STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

HENRY NORRIS JOHNSON, JR.,

Appellant

Appellate Case No. 2015-002242.

INITIAL BRIEF OF RESPONDENT

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II. Did the trial court err by allowing the State to introduce its ballistics evidence through the testimony of Lexington County officers when that testimony was rank hearsay and violated appellant's right to confront the witnesses against him?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in denying Appellant's directed verdict motion where the State presented two co-defendants who provided eyewitness testimony regarding Appellant's involvement in the murder and burglary, as well as additional circumstantial evidence.

II. Whether Investigator Steve Collins' limited testimony regarding the results of ballistics testing conducted on the murder weapon is preserved for appellate review where Appellant raised no objection to the testimony at any point, and where, even if preserved, Appellant can demonstrate no prejudice flowing from the limited hearsay statement.

STATEMENT OF THE CASE

Following the February 12, 2012, homicide of Matthew Millhouse, the Lexington County Grand Jury indicted Appellant Henry Norris Johnson, Jr., along with co-defendants Patrick Larry and Justin Washington, for the charges of murder and first degree burglary. (Indictments 2012-GS-32-01247, -01248).

Appellant retained Jerry Screen, Esq., who represented him a jury trial before the Honorable Thomas W. Cooper, Jr. (Tr. p. 1). Shawn Graham and Gil Bell of the Eleventh Circuit Solicitors Office prosecuted the case, which began October 19, 2015, and lasted four days. (*Id.*).

A jury convicted Appellant of both charges, and Judge Cooper sentenced Appellant to a concurrent thirty years' imprisonment on each charge. (Tr. p. 582, line 20 – p. 583, line 4).

This appeal follows. (Notice of Appeal).

STATEMENT OF FACTS

Co-defendant Justin Washington confessed to doing what JR[1] told him to do. (Tr. p. 398, line 15 – p. 410, line 8). So did co-defendant Patrick Larry. (Tr. p. 249, line 10 – p. 257, line 24). According to Washington, "[Appellant] was always the leader and [he] was always the follower." (Tr. p. 403, line 5). It was February 11, 2012, the day that Voorhees College hosted a basketball game in Denmark. (Tr. p. 241, lines 7-25). The rapper Future was to perform a concert downtown Columbia later that night. (Tr. p. 243, line 23 – p. 244, line 6). Appellant, a Voorhees basketball player, arrived at Larry's home in Swansea with Washington after the game, around 10:00 PM. (Tr. p. 243, lines 6-16). Washington and Larry did not know each other well, having only met a handful of times before, but they were both close friends with Appellant. (Tr. p. 236, line 22 – p. 237, line 14; Tr. p. 395, line 11 – p. 396, line 24). Appellant was the only connection between them. (Tr. p. 397, lines 3-9).

In his dark green four-door Honda Accord, Appellant next drove Washington to the victim's residence so that Larry could buy some weed. (Tr. p. 244, line 9 – p. 245, line 11; Tr. p. 404, lines 8-19). According to Washington, the buy was an opportunity for Appellant and Larry to case the house and "see how things [looked] before he sen[t] [Washington] in." (Tr. p. 403, lines 18-25). Back at Larry's home, Appellant "came up with the idea to rob the house" and enlisted Washington to carry it out. (Tr. p. 248, line 4 – p. 250, line 3; Tr. p. 285, line 5). Appellant thought "it would be a[n] easy lick" because many of the people in the home where Larry had just bought the marijuana were planning to attend the Future concert. (Tr. p. 249, lines 5-15; Tr. p. 404, lines 2-7). The victim as the only person who was supposed to be at the house

[1] Appellant Henry Norris Johnson, Jr., was commonly known by the name JR. (Tr. p. 236, lines 14-21; Tr. p. 393, lines 9-20).

later that night, and Appellant believed there would be cash in the home. (Tr. p. 250, lines 2-16; Tr. p. 399, lines 10-25).

