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**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Hampton County
The Honorable Perry M. Buckner, III, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General
S.C. Bar No. 68383
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit
P.O. Box 1880
Bluffton, South Carolina 29910
(843) 255-5880

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the court erred by excluding the testimony of Hampton Police Officer Johnny Wells that the decedent told him “Douglas” shot him where the decedent had been shot in the face, he was badly bleeding, it appeared to Wells the decedent was about to die, and the decedent indeed died shortly thereafter, since this statement was admissible pursuant to Rule 804(b)(2) as a statement of belief of impending death?
- II. Whether the court erred by ruling it would not allow defense counsel to argue for the admissibility of the dying declarations because the court had done its own research, since this was an arbitrary ruling, it violated Rule 18(a), SCRCrimP, and it denied appellant his right to be fully heard in his defense?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. The admissibility of the victim’s statement is not preserved for review because Appellant refused to argue the statement’s relevance at trial, stating, “I’m not exactly saying the third party did it. I’m just wanting the jury to hear the victim’s final words” and now argues an inconsistent position on appeal. However, the trial judge properly excluded evidence a law enforcement officer heard Victim say the name “Douglas” after he was shot because the statement created mere conjecture a third party shot the victim and did not meet the requirements for third party guilt.
- II. After hearing arguments from the State and the defense, the trial court made a thorough and well-reasoned ruling on the admissibility of hearsay evidence of third party guilt in accordance with the guidelines of SCRCrimP Rule 18(a) and (b). The court’s refusal to allow further argument after the ruling was within his discretion and was not structural error, which is rarely determined and only found in limited circumstances.

STATEMENT OF THE CASE

In April 2013, a Hampton County Grand Jury indicted Appellant, Dalonte Green, for murder. (Indictment.) Appellant proceeded to a jury trial on May 4, 2015 before the Honorable Perry M. Buckner, III. Appellant was represented by Fourteenth Circuit Public Defender Robert Hughes. (R. p.1.) Assistant Solicitor Steve Knight, of the Fourteenth Circuit Solicitor's Office, represented the State. (R. p.1.)

The jury found Appellant guilty as charged on May 7, 2015. (R. p.174, lines 17-20.) Judge Buckner sentenced Appellant to thirty years' imprisonment for murder. (R. p.179, line 23 – p. 180, line 1.)

This appeal follows:

STATEMENT OF FACTS

In the early morning hours of December 1, 2012, officers responded to a call of shots fired at Gray's Paradise Club in Varnville, South Carolina. (R. p. 8, lines 2-11; p. 16, line 24.) Varnville Officer Marion Chambers arrived on the scene and noticed the victim walking away from a residence on Tillman Avenue and walking into the roadway. (R. p. 17, lines 3-7.) The victim appeared to have an injury to his neck and face and was bleeding profusely. (R. p. 17, lines 19-22.) Because of the injury, the victim was unable to respond to Officer Chambers' questions. (R. p. 17, lines 10-20.) Chambers testified at trial the victim never identified who shot him. (R. p. 18, lines 13-18.)

Varnville officer Teddy Scott also arrived on the scene and spoke to the owner of the club, then continued down Tillman Avenue approximately 500 yards where he observed Officer Chambers standing by the victim, who was sitting on the side of the officer's car. (R. p. 7, line 14 – p. 9, line 12; p. 12, lines 17-19.) Officer Scott testified the victim was bleeding from a gunshot wound to his mouth. (R. p. 11, lines 2-4.) Scott asked the victim who shot him, but the victim was mostly only able to “gurgle” his response. (R. p. 9, lines 19-24.) The victim was able to inquire about an ambulance, however. (R. p. 9, lines 23-24.) Scott was standing about twelve inches away from the victim, but he was unable to understand much of what the victim said. (R. p. 10, lines 2-25.) Scott then asked the victim if he could write the name of the shooter, but the victim was too weak to write anything, despite his attempts. (R. p. 11, line 14 – 23.) Scott said the victim could neither identify by name nor describe the person who shot him. (R. p. 12, lines 6-11.) Scott recalled Officer Chambers, Hampton Police Sargent Wells, Hampton County Sheriff Officer Michael Bridges and Hampton Police officer Troy Long were also standing near the victim, but were approximately four or five feet away. (R. p. 13, lines 2-9.)

EMS paramedic Renatta Ford responded to scene. (R. p. 20, line 25 – p. 21, line 21.) Ford testified when she first assessed the victim he had apneal (slow and labored) breathing with “a lot of blood around him.” (R. p. 21, line 23 – p. 22, line 1.) The victim pointed to his mouth, and Ford noticed all his teeth on the right side of his mouth were shattered. (R. p. 22, lines 8-12.) Ford testified the victim could communicate by pointing, but was unable to verbalize anything. (R. p. 22, lines 13-19.) Ford also testified the victim was agitated because he could not breathe, and the paramedics had to suction his mouth and airway to allow him to breathe. (R. p. 22, line 20 – p. 23, line 18.) Once EMS moved the victim to the ambulance and suctioned out his airway, his condition temporarily improved. (R. p. 25, lines 3-10.)

