was moving. "The State did not dispute the defense's theory EA attempted to jump out of the car." Br. of Resp. at 49.

The prosecution and Mr. Beaty presented competing theories of what happened. The State argued intentional strangulation with a USB cord. Mr. Beaty presented evidence of unintentional asphyxiation. The jurors could have reached two conclusions based on Mr. Beaty's expert testimony. Based on Dr. Johnson's testimony, the jurors could have concluded that Ms. Asbill died of unintentional asphyxiation while hanging outside of the car while Mr. Beaty continued to drive. Based on a combination of Dr.

[5] This statement obviously ignores the fact that Mr. Beaty did not save Ms. Asbill. Had he saved her, there would not have been a case.

Johnson's and Dr. Arden's testimony, the jurors could have concluded that Ms. Asbill died from positional asphyxiation. Both scenarios evidenced Mr. Beaty's reckless disregard for Ms. Asbill's safety.

Although, "in a criminal case, the State cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind," *State v. Rowell*, 326 S.C. 313, 317, 487 S.E.2d 185, 186 (1997), our state's traffic regulations provide insight into how Michael Beaty should have acted under these circumstances. By continuing to drive, Mr. Beaty was operating the car at a speed that was too fast for the conditions, *i.e.* Ms. Asbill hanging outside of the moving car. S.C. Code § 56-5-1520(A). Under these circumstances, he should have stopped the car, a fact the Solicitor argued in closing as a reason for the jurors not to acquit Mr. Beaty. After stopping the car, a reasonable person would have made sure Ms. Asbill was secure inside the car and checked on her condition. *Hurd v. Williamsburg County*, 353 S.C. 596, 579 S.E.2d 136 (2003) (evidence was sufficient to support finding that county and transit authority breached its duty of care to passenger by allowing him to exit from bus on shoulder of highway). Securing Ms. Asbill safely inside of the car and checking on her condition would have prevented positional asphyxiation. After securing Ms. Asbill inside the car and checking on her condition, a reasonable person immediately would have called for medical assistance. S.C. Code § 56-5-1230. Had Mr. Beaty been sober and reacting like a reasonable and ordinary person, Ms. Asbill would not have died of unintentional asphyxiation.

Additionally, by arguing the perceived strength of the prosecution's USB cord strangulation theory, *e.g.* Br. of Resp. at 26, the State appears to apply an improper

standard of review. As discussed in his opening brief, at pp. 21-22, "[i]n determining whether the evidence requires a charge of [a lesser included offense], the Court views the facts in a light most favorable to the defendant." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is ***any*** evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) (emphasis added) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. *See also State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) (reversible error not to charge involuntary manslaughter).

Likewise, the State's harmless error analysis, Br. of Resp. at 28-29, must be rejected. Just as in *Chatman*, the "type of strangulation [testified to by the defense experts] differs from ligature strangulation." 336 S.C. at 152 (fn. 1), 519 S.E.2d at 101 (fn. 1). "[T]he evidence in the present case does not support one clear-cut conclusion." *State v. Battle*, 408 S.C. 109, 122, 757 S.E.2d 737, 743 (2014). Thus, "the trial court's refusal to charge involuntary manslaughter was not harmless beyond a reasonable doubt." Id. 408 S.C. at 109, 757 SE.2d at 744.

This Court should order a new trial.

Question III

Did the trial court judge err by informing the jurors during the court's opening instruction that a jury trial is "a search for the truth in an effort to make sure that justice is done" because that instruction is fundamentally incorrect, shifts the burden of proof, decimates the proper burden of proof and jury inquiry of whether the State had proved Michael Beaty's guilt beyond a reasonable doubt, calls upon the jurors to select between two competing versions of the correct truth, and diminishes defense counsel's credibility?

Just as it did during trial, the State continues to embrace the trial judge's erroneous "truth-seeking" instruction by arguing, "The irony of Appellant's argument is that the central function of the trial process in both criminal and civil trial is to discover the truth." And, "[T]he trial court's comments . . . imported the gravity of the jurors responsibility to ensure that justice is done." Yet, the State acknowledges our Supreme Court's precedent on this matter, cited in Mr. Beaty's opening brief, including *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995), and *State v. Manning*, 305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991). Br. of Resp. at 31-34. Just one week after the State served its initial brief, our Supreme Court reaffirmed its instruction in *Daniels* that trial judges remove these types of jury instructions from their General Sessions charges because "[s]uch a charge could effectively alter the jury's perception of the burden of proof." *Teamer v. State*, (S.C.S.Ct. Op. No. 27622) (Filed April 13, 2016), pp. 6-7. Based on this precedent, this Court must reject the State's suggestion that the instruction is proper.