Appellant "volunteered" Washington to arm himself with his father's shotgun and go through with the robbery, and Washington agreed. (Tr. p. 251, line 1 – p. 252, line 5). Washington jumped on board because he did not "have [a] job at the time and [he] needed some money." (Tr. p. 400, lines 10-13). As for the firearm, his father's shotgun was the only weapon he had access to, so he retrieved the gun from the backseat of his father's truck and some shells from his father's drawer just as Appellant asked him to do. (Tr. p. 400, line 16 – p. 401, line 25).

Appellant drove Washington and Larry back to the victim's residence in his dark green Honda. (Tr. p. 247, lines 6-18). On the way, he pulled over to the side of the road and demonstrated to Washington how to conceal the shotgun under his coat and down the side of his leg. (Tr. p. 252, line 19 – p. 254, line 13; Tr. p. 406, lines 14-25). Appellant told Washington to get out of the car "and go to the door and say Rollo," which was a name the victim would recognize. (Tr. p. 255, lines 2-6; Tr. p. 402, lines 13-25). Appellant made a point to tell Washington to keep his face down during the robbery, and "not to say who it is." (Tr. p. 403, lines 7-14). They "circled the block until [another occupant's] car was gone." (Tr. p. 405, line 9 – p. 406, line 13). Appellant drove up to the victim's house, pulled up a few yards from the front door, left the car running, and watched Washington do exactly as he was instructed. (Tr. p. 255, line 7 – p. 256, line 11; Tr. p. 407, line 5 – p. 408, line 8).

Within seconds of entry, a female screamed, a gunshot went off, and Washington came running out of the victim's home and down the street. (Tr. p. 256, lines 11-23). Washington said he shot once because as the door pushed open, Washington noticed the victim grabbing for his own gun. (Tr. p. 408, lines 4-8). Washington also testified that the victim shot at him twice as

Washington ran out of the house. (Tr. p. 408, lines 13-15).

Appellant drove away and picked up Washington on the side of the road. (Tr. p. 257, lines 1-4; Tr. p. 408, lines 15-20). They all rode back to Larry's house, during which time Washington, holding his father's shotgun and nothing else, "said I think I shot him." (Tr. p. 257, lines 5-24; Tr. p. 408, lines 22-23). Appellant and Washington left and stopped off at a gas station where they saw the rescue squad heading towards the incident. (Tr. p. 409, lines 5-15). Appellant then dropped Washington off at his home, where Washington returned the shotgun to his father's truck and went to bed. (Tr. p. 409, lines 19-21).

There were witnesses inside the residence. Melissa Carr, a confessed addict, testified that she, the victim, and another female were in the house at the time of the shooting. (Tr. p. 126, line 5 – p. 131, line 8). Carr witnessed Washington, whom she did not know, shoot the victim in the leg as the victim "went to pull his pistol up." (Tr. p. 131, lines 3-8; Tr. p. 140, lines 1-6). She watched the shooting from the floor, where she took cover upon seeing the man at the door with a shotgun. (Tr. p. 131, lines 9-14). Prior to the shooting, Carr testified that she was nervous because the same "little black car" kept returning to the driveway. (Tr. p. 126, line 16 – p. 127, line 3).

Law enforcement arrived at the scene at approximately 4:15 AM on February 12, and found the victim propped up between the refrigerator and the side door of the residence. (Tr. p. 170, line 19; Tr. p. 173, lines 17-24). "[T]he victim, Matthew Millhouse . . . was deceased on the floor of the kitchen of the residence. There was a [.20 gauge] shotgun shell on the floor and that the house, otherwise looked as you would expect it." (Tr. p. 193, lines 1-20). The victim, a 43-year-old male, sustained a laceration to the major artery located in his upper right thigh which caused him to bleed out. (Tr. p. 165, line 15 – p. 168, line 10). Numerous pellets and the wadding

and endcap from the shell with which he was struck were recovered from the victim's leg during autopsy. (Tr. p. 185, lines 7-17).

