STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule(s)

QUESTIONS PRESENTED

I. Whether the trial court's credibility determination was clearly erroneous where Appellant's testimony during the Jackson v. Denno hearing regarding her alleged invocation of her right to counsel was "simply not plausible."

II. Whether the trial court abused its discretion in denying defense counsel's motion for a mistrial based on alleged premature deliberations, when the trial court found "there's no basis [in the jury's note] for me to assume that [the jury] discussed any issue in the trial."

III. Whether the trial court abused its discretion in failing to charge the jury regarding self-defense where: (a) defense counsel failed to present an argument supporting such a suggestion at trial; and (b) the record demonstrates Appellant, after approaching the car in which the victim was seated, then hitting her with a handgun after which she pointed and presented a firearm at the victim and shot her, was not without fault in bringing about the difficulty.

IV. Whether the trial court abused its discretion in failing to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that Appellant approached the victim, who was sitting in a car, began hitting her with a handgun, pointed and presented a .45 caliber handgun and admitted shooting the victim.

INTRODUCTION

On June 24, 2008, authorities were dispatched to Horry County's Huckabee Heights neighborhood after receiving reports of a shooting. (Tr. 113-14). The ensuing investigation culminated in the trial and conviction of appellant, Brittany Johnson ("Appellant"). (Tr. 492, 501-02).

STATEMENT OF THE CASE

The State agrees with Appellant's statement of the case.

STATEMENT OF THE FACTS

On June 24, 2008, Teresa Cox drove her 1999 Jeep Grand Cherokee to her friend, Monica Burroughs' ("Victim") residence. (Tr. 218-19). Cox, who was stopping in on her way to work, parked her vehicle head-in in front of Victim's residence where she was greeted by Victim and her stepsister, Joanne Davis. (Tr. 218, 219, 220). Thereafter, Victim got into the passenger seat of Cox's Grand Cherokee, next to Cox, while Davis proceeded to get into the backseat. (Tr. 181, 220-21). According to both Cox and Davis, they left the doors open. (App. 184, 222).

After Davis and Victim got into Cox's Grand Cherokee, the trio began discussing two pairs of designer sunglasses that Victim had recently purchased which prompted Victim to momentarily return to her residence to get the sunglasses in order to show them to Cox. (Tr. 184-85, 221). When she returned to the Grand Cherokee, Cox tried on one pair of sunglasses, said she did not like them, then tried on the other pair of sunglasses telling Victim she liked them. (Tr. 221). Cox added that Victim's former boyfriend, Franklin "Putty" Pyatt, would be mad that Victim was wearing one of his favorite designer's sunglasses. (Tr. 221). The

conversation then shifted, when both Cox and Davis observed Appellant approaching the Grand Cherokee on the passenger side. (Tr. 185, 222).

Cox, who believed that Appellant was armed with a knife, and Davis, who recognized Appellant was armed with a gun, watched as Appellant attacked Victim with the gun as if she were pistol-whipping her. (Tr. 185-86, 188-89, 222-23). Reacting to the attack, Victim said "oh shit" and blocked Appellant's blows while simultaneously trying to defend herself and get out of the car. (App. 187, 188-89, 223). Meanwhile, in response, both Cox and Davis jumped out of the Grand Cherokee and were attempting to run around the vehicle to help Victim, who was already separated from Appellant, when they heard a shot. (Tr. 186-87, 190-91, 223, 224-25). Next, Cox and Davis observed Victim running away from the Cherokee. (Tr. 192, 226). According to both women Appellant then began screaming "I told you I was going to get you, bitch" which she repeated four to five times before she ran away. (Tr. 193, 194, 227, 229). After Appellant left, both Cox and Davis ran to Victim who was in the bushes beside her residence. (Tr. 196, 230). According to both women, Victim, who was unarmed, had been shot in the chest and was bleeding profusely. (Tr. 194, 230). She asked both women why she had been shot. (Tr. 196, 230).

In the aftermath of the incident, authorities, who had been called by Cox, were dispatched to the crime scene. (Tr. 113-14, 230, 243). Upon arriving at the crime scene, Detective John King of the Conway Police Department met with Cox and took her to the police station where he interviewed her. (Tr. 115). During the interview, Cox confirmed Victim's identity and further named Appellant as the perpetrator. (Tr. 116-17). The following day, King interviewed Davis. (Tr. 198). Thereafter, King, who learned Victim had died, sought and received an arrest warrant

for Appellant. (Tr. 118-19). While authorities were initially unable to locate Appellant, she was subsequently apprehended by U.S. Marshalls on July 2nd in Darlington County. (Tr. 119).

Following her apprehension by U.S. Marshalls, Appellant was taken into custody by the Conway Police Department. (Tr. 120). When she was taken into Conway authorities' custody, she was told she was under arrest for Victim's murder and was advised of her Miranda[1] rights by Sergeant Shawn Addison[2] in the presence of King. (Tr. 121, 360). Additionally, Appellant was presented with an advisement of rights form which told Appellant she had a right to remain silent (Tr. 124); anything she said could be used against her (Tr. 124); she had the right to speak with an attorney and have the attorney present during questioning (Tr. 124); if she could not afford an attorney, one would be appointed for her before any questioning commenced (Tr. 124-25); and if she chose to make a statement, she could stop at any time. (Tr. 125). King reviewed this form with Appellant, who then initialed the form nine different times to acknowledge that she understood her rights and wished to waive them to speak with King. (Tr. 121, 126-27). She then gave a statement which was recorded on video. (Tr. 122, 128). In the recorded statement, Appellant admitted she hit Victim with the gun before shooting her at a distance outside of the Grand Cherokee. (Tr. 371-73, 374).