Markeisha Smith was a patron of Gray’s Paradise and was celebrating her birthday that night. (R. p. 27, lines 7- 24.) Smith and a few of her friends arrived at the club between 10:00 and 11:00 pm. (R. p. 28, lines 7-10.) A friend of Smith took several pictures at the club with her iPad, and Smith later emailed those photos to law enforcement. (R. p. 29, lines 22-24; p. 33, lines 9-13; State’s Exhibit 9.) Included in the photos was a picture of Appellant and his girlfriend, both of whom Smith identified. (R. p. 29, lines 4-13.) Appellant’s girlfriend was a friend of Smith’s younger sister, and they came to Smith’s party together. (R. p. 30, line 23 – p. 31, line 4.) Smith also identified Appellant as wearing a plaid shirt in the photo. (R. p. 31, lines 16-17.)

Chief Tyrone Smith, of the Varnville Police Department, identified a photograph of a man wearing a plaid shirt. (R. p. 37, lines 3-18; State’s Exhibit 10.) Chief Smith also testified he found the same plaid shirt ten days later in an overgrown area¹ behind an abandoned residence, approximately seventy-five feet from Gray’s Paradise club. (R. p. 37, line 16 – p. 38, line 4; p. 38, lines 15-22; p. 40, lines 16-23.)

¹ Chief Smith testified the discarded plaid shirt was found in some hedge bushes near an abandoned house, and the wooded area surrounding that location contained thorns that stuck to his clothing. (R. pp. 39-40.)

Taylor McQuire, who went to school with Appellant, was at the club with his cousin on December 1, 2012. (R. p. 48, lines 1-25.) McQuire parked beside the club, and he was in his car when he saw Appellant about fifteen or twenty feet away. McQuire asked Appellant for a cigarette and noticed Appellant was holding a gun. (R. p. 49, lines 4-24; p. 53, lines 5-6.) Although he did not see the shooting, McQuire said he drove off once he heard the gun go off. (R. p. 52, lines 7-10.)

Clarence Riley testified he also went to the club that night with Appellant. (R. p. 55, line 18 – p. 56, line 1.) Riley testified he gave Appellant a gun that night “because he asked for it.” (R. p. 56, line 22 – p. 57, line 1.) When Riley gave Appellant the gun, he was standing by a van parked outside the club. (R. p. 62, lines 10-15; State’s Exhibit 5.) After Riley gave Appellant the gun, he went back into the club. (R. p. 57, lines 6-9.) Riley said Appellant was wearing a white shirt with another plaid shirt, which Riley identified as State’s Exhibit 11, around Appellant’s shoulders. (R. p. 57, lines 10-21; State’s Exhibit 11.) When Riley came out of the club minutes after the shooting, Appellant was only wearing the white shirt. (R. p. 58, lines 15-25.) Riley, Appellant, and two females left the club to go to McDonalds following the shooting. (R. p. 59, lines 1-5.) Riley said Appellant was out of breath in the car on the way there, as if he had been running. (R. p. 59, lines 6-14.) Appellant’s girlfriend, who was also in the car, was picking something off his white shirt. (R. p. 59, lines 15-22.)

At some point that evening, Appellant returned the gun to Riley. (R. p. 60, lines 8-9.) After the group left McDonalds, Riley dropped Appellant and his girlfriend off at his house and went home. (R. p. 60, lines 4-7.) The next day, Riley “got rid of” the gun “because I heard that he did something with the gun that I had in my hand.” (R. p. 60, lines 15-17.) Riley buried the gun in the woods near his grandmother’s house. (R. p. 60, line 16 – p. 61, line 3.) Riley was later

unable to locate the gun. (R. p. 66, lines 15-17.)

Tevin Rashad Platts was also in the club with Riley and Appellant. (R. p. 68, line 11 – p. 69, line 5.) Platts is Appellant's cousin and he is also a cousin of the victim. (R. p. 69, lines 12-17.) As Platts left the club, he saw Appellant and Riley outside in the parking lot. (R. p. 69, lines 20-23.)

Dr. Lee Marie Tormos, the State's pathologist, testified the victim sustained two gunshot wounds, one to the right arm above the elbow and the other to the face. (R. p. 85, line 6 – p. 86, line 18.) The bullet that struck the victim's face entered the lower right lip, fractured the victim's teeth, traveled across the tongue, and then lodged into the back of his throat, lacerating his jugular vein. (R. p. 85, line 9 – p. 86, line 2.) Dr. Tormos said she found soot in the wound to the face and particles consistent with soot on the tongue. (R. p. 88, lines 6-14.) Based on these findings, Dr. Tormos opined the muzzle of the gun was very close to the victim's face when it was fired. (R. p. 88, lines 14-16.)

Dr. Tormos further testified the severance of the jugular vein could cause a person to bleed to death for a period of several minutes to even an hour. Although she would not be surprised to know the victim walked 500 yards after being shot, Dr. Tormos did testify she would be surprised if the victim was able to talk to anyone, considering the wounds to his tongue and mandible. (R. p. 89, lines 5-25.) Dr. Tormos said, "... if he talked, then he could very well have uttered sound, but he might not have been easy to understand because of the trauma to the tongue and to the lip." (R. p. 89, line 24 – p. 90, line 2.)