As for the investigation lending to Appellant's arrest, Carr initially identified "Spider's brother" as a person who may have been involved. (Tr. p. 196, line 12 – p. 197, line 11). Others in the area, including the person named by Carr, informed investigators that Larry may have been involved. (Tr. p. 198, lines 3-18). Spider's brother provided an alibi which checked out. (Tr. p. 198, line 19 – p. 199, line 6). In confirming that alibi, law enforcement was again tipped off to Larry's involvement. (Tr. p. 199, lines 8-10). Carr, approached with a six-pack lineup, then identified Larry as "the individual that she believed had entered the residence with the shotgun and had previously been at the residence and purchased marijuana earlier in the day." (Tr. p. 138, lines 5-24; Tr. p. 199, lines 12-22).

Larry initially denied knowing anything about the murder. (Tr. p. 258, line 5 – p. 259, line 18). A subsequent search of Larry's residence led to his arrest for possession of marijuana, during which time Larry admitted his involvement and implicated Appellant and Washington. (Tr. p. 202, line 1 – p. 203, line 4; Tr. p. 261, line 5 – p. 262, line 23). Larry cooperated in four interviews with law enforcement on the following dates in 2012: February 15, February 16, June 27, and July 2. (Tr. p. 217, line 10 – p. 221, line 1). Larry testified that he first named Appellant because he "could verify [his] alibi" and confirm that Larry did not shoot the victim. (Tr. p. 263, lines 1-4). But Appellant did not confirm the alibi. (Tr. p. 263, lines 5-7).

Instead, Appellant and law enforcement arranged to meet informally in a flea market parking lot in a neighboring county on February 16, 2012. (Tr. p. 318, line 1 - . 320, line 12). Appellant and Investigator Steve Collins spoke for ten to fifteen minutes during which time Appellant "maintained that he had no knowledge of what took place." (Tr. p. 320, line 24 – p.

321, line 25). Investigator Collins informally spoke with Washington at the same parking lot the next day. (Tr. p. 323, line 18 – p. 324, line 2). Like Appellant, Washington denied knowing anything about the shooting and "stated that he had been at his parents' house during the entire incident." (Tr. p. 324, lines 3-7). But neither one of Washington's of his parents were willing to confirm that their son was at home the entire day. (Tr. p. 325, lines 11-23).

The co-defendants' parents helped to corroborate the night's events. (Tr. p. 323, lines 3-23; Tr. p. 325, lines 11-23). Larry's mother Mary Porter testified that she recalled returned home from church around 11:00 PM on February 11. (Tr. p. 303, 11-16). When she woke up a little bit later to turn off the stove, she heard Appellant's voice intermixed with her son's. (Tr. p. 303, lines 21-24). She greeted Appellant, but did not see him because the young men were in Larry's bedroom near the kitchen. (Tr. p. 304, lines 1-23). Ms. Porter also testified that she had previously met Washington, whom Appellant said would "jump off a bridge if [he] ask[ed] him." (Tr. p. 306, lines 1-11).

Washington's father similarly testified that Washington was very obedient, "he'd put down everything that he ha[d] in front of him and do" what you asked. (Tr. p. 451, lines 12-19). When approached by law enforcement regarding what he may know about the incident, Washington's father willingly handed over his .20 gauge shotgun because he "wanted [law enforcement] to get the right person who [did] it" even though he knew it may implicate his son. (Tr. p. 452, line 14 – p. 453, line 9). Investigator Collins seized the .20 gauge shotgun and submitted it to Richland County's Firearm's Examination Unit. (Tr. p. 326, line 2 – p. 328, line 5). Investigator Collins received "official results indicating that the shotgun and the shell were a match," and thereafter obtained arrest warrants for Appellant's and Washington's arrest. (Tr. p. 329, line 6 – p. 330, line 2).

Upon arrest, Washington offered a full confession. (Tr. p. 330, lines 3-21). He implicated Appellant as the ringleader. (Tr. p. 330, lines 22-25). Appellant was arrested the same day as Washington, and at all times maintained that he knew nothing about the incident. (Tr. p. 331, lines 1-10).