The State spends most of its brief recounting the trial judge's final instructions, trying to minimize the prejudice of the erroneous instruction. The State's contention that the trial court's final instruction "diminished to negligible any conceivable prejudice

from the pretrial comment on the search for the truth," Br. of Resp. at 33, is belied by the Solicitor embracing the erroneous instruction as a central theme of his closing argument. As pointed out in Mr. Beaty's opening brief at p. 37, the judge's final instruction on the law did not cure the prejudice. When this Court "consider[s] the erroneous charge of the trial judge in connection with the efforts of the solicitor to" capitalize on the error and implore the jurors to seek the truth and find justice for Ms. Asbill's family, "we do not think it can be said that His Honor's effort to correct the error which he had inadvertently made removed the prejudice to" Mr. Beaty. *State v. Swilling*, 246 S.C. 144, 152, 142 S.E.2d 864, 868 (1965) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In South Carolina, as elsewhere, "[i]t is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean." *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). "In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation." *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1965)). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

In his opening brief, at pp. 35-37, Mr. Beatty discussed five reasons why he was prejudiced by the "truth-seeking" instruction, many of which flowed from the unique facts of this case and how the evidence unfolded at trial. The respondent's brief does not attempt to respond to ***any*** of Mr. Beaty's specific assertions of prejudice. Central to this inquiry is the Solicitor's acknowledgment to the trial judge, outside the jurors' presence, that the truth seeking instruction is "disfavored." Rec. on Appeal, 106, l 21 – 107, l 10. But later, the Solicitor embraced the "truth-seeking" instruction in his closing argument to gain a tactical advantage in front of the jurors by confusing the burden of proof. Mr. Beaty's counsel could not effectively clarify this confusion when the confusion originated from the trial judge. *See e.g State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (the ultimate effect of the improper instruction "was to appellant's attorney[s'] credibility in the eyes of the jury").

This Court should reverse Mr. Beaty's conviction. Only our Supreme Court, however, can instruct Court Administration[6] to remove the instruction from the General Sessions charge book that can be found on The Judicial Department's website.[7]

This Court should order a new trial.

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[6] "The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system." S.C. Const. Art. V, § 4. "Court Administration was established in 1973 to aid the Chief Justice in the administration of the state judicial system. This office has a wide range of responsibilities and duties. . . . Court Administration provides assistance to individual courts on procedural matters." http://www.sccourts.org/supreme/courtAdministration.cfm (last viewed June 4, 2016).

[7] Found at http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf (last viewed June 4, 2016).

Question IV

Did the trial court err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the new theory made by the state in its rebuttal closing argument?

Bailey v. State, 440 A.2d 997 (Del. 1982) clearly and unequivocally holds that not requiring the government to open fully on the law and the facts can have implications under the due process clauses of the state and federal constitutions. Basic fairness, which is at the heart of the due process clause, would dictate that each side have a fair opportunity to reply to the best argument the other side has. By not requiring the State to open fully on its theory of the case, South Carolina sanctions sandbagging by prosecutors. Why should the defendant be required in their closing arguments to fully advise the State of every theory they have on the meaning of and inferences from the evidence, but be deprived of the opportunity to respond to the State's best theory simply because the defendant elected to introduce evidence, however so small. Such a procedure encourages defense counsel not to introduce evidence, which in many cases, if not all, would give the State another advantage.

The State in its brief appears to argue that Mr. Beaty is contending that he was somehow entitled to the last argument. As the State argues, "First, according to well-settled state procedural practice, Appellant lost the opportunity to present the last argument when he introduced evidence in the form of two expert witnesses." Brief of Resp. at 39. Mr. Beaty has never, at the trial below nor in his opening brief, asserted such a position. Never once does Mr. Beaty ever remotely suggest he was entitled to the

last argument. All he requested was that he be permitted a fair response to the State's best argument.

Mr. Beaty contends that the practice, in virtually every state in the union and the federal courts, that the State in its opening give their best argument, that the defense has the right to respond to the State's theories, and then the State responds to the defendant's theories is fair. Can the State seriously argue that a system that permits either side to give their closing argument in such a fashion that the other side does not have the opportunity to respond is fair? A procedure that is equally unfair to both sides cannot be deemed to be overall fair. Equal unfairness is not fairness.