SLED analyst Agent Jennifer Stone found particles of gunshot residue on the right sleeve of the plaid shirt recovered by law enforcement. (R. p. 91, lines 9-25; p. 97, line 19 – p. 98, line

1.) Agent Stone also found gunshot residue and particles consistent with residue² on the shirt's right chest, left chest, and left sleeve. (R. p. 98, lines 1-9.) In her opinion, the plaid shirt was close to a weapon when it discharged. (R. p. 98, lines 10-12.)

Dontae Collins gave a statement to Police Chief Smith on December 8, 2012, in which he told Chief Smith he saw Appellant with a gun, crouched down by a van. Collins heard the gun shot go off, saying no one else in the parking lot could have shot the victim. (State's Exhibit 12.) Collins later recanted his statement at trial. (R. p. 116, line 8-14.) Similarly, Joseph Smoaks gave a statement to Chief Smith which he also recanted. Smoaks was an inmate at the Hampton County Detention Center at the same time as Appellant. Smoaks told Chief Smith on January 17, 2013, that one day in the recreation yard Appellant told him Riley gave him a gun and he shot the victim. (R. p. 76, line 17 – p. 77, line 7.) Smoaks recanted his statement to Chief Smith before the jury, but the solicitor played the recorded statement to the jury to refresh Smoak's recollection. (R. p. 78, line 17 – p. 79, line 24.) The recording was published but was not entered into evidence. (R. p. 2.)

How the Issue Was Presented at Trial

Following the conclusion of the State's case and after Appellant elected not to testify on his own behalf, the defense requested an *in camera* hearing of Johnny Wells, an officer with the Hampton Police Department. (R. p. 117, line 12; pp. 119-122; p. 122, line 9 – p. 123, line 12.) Wells testified he responded to the call about the shots fired at Gray's Paradise club, but he waited for other officers to arrive on scene so he had back up. (R. p. 123, lines 11-17.) Wells said he noticed the victim walking down the street and saying he was shot. (R. p. 124, lines 8-10.) Other officers were with the victim, as well, asking who shot him. The victim began to fall to the

² Agent Stone testified gunshot residue contains three elements of barium, antimony, and lead. Particles "consistent with gunshot residue" means two of the three elements are found, but not the third. (R. p. 98, lines 3-6.)

ground, and Wells grabbed him. (R. p. 124, lines 10-14.) Wells said the victim “was bleeding all over the place.” (R. p. 124, lines 14-15.) Wells testimony continued as follows:

Q: Did he answer the question of who killed him?

A: Well, I do believe he said a name.

Q: Do you recall that name?

A: Yes, I do.

Q: What was it?

A: The name I heard him say at that time was Douglas.

Q: And you were sure enough to write that time in an incident report?

A: Yes, sir, I did.

(R. p. 125, lines 11-19.) On cross examination, the solicitor questioned Wells in more detail:

Q: Mr. Wells, you said he was mumbling and he was spitting up blood; is that correct?

A: I said -- yes, I did say that.

Q: So he was mumbling and spitting up blood, and who was the other officer who was there at the scene when you got there?

A: I don't know. There were several officers. The particular officer that I recall who asked him to question was Officer Teddy Scott.

Q: Teddy Scott. And when Teddy Scott asked him to question, where was Teddy Scott at in relation to where Mr. Rood was at?

A: We were all within an arm's reach of him.

Q: Arm's reach? Was Mr. Scott standing up or kneeling down?

A: He was standing at one point, and then he asked him, “Who shot you?” And he said, “Douglas,” and then Teddy said, “What?” He said, “Douglas.” He said, “What did you say?”

Q: Did repeat himself? “Douglas” more than once?

A: Yes, he did.

Q: Even though he is spitting out blood in mumbling?

A: Yes.

Q: Okay. Where were you at, at this time?

A: I was holding Mr. Rodd in my hand.

Q: In your hand. So you were actually, physically holding him?

A: Yes, his blood was on my hands in my body.

Q: Did he scream out, “Douglas,” or just say, “Douglas,” mumble. Can you describe in the mumbling tone that you previously testified to how he said Douglas?

THE COURT: Repeat the question.

ASST. SOL. KNIGHT: I would ask him to describe -- he said the victim was mumbling. I want him to describe the mumbling and the word Douglas in one sentence.

Q: How did he do that?

A: I don't know how he do that.

Q: But he was mumbling, correct?

A: He wasn't really mumbling. He answered the question. He was saying, "My mouth, my mouth." I know he said, "Douglas," and he also said, "I don't want to die." That's what I recall.

(R. p. 125, line 25 – p. 127, line 15.)

The solicitor initially objected to the testimony on the grounds there was no evidence the victim believed his death was imminent. (R. p. 127, line 22 – p. 128, line 4.) The court questioned the solicitor whether the testimony elicited evidence of third party guilt, and the solicitor agreed, further objecting to the testimony because the criteria for third party guilt had not been met. (R. p. 128, lines 7-19.) The court then turned to Appellant for his response. Appellant appeared to recognize the problem with the testimony, and significantly, admitted he had no other information about "Douglas" or indicating this person was the guilty party:

MR. HUGHES: Your Honor, **I cannot identify who Douglas is because of the one witness I have as to who Douglas was.**

THE COURT: Now, don't get into something that hasn't been testified. We base it on the evidence in this case and not what you think you could have done.