After the incident, Appellant told Washington "they just interviewed [Larry] and arrested him. . . . And he told [Washington] that if push come to shove, [Washington] need[ed] to take the murder rap because [Appellant was] supposed to be going overseas to play basketball. And that [Appellant would] take care of [him] and make sure [he] got a good lawyer and make sure [he had] money on the books [in the detention center]."[2] (Tr. p. 411, lines 1-13).

Additional phone records demonstrated that from October 2014 to October 2015, more than 120 phone calls were placed between Washington's account at the detention center and an 803 number ending in 5532—a phone number belonging to Appellant post-arrest. (Tr. p. 363, line 11 – p. 364, line 13; Tr. p. 458, lines 2-16). Two of those calls were published at trial. (Tr. p. 424, line 17 – p. 428, line 19). Washington and Appellant continued to write letters from 2012-2015 while awaiting separate trials. (Tr. p. 420, line 16 – p. 422, line 21).

[2] Washington also testified that in the days following the murder, Appellant instructed Washington to "keep [his] mouth closed. And if push [came] to shove [to] go ahead and tell them that it was an accident, that the gun went off when the door was closed . . . ." (Tr. p. 414, lines 6-21). Washington told this version to law enforcement at first. (Tr. p. 417, lines 5-25). Appellant later told Washington "to stick to the story about that he has nothing to do with it, that the gun went off on accident [and] . . . [t]hat Patrick [Larry] put a gun to [his] head and made [him] do it." (Tr. p. 419, lines 1-25). And Washington did as Appellant told him. (Tr. p. 419, lines 18-25). But prior to sending that story in a letter as instructed, Washington flushed the letter down the toiled so he would not get in trouble. (Tr. p. 420, lines 1-15).

ARGUMENT

I. The trial court correctly denied Appellant's directed verdict motion because the State's case-in-chief included inculpatory testimony from two co-defendants, in addition to other direct and circumstantial evidence of guilt.

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler,* 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The trial court is correct in denying an appellant's motion for directed verdict when, also viewing the evidence in the light most favorable to the State, "there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" *State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016) (quoting *State v. Littlejohn,* 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)). "In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight." *Id.* at 192, 785 S.E.2d at 452. While "the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *State v. Bennett,* 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) (emphasis in original).

The Appellant moved for a directed verdict at the close of the State's case. (Tr. p. 503, lines 4-14). The trial court considered the motion in the light most favorable to the State and denied the motion, finding: "some circumstantial evidence surrounding the telephone records and things of that nature. But the bulk of the evidence is the testimony of the two other folks who are involved in this, especially Mr. Washington. That evidence alone would be sufficient to survive the motion. I need not go beyond that." (Tr. p. 503, line 15 – p. 504, line 3).[3]

[3] As to whether this issue is preserved on appeal, Appellant did not present any evidence at trial. *See State v. Bailey,* 368 S.C. 39, 43-44, 626 S.E.2d 898, 900-901 (Ct. App. 2006) (preservation

The State indeed put forth evidence sufficient to overcome a motion for directed verdict and to sustain Appellant's convictions and sentence. "[P]resence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." *State v. Hill,* 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977). Both co-defendants, Washington and Larry, confessed in full and testified at trial to taking part in the armed robbery at Appellant's command. (Tr. p. 249, ine 10 – p. 257, line 24; Tr. p. 398, line 15 – p. 410, line 8). Co-defendant Washington, the confessed triggerman, stated "[Appellant] was always the leader and [he] was always the follower." (Tr. p. 403, line 5). Considering Washington and Larry's testimonies alone, the State's presentation at trial unequivocally showed that Appellant volunteered co-defendant Washington as the principal actor, ensured he was armed with a .20 gauge shotgun, instructed him on how to go about robbing the victim's residence, and drove him to and from the scene. (Tr. p. 244, line 9 – p. 256, line 11; Tr. p. 397, line 15 – p. 408, line 8). Co-defendants Washington and Larry each testified to corroborating details. (*Id.*). Moreover, the State put forth evidence that Appellant maintained contact with Washington post-arrest and in fact instructed Washington to lie about the events and "take the murder rap because [Appellant was] supposed to be going overseas to play basketball . . . ." (Tr. p. 411, line 1 – p. 422, line 21). This evidence offers circumstantial support to the State's theory of the case—that Appellant acted as the ringleader in planning the robbery which resulted in the victim's murder.