The State then attempts to argue that the defense was not prejudiced because the defense knew the death was caused by strangulation. Counsel agrees they knew the cause of death was strangulation, but that is all. No one reading the entire transcript of the testimony would know that the State would contend that Ms. Asbill was strangled in front of Mr. Beaty's mother's house while Ms. Asbill was screaming in pain from her injured hands, and Mr. Beaty strangled her to "shut her up" so that she would not awaken the neighbors. Rec. on App. at 801, l 25. The State did not even inform Mr. Beaty of this theory during its opening statement. Until the State's very last closing, Mr. Beaty did not know the State would adopt part of the expert testimony provided by the defense. Rec. on App. at 795, l 13 - 796, l 7.

The State in its brief does not attempt to justify the current procedure in South Carolina as being sound. It merely recites several older cases, *State v. Brisbane,* 2 Bay 451 (S.C. 1802) and *State v. Gellis,* 158 S.C. 471, 155 S.E. 849 (1930), for the proposition that when a defendant does not offer testimony, counsel for defendant may

have the final argument. As previously stated, Mr. Beaty never asserted this position, and it is not an issue in this case. Mr. Beaty well recognizes that when a defendant introduces evidence he does not have the right to the final argument.

The State asserts, "There is no constitutional **right** to a certain order or scope of argument." Br. of Resp. at 38 (emphasis in original). No authority is cited for this proposition for the simple reason that constitutional rights are involved in an inherently unfair order of closing argument. *See, Bailey v. State,* 440 A.2d 997 (Del. 1982). The State does not dispute that the practice years ago was for the State to open fully on the law and the facts. *State v. Atterberry* , 129 S.C. 464, 124 S.C. 648 (1924).[8]

The Appellant asks that the State answer two simple questions. First, is it inherently and fundamentally unfair for one side not to have the opportunity to respond to the best argument the other sides has? Second, if something is inherently and fundamentally unfair, does it violate the due process clause of the state and federal constitutions? *Doyle v. Ohio* , 426 U.S. 610, 618 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"); *United States v. Schell,* 775 F.2d 559, 565 (4th Cir. 1995) ("Such switching of sides is fundamentally unfair and inherently prejudicial. Without question, the client's right to a fair trial, secured by the due process clauses of the fifth and fourteenth amendments, is compromised under these circumstances."). The logical answer to question one is "no" and question two

[8] Giving the defense the right to close when it offers no evidence is not inconsistent with requiring the State to open fully on the law and the facts. When defense offers no evidence it must also open fully on the law and the facts and then has the last argument which only replies to the new issues raised by the State. This procedure is fair to both sides in all circumstances.

is "yes." The procedure adopted in South Carolina for the order of closing arguments does violate the due process clauses of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America.

This Court should order a new trial.

Question V

Did the trial court err in failing to charge the law of circumstantial evidence as set forth in *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) instead of the law as stated in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) when the Edwards charge properly stated how a jury should review circumstantial evidence?

As noted in the opening brief, at pp. 43-44, our Supreme Court has struggled with how jurors should be instructed on circumstantial evidence. *See State v. Logan*, 405 S.C. 83, 99-100, 747 S.E.2d 444, 452-53 (2013), *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004), *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), and *State v. Edwards,* 298 S.C. 272, 379 S.E.2d 888 (1989). This struggle results, in part, from our Court trying to craft a "one size fits all" instruction, which departs from its admonition in other cases:

> The evidence presented at trial determines the charged jury instruction. The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury. If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury.

State v. Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002) (internal citations and quotations omitted).

The *Logan* instruction did not fit the facts of this case—where the jurors were presented with two competing theories—because it did not convey to the jurors that the

prosecution had the burden of proof of disproving the defense theory beyond a reasonable doubt. The *Edwards* charge would have conveyed to the jurors the prosecution's obligation was to exclude "every other reasonable hypothesis." 298 S.C. at 275, 379 S.E.2d at 889. Although the *Edwards* charge might not be appropriate in every case, our Supreme Court should allow trial court judges the discretion, when requested, to provide the instruction in appropriate cases like Mr. Beaty's.

This Court should order a new trial.

Question VI

Did the trial court err in excluding the testimony of Valerie Jones concerning a prior incident when Emily Anna Asbill threatened to jump from an automobile when such testimony was relevant to establish the fact that Ms. Asbill was attempting to jump from the automobile when she was restrained by Michael Beaty resulting in her death?