MR. HUGHES: Well, Your Honor, I have a dying declaration.

THE COURT: You agree that I also have to evaluate not only—you agree that its hearsay?

MR. HUGHES: It's hearsay.

THE COURT: And you believe that it comes under 804(b)(2), which says that in prosecution for homicide, a statement made by the declarant while believing that the declarant's death was imminent concerning the cause and circumstances of what declarant believe to be impending death, it falls within the exception or an exception to the hearsay rule. Is that your position?

MR. HUGHES: That is my position.

THE COURT: Doesn't the Court have to also evaluate the evidence under South Carolina's third party guilt evidence rule?

MR. HUGHES: Well, Your Honor, **I'm not exactly saying that the third party did it.** I'm just wanting the jury to hear the victim's final words.

(R. p. 128, line 21 – p. 129, line 19 (emphasis added).) Respondent submits Appellant's offer of admissibility as a dying declaration was merely a red herring because he knew the statement was inadmissible.

The Court's Ruling on Evidence of Third Party Guilt

The trial court anticipated the issue concerning the admissibility of Wells' testimony because, as the court noted, the judge had researched the issue in the days before the testimony. (R. p. 132, lines 14-15.) Judge Buckner clearly understood the testimony had greater implications for third party guilt than whether the statement was a dying declaration, despite Appellant's argument he sought to admit the testimony only for the purpose of allowing the jury to hear the victim's final words. The court viewed Appellant's argument for the statement as a dying declaration as merely one factor to consider, but ultimately irrelevant. Judge Buckner expressed the following concern:

THE COURT: I understand you do, but it also generates the issue of third party guilt. Since you don't know who Douglas is there's been no evidence about a Douglas at the scene. What you seek to admit, Mr. Hughes, and I certainly will allow you to call Mr. Wells as a witness since he certainly can testify to what he observed, where he was, who was with them, anything you choose to seek. The question is the question of hearing this statement of Douglas. You seek to admit hearsay evidence under 804 (b) (2), which says as I told you, the statement made by declarant while believing that declarant's death was imminent concerning the cause or circumstances of what declarant believed to be impending death.

The statement can be admissible as a dying declaration as an exception to the hearsay rule. It does not make any difference, Mr. Hughes, for my research, the length of time the declarant lives after making any declaration. That is immaterial.

There's a case on that, the Hall case; it's an old one, 1926. The problem I see here is that I also have to evaluate in under third-party guilt. Evidence that is offered by you, and that's what you're doing in your case, offered by the accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with the defendant's own guilt, and as such facts as raised a reasonable inference or presumption as to his own innocence.

Evidence which can have no other effect other 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 under our rules for third party guilt. I've looked at a number of third party guilt cases, including the case you provided to me in a number of cases that my law clerk provided to me.

The case my law clerk provided to me was Lorenzo v. State, where the victim's father who was not the defendant, was on the sex offender registry in a criminal sexual conduct with a minor case, and it was held inadmissible under the rule that was pronounced in the Gregory case, which is the oldest case on third-

party guilty in South Carolina. It's 198, South Carolina 98, 1941. They applied it in the Lorenzo case, 2008. I also looked at the Swafford case, which is 2007, evidence that another person was driving the defendant's vehicle hours before an accident resulting in death was held to be inadmissible as well. The Court, I believe, correctly applied the rule that was established in Gregory.

I believe this testimony, Mr. Hughes, the proffered testimony that is being offered by you on behalf of the accused, raises the bare suspicion of third-party guilty without any other evidence to support that conclusion.

And this Court, following the rule that was announced -- and that assumes you're correct that this is a dying declaration. But the rule announced in Gregory says that "Evidence offered by the accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and as such facts as raised a reasonable inference, or presumption, as to his own innocence. Evidence which can have no other affected," in this case the word single quote Douglas," 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."

There should have been for me some proof of circumstances with it. Some train of facts or circumstances which tend clearly to point out that such other person as the guilty party. Here, I don't have that, and for that reason, Mr. Hughes, the State's objection as to the admission of the testimony is sustained.

(R. p. 129, line 20 – p. 132, line 12.) After the court issued its lengthy and thoughtful ruling, defense counsel asked if he could argue further. (R. p. 132, line 13.) The court declined, noting the argument had been well researched, the defense had proffered its witness, and the court had listened to argument from the solicitor and the defense. (R. p. 132, lines 14-20.) The court offered to allow the defense to call the witness to testify about the victim's other dying declarations, but would not allow the any testimony of the name "Douglas." (R. p. 132, line 20-22.) The court also noted Appellant's objection for the record. (R. p. 132, line 23 – p. 133, line 1.) In light of the ruling, Appellant elected not to call any witnesses and obtain the benefit of the last closing argument. (R. p. 133, lines 15-17.)

ARGUMENT

I. The admissibility of the victim's statement is not preserved for review because Appellant refused to argue the statement's relevance at trial, stating, "I'm not exactly saying the third party did it. I'm just wanting the jury to hear the victim's final words" and now argues an inconsistent position on appeal. However, the trial judge properly excluded evidence a law enforcement officer heard Victim say the name "Douglas" after he was shot because the statement created mere conjecture a third party shot the victim and did not meet the requirements for third party guilt.