But the State did not rely upon the co-defendant confessions alone. The State presented a witness from inside the victim's residence whose eyewitness testimony demonstrated that a little dark car kept pulling up to the residence prior to the shooting. (Tr. p. 126, line 5 – p. 131, line 8).

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of a directed verdict motion requires the renewal of that motion at the close of all evidence if the motion was denied at the close of the State's case).

This eyewitness later identified co-defendant Larry as "the individual that she believed had entered the residence with the shotgun and had previously been at the residence and purchased marijuana earlier in the day." (Tr. p. 138, lines 5-24; Tr. p. 199, lines 12-22). The State also put forth evidence from investigators who identified Appellant and the co-defendants as suspects based upon this eyewitness' identification and a collection of other tips. (Tr. p. 198, line 8 – p. 199, line 10). According to law enforcement testimony, it was not long into this investigation that co-defendant Larry admitted his involvement and implicated Appellant and Washington. (Tr. p. 202, line 1 – p. 203, line 4; Tr. p. 261, line 5 – p. 262, line 23).

The State also called Larry's mother to testify that she identified Appellant being at her home with Larry on the night of the murder, placing two of the co-defendants together at a place and time corroborative of the testifying co-defendants' declarations. (Tr. p. 303, lines 21-24).

Finally, the State presented Washington's father to testify that he turned over his .20 gauge shotgun to law enforcement because he "wanted [law enforcement] to get the right person who [did] it" even though he knew it may implicate his son, whose initial alibi the father could not verify. (Tr. p. 452, line 14 – p. 453, line 9). The State's investigator testified that he seized the .20 gauge shotgun and submitted it to Richland County's Firearm's Examination Unit and thereafter received "official results indicating that the shotgun and the shell were a match," lending to his obtaining arrest warrants for Appellant's and Washington's arrest. (Tr. p. 326, line 2 – p. 330, line 2).

Considering the above, even had the trial court solely considered the co-defendants' testimonies, the trial court correctly denied Appellant's directed verdict motion in this case.[4]

[4] The record does not reflect that the trial court only considered a limited amount of evidence in ruling upon the motion; however, the trial court was correct in distinguishing that the co-

II. Appellant's counsel posed no objection to Investigator Steve Collins' testimony regarding the results of a ballistics test conducted in relation to the murder, leaving Appellant's issue unpreserved; and, the isolated testimony at issue, while testimonial, does not prejudice Appellant in a manner requiring reversal.

Appellant purports that the following exchange regarding a firearm seized by Investigator Collins during his inquiry into the murder constitutes impermissible hearsay testimony warranting reversal:

> THE STATE: Upon seizing the firearm, did you attempt to do or send off for any testing of the shell located at the scene and the firearm?
>
> COLLINS: Yes, we sent the shotgun and the shell seized at the scene to Richland County's Firearm's Examination Unit. *And we were advised that* the shotgun shell and the firearm came back as a match, that the shell seized at the scene was fired from the shotgun that was turned over to us from Mr. Washington.
>
> THE STATE: According to those results, was there any doubt that's the same shotgun, that shell that was recovered for a match to that shotgun?
>
> COLLINS: Yes. No, there were no doubt[s] that that shotgun fired the shell that was located at [redacted address] the incident location and the murder of Matthew Milhouse.

(Tr. p. 329, lines 1-15 (emphasis added)).

The remainder of the testimony on this topic continued as follows:

> THE STATE: Upon receiving that information, what did that lead you do to?
>
> COLLINS: That lead us to obtain arrest warrants for [Appellant] Henry Johnson and Justin Washington.
>
> THE STATE: Were those obtained at the same time?
>
> COLLINS: They were [obtained] later that same morning. We got preliminary results back on February 23rd from Richland County of a match, but it needed to be peer reviewed. On the 24th of February we received the official results

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defendants' testimonies alone constituted enough evidence to deny the motion. (Tr. p. 503, line 15 – p. 504, line 3).