The trial court, in ruling on this issue, said, "I have denied it coming in." Rec. on App. at 731, l 14. The specific ruling was that the testimony of Valerie Jones was not admissible. The trial court could not have been clearer. Trial counsel offered to submit an affidavit rather than having Ms. Jones testify. The State consented to the submission of an affidavit, which was in fact submitted. Affidavit of Valerie Jones. Rec. on App. at 967. Rec. on App. at 781, ll 20.

The State improperly argues that the evidence is not relevant because the State agreed that Emily Asbill attempted to jump out of the automobile. Br. of Resp. at 49. The State never referred to Ms. Asbill jumping from the automobile in their opening argument. Rec. on App. at 741-752. Only in their "reply" argument did they indicate, for the first time, they believed Ms. Asbill attempted to jump from the automobile. Rec. on App. at 795, ll 19-25. At the trial when the evidence was offered the State never

argued the evidence was not relevant because they agreed Ms. Asbill attempted to jump out of the automobile. Rec. on App. at 731, ll 12-22.

The State further argues that the evidence was improper character evidence and was not a threat against Mr. Beaty. Mr. Beaty has never argued that the evidence was character nor has he argued the evidence constituted a threat against him. Mr. Beaty cited several cases where the threat against the defendant was relevant because it made more probable who was the aggressor. Just as in this case, it made more probable that Ms. Asbill attempted to jump from the moving automobile.

The fact that the statement was several years earlier goes to the weight of the evidence and not its admissibility. *State v. Campbell*, 35 S.C. 28, 14 S.E. 292 (1892). While Mr. Beaty disputes the allegation that the statement was introduced to embarrass the family of Ms. Asbill, such can never be a reason to exclude evidence in a criminal trial. And the State has cited no cases to support its proposition.

This Court should order a new trial.

Question VII

Did the trial judge err by denying Michael Beaty's request for the court to *voir dire* jurors to determine whether any of the potential jurors had a bias against defense lawyers who represent someone charged with murder, and when the failure to do so prejudiced Mr. Beaty by the prosecution's repeated attacks on the defense during his jury trial?

The State argues this issue is not preserved for appellate review. Br. of Resp. at 50-51. Mr. Beaty's written request for *voir dire* and his objection at the conclusion of *voir dire* preserved this issue for appeal. The prosecution knew this issue was preserved when it responded to Mr. Beaty's new trial motion. Rec. on App. 53. The trial judge knew this issue was preserved when he denied Mr. Beaty's new trial motion. Rec. on

App. 994. "[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011).

As discussed in the opening brief, at pp. 50-53, throughout Mr. Beaty's trial, the prosecution mocked, belittled, or otherwise attacked his defense, his lawyers, and his expert witnesses.

This Court should order a new trial.

Question VIII

Should this Court order a new trial based on the cumulative error doctrine?

As discussed in Mr. Beatty's opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. Respondent's brief, at p. 54, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying this Court's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 203). Beekman asked this Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded Beekman was attempting to invoke the "plain error rule" that is not recognized in our State. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90.

As seen, Mr. Beaty raised at trial every issue he asserted in his opening brief. The only issue the State contends is not preserved is Question VII regarding the adequacy of the *voir dire*, although Mr. Beaty asserts it was adequately preserved. Even if this issue is excluded from the cumulative error analysis, the cumulative error of the other issues

warrants reversal.

This Court should order a new trial.

CONCLUSION

For the reasons set forth in this brief and the opening brief, this Court should reverse the conviction of Michael Vernon Beaty, Jr. for murder.

August 9, 2016

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar No. 06188

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
charles@groselawfirm.com
S. C. Bar No. 66063

Attorneys for Michael Beaty

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 12 2016
SC SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of General Sessions

W. Jeffrey Young , Circuit Judge

Appellate Case № 2015-000718

The State, ... **Respondent,**

vs.

Michael Vernon Beaty, Jr. ..... **Appellant.**

CERTIFICATE OF COUNSEL

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

Aug 9, 2016

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
Rauchwise@gmail.com
S.C. Bar No. 006188

E. CHARLES GROSE, JR.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
Charles@groselawfirm.com
S.C. Bar No. 66063

Attorneys for Michael Beaty

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Appellate Case № 2015-000718

The State, ... Respondent,

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on August 10, 2016, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the Final Brief of Appellant, the Final Reply Brief of Appellant, and the Certificate's of Counsel in the above case addressed to Donald L. Zelenka, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

Sworn to and Subscribed

Sandy Traynham

before me this 10 day

0f August, 2016

Mary Lee Harter
Notary Public for South Carolina
My Commission Expires: 11/30/22