The issue concerns whether a statement which clearly implicated a third party for the commission crime was admissible under the circumstances of the case. Despite Appellant's current attempt to frame the statement as a dying declaration, the trial court properly focused on Appellant's greater hurdle to admissibility: the uncorroborated existence of a man named Douglas, who even the defense did not claim to be the guilty party ("I'm not exactly saying that the third party did it") and conceded was unknown ("I cannot identify who Douglas is ..."). (R. p. 128, lines 21-22; p. 129, lines 17-18.) Defense counsel expressly told the court he was only offering the testimony because he "want[ed] the jury to hear the victim's final words." (R. p. 129, lines 18-19.) The trial court properly found the evidence was inadmissible, and any analysis of whether the statement was a dying declaration was irrelevant.

The murder charge stemmed from the death of the victim after he was shot outside Gray's Paradise club in the early morning of December 1, 2012. The State maintained Appellant asked for a gun from his friend, crouched behind a van and waited for the victim to leave the club, then stood and shot him. The victim, struck in the face and arm, walked several yards down the street before collapsing and later dying from his wounds. (R. pp. 7-9; 11-13; 17-18.) The defense improperly attempted to introduce evidence of third party guilt via the testimony of Officer Johnny Wells, the only witness who claimed he heard the victim articulate any words other than a gurgle. Wells testified that in response to another officer asking the victim who shot

him, he heard the victim say, "Douglas." At trial Appellant argued he was offering the statement as a dying declaration, but that argument was merely a red herring. As the trial court properly determined, and despite the defense's assertions otherwise, the statement was offered in an attempt to suggest to the jury someone else shot the victim, though the existence of "Douglas" was never established. The court properly refused to allow the portion of Wells' testimony which implicated a third party, despite Appellant's argument he was not offering the testimony for that reason.

On appeal, Appellant appears to now concede the statement was offered to show third party guilt, claiming the evidence "was obviously relevant. The major issue in a murder is the identity of the murderer." *Compare* IBOA. p. 17 (citing Rule 401 SCRE) with R. p. 129, lines 17-19. This position is contrary to his argument at trial. However, Appellant makes no argument how the evidence satisfies the requirements of South Carolina law on third party guilt. Indeed, Appellant avoids that argument completely. As the trial court recognized, Appellant's argument is a distraction from the central issue of concern, which is the evidence of third party guilt. This Court should affirm his conviction.

The Relevance of the Statement Is Not Preserved for Review

As an initial matter, Appellant's argument the victim's statement is relevant to the identity of the killer is not preserved for review. Although Appellant argued at trial the statement was a dying declaration and he continues this argument on appeal, his expressed basis for the relevancy of the statement as a dying declaration **is not** preserved. Indeed, defense counsel expressly disavowed the relevancy of the statement to identity of the killer when pressed by the trial court. Appellant conceded he was not offering the statement to suggest "Douglas" was the identity of the killer, saying "I'm not exactly saying that the third party did it." (R. p. 129, lines

17-18.) Appellant cannot now argue the statement is clearly relevant. See *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded in the trial court cannot be argued on appeal); *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995)(a party cannot argue one ground below and then argue another ground on appeal); *State v. Benton*, 338 S.C. 151, 156–57, 526 S.E.2d 228, 231 (2000) (finding Appellant could not argue a palm print was direct evidence at trial and then argue the print was circumstantial evidence on appeal); *State v. Russell*, 383 S.C. 447, 679 S.E.2d 542 (2009) (finding the appellate argument a videotaped interview of victim was prejudicial when at trial the defendant argued the interview was cumulative of the child's testimony unpreserved for review). Appellant's current argument is inconsistent with the position he presented to the trial court. Appellant did not simply fail to raise the issue of relevancy to the trial court; he refused to argue it. Therefore, Appellant should not be permitted to assume the relevance of the statement, as he does in his brief, before engaging in his analysis of the statement as a dying declaration. This issue is not preserved for review. Regardless, should the Court choose to look beyond the issue preservation to the merits, Appellant's claim still fails.

Standard of Review

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining

whether the trial court's ruling is supported by any evidence. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added).

Relevance and Rule 403

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Stated another way, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (citing Rule 401, SCRE); *State v. Bixby* 388 S.C. 528, 544, 698 S.E.2d 572, 581 (2010).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C. 211 740 S.E.2d 512 (Ct. App. 2013); *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." *State v. Lee*, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (Ct. App. 2012) (quotation marks and citations omitted).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Horton*, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004); *State v. Adams*, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). The appellate court will review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (S.C. App. 2004). Rule 403's prohibition against evidence which may mislead the jury or be a waste of time directly relate to the limitations on evidence of third party guilt.