> indicating that the shotgun and the shell were a match. The warrants for those two individuals were obtained later that same day, after the results were present.

(Tr. p. 329, line 16 – p. 330, line 2).

A. Appellant posed no objection to this testimony and, consequently, the issue is unpreserved for appellate review.

A contemporaneous objection and a ruling by the trial court are required to preserve an issue for direct appellate review. *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). Absent a contemporaneous objection on the record, there can be no basis for appellate review, for "[a] party cannot complain of an error which his own conduct has induced." *State v. Carlson,* 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (citing *State v. Stroman,* 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)). Thus, where "a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson, supra.*

Appellant having raised no objection, the issue presently before this Court is therefore wholly unpreserved for review.

B. If the issue had been preserved for review, the isolated testimony constitutes testimonial hearsay but does not cause prejudice warranting reversal.

i. *In isolation, the testimony at issue constitutes testimonial hearsay—*

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *In re Care & Treatment of Harvey,* 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE).

"Hearsay is not admissible unless there is an applicable exception." *Id.* at 61-62, 584 S.E.2d at 897 (citing Rule 803, SCRE). Additionally, the Sixth Amendment's Confrontation Clause gives the accused "[i]n all criminal prosecutions . . . the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. The United States Supreme Court has held that the Clause permits admission of "[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington,* 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004).

The extent of the evidence challenged by Appellant which may constitute hearsay is Investigator Collins' statement: "We were advised that the shotgun shell and the firearm came back as a match, that the shell seized at the scene was fired from the shotgun that was turned over to us from Mr. Washington." (Tr. p. 329, lines 6-9). This testimony reflects an out-of-court statement introduced by someone other than the initial declarant: Investigator Collins was allowed to report ballistics test results promulgated by another, non-testifying individual. Rule 801, SCRE. It appears the testimony was offered to prove the truth of the matter asserted because it led Investigator Collins to testify that he personally had "no doubt that the shotgun fired the shell that was located at" the crime scene. (Tr. p. 329, lines 13-15). Investigator Collins' testimony therefore included a limited amount of hearsay.

If a hearsay statement "is not made for 'the primary purpose of creating an out-of-court substitute for trial testimony,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause" and a hearsay exception may apply to render it admissible. *Williams v. Illinois*, — U.S. —, —, 132 S.Ct. 2221, 2243 (2012) (quoting *Michigan v. Bryant,* 562 U.S. 344, 359, 131 S.Ct. 1143, 1155 (2011)). However, "where the primary purpose of an out-of-court statement is to serve as evidence or 'an out-of-court substitute for trial

testimony,' the statement is considered testimonial" and its admission violates the Confrontation Clause, unless the declarant is unavailable[5] and the statement has been subject to cross-examination at a time prior to its admission at trial. *State v. Brockmeyer,* 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (quoting *Bullcoming v. New Mexico,* 564 U.S. 647, 131 S.Ct. 2705 (2011)); *see Crawford v. Washington, supra.*

Without more in the record regarding the availability or unavailability of the ballistics analyst[s] involved in the investigation, the very limited testimony at issue appears to constitute an inadmissible out-of-court substitute for the ballistics analyst's testimony. *Bullcoming v. New Mexico, supra* (rejecting business records exception to the hearsay rule where the analyst who prepared the report at issue was not available to testify); *contra State v. Brockmeyer,* 406 S.C. at 352, 751 S.E.2d at 660 (applying the business records exception to the hearsay rule to chain-of-custody records because the non-testifying evidence custodians "were in no manner involved in the testing or analysis of the recovered items" and, therefore, the evidence at issue was non-testimonial).

ii. —but its admission caused Appellant no prejudice.

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *State v. Commander,* 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black,* 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the

[5] There exists no testimony in the record which may shed light on whether the ballistics analyst was unavailable pursuant to Rule 804, SCRE.

court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts,* 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) (citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967)). "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." *State v. Chavis*, 412 S.C. 101, 109–10, 771 S.E.2d 336, 340 (2015). The factors for consideration in any harmless error analysis include:

> the important of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecutions' case.