Evidence of Third Party Guilt Must Cast More Than a Bare Suspicion

The admissibility of evidence of third-party guilt is governed by the rule set forth in *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). See *State v. Cope*, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct.App.2009) (quoting *State v. Gregory* as the rule governing admissibility of evidence of third-party guilt); *State v. Swafford*, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct.App.2007) (affirming application of *State v. Gregory*). 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. 98, 104-105, 16 S.E.2d 532, 534-35(1941) (emphasis added). The United States Supreme Court clarified the above-outlined rule regarding the admission of third-party guilt in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). *Holmes* found

the trial court erred by considering the strength of the State's **rather than determining the corroboration of the third party guilt by the defense**. *Id.* at 328–29. The *Holmes* Court also held that though the trial court erred in denying the admissibility of the statement, the limitations on the admissibility of third party guilt as outlined in *Gregory* do not deny a defendant his right to present evidence. *Id.*; *see also*, *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (2010); *Miller v. State*, 379 S.C. 108, 114, 665 S.E.2d 596, 599 (2008). *Holmes v. South Carolina* preserves *Gregory* as the appropriate standard for evaluating the admissibility of evidence of third-party guilt.

In *Lorenzen v. State*, 376 S.C. 521, 657 S.E. 2d 771 (2008), the Court held the sexual offender registry listing the victim's father's name would not have been admissible under either a pre-or post-*Holmes* third-party guilt standard. Significantly, the victim's father was listed on the registry for committing the crime of assault with intent to commit criminal sexual conduct in the first degree which would have involved an adult victim whereas defendant was charged with criminal sexual conduct with a minor. *Id.* at 531-533, 376 S.E.2d at 777-778. Defendant's PCR counsel acknowledged there was nothing on the registry to indicate the victim's father committed a crime against a child. *Id.* Furthermore, defendant's allegation that the victim's father may have been the perpetrator was so nebulous that it would have had no other effect than to “cast a bare suspicion.” Therefore, the Supreme Court did not believe these facts would be inconsistent with defendant's guilt or raise a reasonable inference of his innocence. *Id.*

As the U.S. Supreme Court and our state courts have held, evidence of third party guilt must do more than cast a bare suspicion or make a conjectural inference as to the guilt of another before it is admissible. At trial, Appellant attempted to side step this argument by claiming he was not offering the evidence to challenge the identity of the murderer. Appellant admitted he

could not identify who “Douglas is because of the one witness I have as to who Douglas was” was. (R. p. 128, lines 21-22.) Thus, unlike in other cases in which the third party was an identifiable person, in the instant case no other evidence was offered to show the third party actually exists. Even Appellant acknowledged this. As the trial court found, the mere mention of a name cannot give rise to a “reasonable inference or presumption as to [Appellant’s] innocence.” *Gregory*, 198 S.C. 98, 16 S.E.2d at 534. At trial, defense counsel unequivocally stated, “I’m not exactly saying that the third party did it.” (R. p. 129, lines 17-19.) To now suggest on appeal his intent was otherwise is improper.

Statement Upon Belief of Impending Death

In effect, Appellant argues the admissibility of a dying declaration trumps all other evidentiary concerns. This argument is without merit, however. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible unless it falls within an exception. Rule 802, SCRE. A statement upon belief of impending death, or a dying declaration, is such a statement when "made by a declarant while believing that the declarant's death [is] imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Rule 804(b)(2), SCRE.

A declarant is not required to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration. *State v. McHoney*, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001). "The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration." *Id.* The belief in imminent death may be demonstrated by the declarant's own statement or from circumstantial evidence, such as the nature of the wounds, the declarant's critical condition, or statements made in the declarant's

presence. *Id.* at 93, 544 S.E.2d at 33-34 (citations omitted). Moreover, the length of time the declarant lives after making the dying declaration is immaterial. The focus is on the person's state of mind when the statement is made, not on the outcome of the injuries. *State v. Hall*, 134 S.C. 361, 361, 133 S.E. 24, 26 (1926). In *Hall*, the Supreme Court held it was up to the jury to pass on the credibility of the dying declaration, and the length of time between the declaration and death is only one factor to be considered. *Id.*

In the case before the court, the solicitor first argued there was no evidence from any of the witnesses, law enforcement officers, EMS workers, or pathologist the victim knew he was dying. (R. p. 127, line 22 – p. 128, line 4.) *McHoney* allows the court to consider the circumstances surrounding the statement to infer the victim's state of mind, so the judge could have taken into account the victim's ability to walk and gesture, the prompt arrival of officers and EMS, and the victim's apparent improvement in condition once EMS responders began suctioning his airway. (R. pp. 22-23.) Had the judge ruled the statement was inadmissible on the dying declaration basis alone, that decision would still be reviewed by this Court under the abuse of discretion standard set forth in *McDonald* and *Kelly*. The record reflects, however, the trial judge was more concerned with the portion of the proffered testimony which offered uncorroborated evidence of third party guilt. (R. pp. 128-132.)

In his brief, Appellant claims the trial judge erred because he reasoned "that for the dying declaration to be admissible it must **also** meet all of the elements for evidence of third party guilt. (FBOR at p. 15.) This is a misstatement of the judge's ruling. In effect, the trial court ruled a statement made upon belief of impending death, **if also** providing evidence of third party guilt, must satisfy the requirements of both tests. The location of the "also" makes a significant difference. In *State v. Hall*, 134 S.C. 361, 133 S.E.2d 24 (1926) and *State v. Bethea*, 241 S.C. 16,

126 S.E.2d 846(1962), the court held a dying declaration was admissible under what is now the approximate language of Rule 804(b)(2) because the person identified in the declaration was the defendant, not a third party. There was no need for the court to address the third party guilt question when it enumerated the requirements for the statement's admissibility.