Delaware v. Van Ardsall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986). Harmless error can apply even if the court finds a violation of a defendant's Sixth Amendment right to confrontation. *Id.* at 684, 106 S.Ct. at 1428; *State v. Mizzell,* 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002).

In Appellant's case, direct evidence exists of guilt such that—had the trial court issued an erroneous ruling in regards to this issue—the admission of the challenged testimony proves harmless beyond a reasonable doubt. As noted in Respondent's directed verdict analysis above, both co-defendants confessed to corroborating details of the crimes' commission.

However, also beyond a reasonable doubt, the statement at issue could not affect the outcome of the trial. Washington himself testified that he took the shotgun from the backseat of his dad's truck, used it during the crimes' commission, and then put it back where he found it. (Tr. p. 400, line 16 – p. 409, line 21). "Having authenticated most of the items through his own testimony, [the co-defendant] himself negate[s] any possible prejudice by the admission" of the

ballistics results. *State v. Brockmeyer,* 406 S.C. at 354, 751 S.E.2d at 661.

Moreover, Investigator Collins permissibly testified that (1) he personally seized the shotgun from Washington's father, (2) identified the shotgun by a distinctive "W" engraving as well as by serial number, (3) explained that he submitted it for testing in conjunction with the shell recovered from the scene, (4) and, as a result of information gleaned from those test results, obtained arrest warrants for Appellant and Washington. (Tr. p. 326, line 2 – p. 330, line 4). He additionally identified the shell from the scene as belonging to a .20 gauge, as well as denoting that the seized shotgun was a .20 gauge based upon his own personal knowledge and visual examination. (Tr. p. 193, lines 1-20; Tr. p. 326, lines 16-19). The same conclusions can be drawn for this permissible testimony as can be drawn from the ballistics results: the shotgun seized in connection with the murder was indeed the same firearm used in the murder's commission. "Thus, any error was harmless because even assuming the anonymous [ballistics analyst] testified to that effect, it would have been cumulative." *Id.*

When the limited amount of alleged hearsay testimony is extracted from the remainder of the testimony concerning the shotgun, the only reasonable inference that can be drawn from the admissible testimony is that the shotgun Washington's father relinquished to law enforcement for testing was the same gun co-defendant Washington admitted to retrieving from his father's truck and used in the crimes at Appellant's direction. Given the amount of circumstantial evidence linking the tested shotgun to the crimes, any testimony concerning the outcome of a ballistics examination is unnecessary to reach the same conclusion. *State v. Brockmeyer, supra.* As a result, any error in Investigator Collins' limited testimony on the results of the ballistics test proves harmless.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant's convictions and sentence.

Respectfully submitted,

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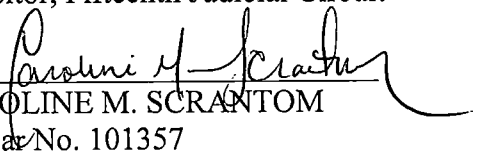
By: 
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ATTORNEY FOR RESPONDENT

October 19, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

HENRY NORRIS JOHNSON, JR.,

Appellant

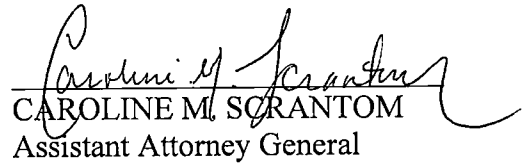
Appellate Case No. 2015-002242.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Elizabeth A. Franklin-Best
Blume Norris & Franklin-Best, LLC
900 Elmwood Avenue, Ste. 200
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 19th day of October, 2016.



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October 19, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Henry Norris Johnson, Jr.
Appeal from Lexington County
Appellate Case No. 2015-002242

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated October 19, 2016, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Caroline M. Scrantom
Assistant Attorney General

CMS/pjc
Enclosure

cc: Elizabeth Franklin-Best, Esquire
The Honorable Donald V. Myers, Solicitor, 11th Judicial Circuit
Trisha Allen, Victim Services