As for Appellant's argument the language of 804(b)(3) contains a qualifier for third party guilt, and so 804(b)(2) must not intend any qualifiers, this argument assumes the evidence is admitted in a vacuum, with no other evidentiary considerations. The rule governing a statement against interest, or 804(b)(3), contains elements, or "qualifiers" most often applicable to the reliability of the statement. In other words, a statement contrary to a person's interest is unlikely to have been a lie, unless someone on trial for a crime offers exculpatory evidence and then the very existence of the statement is suspect. A dying declaration, on the other hand, such as those offered by the prosecution in *Hill* and *Bethea* to prove the identification of the defendant by the deceased victim, is often corroborated by and relevant to the State's theory of the case. While the statement against interest predicts the need for corroboration, the dying declaration does not.

Regardless of the elements of Rule 804(b)(2) or 804(b)(3), neither exception can anticipate all complications of admissibility. When confronted by them, the courts address the concerns individually, as the trial judge did here. The fact the victim may have said the name "Douglas," which was arguably an exception to the hearsay prohibition, was only one factor the court could consider before ultimately moving on to the more important analysis of third party guilt. Because the evidence failed to cast even a bare suspicion of guilt on any particular person, the court properly refused to allow it. To have done otherwise would have subjected the same evidence to assessment under Rule 403 as confusing and a waste of time since trial counsel asserted he was not introducing the statement to show "Douglas" was the shooter.

Harmless Error

Lastly on this issue, the improper admission of hearsay evidence is not necessarily reversible error, but is subject to a harmless error analysis. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994). Appellate courts must determine whether the error was harmless beyond a reasonable doubt. *Id.* Moreover, whether an error is harmless depends on the particular circumstances of the case. *Id.* The circumstances include, but are not limited to, the importance of the witness' testimony in the State'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, and the overall strength of the State's case. *Id.* Error is only harmless "when it 'could not have reasonably affected the result at trial.'" *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (citation omitted).

Thus, even if the Court were to find the trial court abused its broad scope of discretion, any alleged error is harmless beyond a reasonable doubt. *See State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (holding admission of hearsay evidence is subject to harmless error analysis). The State presented compelling evidence the victim was unable to talk at all, only to gesture and make "gurgling sounds." The State also put forth witnesses who assisted the victim when he made the purported statement, and those witnesses did not hear the victim say "Douglas" in response to the officer's questions concerning who shot him. Thus, even if the statement was admitted, the jury would have also heard multiple conflicting statements casting doubt on Officer Wells' testimony. Additionally, even if the jury believed Wells heard the victim respond with the word, "Douglas," the State's theory of the case was corroborated by and cumulative to that of multiple other witnesses and evidence. *See Graham* (stating appellate courts will examine a host of factors to determine if the error was harmless, including the

importance of the witness' testimony, whether the testimony was cumulative, and the presence of evidence corroborating the witness' testimony).

The court's ruling of admissibility of Wells' testimony had no impact on the jury's guilty verdict when an examination of the record shows the State also admitted and the jury considered: (1) Appellant's friend Clarence Riley, whose testimony put the gun in appellant's hand, and identified Appellant's plaid shirt later found with gunshot residue on it. Riley later buried the gun because he heard Appellant used it in a crime (R. pp. 57-60); (2) testimony from witnesses who placed Appellant at the club and in the parking lot with a gun immediately before the shooting (R. pp. 49-51); (3) a plaid shirt matching the one worn by Appellant that night was found near the club and tested positive for gunshot residue (R. pp. 38-39; 94-99); (4) testimony Appellant was out of breath immediately following the shooting (R. p. 59); and (5) Appellant was not wearing the plaid shirt immediately following the shooting, and his girlfriend removed debris from Appellant's shirt in back seat of the car. (R. p. 59.) Accordingly, because admitting Wells' statement would not have affected the verdict, any alleged error in refusing to admit it was harmless beyond a reasonable doubt. *See Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151 (holding an error admitting hearsay evidence is harmless when it could not have reasonably affected the result at trial).

II. After hearing arguments from the State and the defense, the trial court made a thorough and well-reasoned ruling on the admissibility of hearsay evidence of third party guilt in accordance with the guidelines of SCRCrimP Rule 18(a) and (b). The court's refusal to allow further argument after the ruling was within his discretion and was not structural error, which is rarely determined and only found in limited circumstances.

Appellant next argues the ruling on the admissibility of the evidence was error itself, because it was an "arbitrary ruling, it violated Rule 18(a), SCRCrimP, and it denied appellant his right to be heard fully in his defense." (FBOR at 18.) Appellant misstates the record before the

court. Appellant further exaggerates the application of the structural error concept, arguing the court's refusal to allow him to argue after the court's ruling constituted an error so profound it transcended the criminal process. *See State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (1013).

As discussed in the previous issue, the United States Supreme Court has held the refusal to admit dubious evidence of third party guilty does not violate a defendant's constitutional rights. *Holmes*, at 327 (noting "[Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial") (citation omitted). Appellant's argument is merely an effort to side step that holding by attacking the trial judge instead.

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the US Supreme Court divided constitutional errors into two classes: 1) trial errors, which include most constitutional errors, and which occur during presentation of the case to the jury and may be quantitatively assessed in the context of other evidence to determine harmless error beyond a reasonable doubt and 2) structural defects, which defy analysis by harmless error standards because they affect the framework within which the trial proceeds, not the trial process itself. *Id.* at 1246; *see also Neder v. United States*, 527 U.S. 1, 7-9 (1999). Furthermore, in our jurisdiction, structural errors are only those that deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair. *State v. Rivera*, 402 S.C. 225, 248, 741 S.E.2d 694, 706 (2013). The Supreme Court characterized as "structural" "a very limited class of errors" that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. *United States v. Davila*, 133 S. Ct. 2139, 2149, 186 L. Ed. 2d 139 (2013)

Such structural errors include the denial of counsel, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), the denial of the right of self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 177–178, n. 8, (1984), the denial of the right to public trial, *see Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, *see Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Turning to the facts of the case, the State strongly disputes Appellant’s initial premise defense counsel was not allowed to argue Appellant’s position on the admissibility of Officer Wells’ testimony. The trial court asked to hear from the solicitor first then turned to Appellant for his argument concerning the dying declaration, and more specifically, the issue of third party guilt. (R. p. 128, line 21 – p. 129, line 19.) Defense counsel acknowledged he could not corroborate the existence of a third party named ‘Douglas’ and appeared to recognize the evidence of third party guilt would not be recognized under that doctrine. Defense counsel then argued the statement was a dying declaration, which the Court summed up by asking Appellant if he believed it was admissible pursuant to 804(b)(2) as a hearsay exception. Counsel said, ‘‘That’s my position.’’ (R. p. 129, line 13.) When the trial judge pressed counsel on the additional consideration of the third party guilt, defense counsel answered evasively, telling the court he was offering the statement to the jury only so that they may hear the victim’s final words. (R. p. 129, lines 17-19.)

After counsel’s failure to address the third party guilt issue, the court then gave a thorough and detailed analysis of the law of the dying declaration exception followed by an in-depth third party guilt discussion. (R. pp. 129 – 132.) Contrary to Appellant’s claim the court refused to hear argument and violated Rule 18(a) of the South Carolina Rules of Criminal Procedure, in fact the court adhered stringently to the Rules of Criminal Procedure and set forth a

well-reasoned basis for his ruling before declaring the State's objection to the testimony sustained. (R. p. 132, lines 7-12.) Only when defense counsel attempted to argue further *after* the court made its ruling did the judge inform counsel he would allow no more argument. The court went on to clarify he would allow the defense to call Officer Wells as a witness to testify about the victim's last actions and words, but he would not allow testimony "as to what he heard as far as the name." (R. p. 132, line 17-22.)

Interestingly, the language of Rule 18 SCRCrimP makes it clear the trial judge went above and beyond what the rules require in hearing from defense counsel on the admissibility of the testimony. Rule 18 states, in part:

(a) Argument After Ruling. Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.

(b) Argument on Objection. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court.

...

Rule 18, SCRCrimP. The trial judge had already heard from the defense *and* ruled on the State's objection to the motion before defense counsel violated 18(a) above by attempting to argue *further*. Moreover, 18 (b) makes it clear the trial judge need not have heard from counsel at all on the objection to the admissibility of the testimony. The court clearly accommodated defense counsel more than necessary in an effort to make the most reasoned decision possible.

The trial court's decision to discontinue further arguments after his ruling was also within his discretion. A trial judge has the inherent power to maintain order and decorum in his courtroom. *See, e.g., State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (conduct of a criminal trial is left largely to the sound discretion of the trial judge); *State v. Shelton*, 270 S.C. 577, 243 S.E.2d 455 (1978) (trial judge has inherent power to maintain order in his court); *State v. Tuckness*, 257 S.C. 295, 185 S.E.2d 607 (1971) (trial judge has the right and duty to ensure

that proper decorum is maintained and that trial is conducted in an orderly and dignified manner).

In the case before the court, the trial court fully prepared for this trial, anticipating and preliminarily researching the issue of conflicting evidentiary concerns facing the admission of Wells' testimony. Appellant argues the court's ruling was in error, then seeks to disparage the method in which the trial judge reached his conclusion and conducted his courtroom. Appellant's second issue is merely an attempt to by-pass the harmless error argument by calling the court's perfectly respectful interaction with defense counsel structural error. Defense counsel was heard when the court was not required to hear him, counsel's objection was noted for the record for issue preservation, and the judge even offered to allow some of the testimony to come into evidence. Far from a structural error which affected the framework of the trial or transcended the criminal process, the objection to the testimony, the proffer, the argument, and the issue preservation were the very model of the criminal appellate process. Consequently, Appellant obtained the benefit of the last closing argument by electing not to call any defense witnesses, but still filed his appeal on the basis of the preserved evidentiary issue. However, as both of Appellant's issues on appeal lack merit, this Court should affirm his conviction.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
SUSANNAH R. COLE

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

September 30, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 30 2016
SC Court of Appeals

Appeal from Hampton County
The Honorable Perry M. Buckner, III, Circuit Court Judge

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
SUSANNAH R. COLE

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

September 30, 2016.