A. The Jackson v. Denno Hearing

On February 7, 2011, Appellant's case was called to trial. (Tr. 1). During the pre-trial proceedings, the State, pursuant to Jackson v. Denno, 378 U.S. 368 (1964) requested a hearing to determine whether Appellant's statement was freely, intelligently and voluntarily given. (Tr. 1-2). In the hearing, King testified he interviewed Appellant "around July 2nd" at the Conway

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] The State, consistent with Appellant's brief, believes the person referred to in the transcript at page 121 and page 360 as Sergeant Shawn Addison, is the same person referenced during the pre-trial, Jackson v. Denno 378 U.S. 368 (1964) hearing as Investigation Supervisor, Shaun Patterson. (Tr. 10).

Police Annex. (Tr. 9-10). Continuing, King said he was accompanied by Investigations Supervisor, Sergeant Shaun Patterson.[3] (Tr. 10). Additionally, King told the trial court that based upon his interview with Appellant, she was not under the influence of alcohol or drugs when she gave the statement and further noted that based upon Appellant's ability to answer his questions, he did not believe Appellant suffered from any mental or physical condition which would impair her ability to understand the proceedings. (Tr. 10).

King then told the trial court that prior to the interview, which last approximately thirty (30) minutes, Appellant was advised of her Miranda rights which she subsequently waived. (Tr. 12). In particular, Appellant was advised that: (1) she had a right to remain silent (Tr. 12); (2) anything she said could be used against her (Tr. 12); (3) she had a right to an attorney (Tr. 12); (4) if Appellant could not afford an attorney, one would be provided for her before any questioning commenced (Tr. 12); and (5) if Appellant decided to make a statement, she had the right to stop at any time. (Tr. 12).

Thereafter, King explained that he also provided Appellant with an advisement of rights form which contained the Miranda warnings Appellant had received. (Tr. 13). King further highlighted that Appellant signed the portion of the form which indicated she wished to waive her rights and speak with authorities. (Tr. 13-14). King added that he provided Appellant with a copy of the form. (Tr. 14).

The State next asked King whether he had inquired as to whether Appellant wanted an attorney. (Tr. 15). In response, King replied that he had, explaining that Appellant told him she did not want an attorney and during the questioning, never said anything like "I think I want an attorney now" or "anything like that[.]" (Tr. 15).

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[3] See footnote 1 *supra*.

On cross-examination, defense counsel questioned King as to whether Appellant had previously requested an attorney. (Tr. 19). In response, King said "to my recollection, she never asked for an attorney." (Tr. 19). Continuing, defense counsel questioned King as to whether Appellant may have inquired about an attorney prior to giving the statement. (Tr. 19-20). Again, King explained that he did not have any knowledge regarding any statements made to Appellant prior to her entering into the interview room. (Tr. 21).

Defense counsel then called Appellant to the stand where she testified regarding her initial apprehension by individuals that she believed, were State Troopers. (Tr. 22-23, 26-27). Specifically, Appellant stated that when she was initially apprehended, she was never told why she was under arrest and was never advised of her rights. (Tr. 23-24). Continuing, Appellant told the trial court that after her initial apprehension she was taken to the Darlington County Detention Center where she was booked, but still was not advised of her rights. (Tr. 24). Appellant then testified that after a few hours, two individuals retrieved her from Darlington County and transported her to Horry County. (Tr. 25). When asked whether King was one of the two men who transported her Appellant stated "I can't even remember." (Tr. 26).

Appellant then went on to state that she asked for an attorney multiple times stating, "the first time I asked for an attorney was with—while I was being signed over by whoever that Marshal was[.]" (Tr. 27). In particular, Appellant testified that she asked the Marshal whether she was going to need an attorney, claiming the Marshal responded that "he was pretty sure [she] would." (Tr. 28). Next, Appellant described the second time she allegedly requested an attorney testifying that upon her return to Conway, she was escorted to the interview room where she stated "I need an attorney for this, don't I?" (Tr. 28-29). She then stated that "their" response

was, "[t]he Judge will—the Judge will take care of that. When you get downtown, he issues a warrant." (Tr. 29). Appellant never identified who gave this response.

On cross-examination, the State, after identifying and presenting Appellant with the advisement of rights form confirmed that Appellant initialed that she understood she had a right to remain silent (Tr. 31, 34); anything she said could be used against her (Tr. 31, 34); if she made a statement she could stop at any time (Tr. 31-32, 34); and she had a right to an attorney. (Tr. 33, 34). In addition, Appellant acknowledged that despite understanding her rights, she wished to waive them. (Tr. 34). Appellant further confirmed the recorded video statement showed that she told officers she wanted to waive her rights. (Tr. 34).

The State then confirmed the following:

> And so now you're here today to say that at some point you asked for an attorney but you had all the time during the forty minute interview at any point on that form to say 'I want an attorney, I'm going to be quiet and I don't want to talk to you.'

(Tr. 35). In response, Appellant answered that she "was under the impression that the attorney wasn't just going to show up. You know, I wasn't going to get an attorney right then. (Tr. 35). Appellant then acknowledged she was informed she had a right to remain silent and anything she said could be used against her. (Tr. 35).

Immediately following the conclusion of the hearing, the trial court determined:

> In regards to the evidentiary hearing just held in this case, I have held an evidentiary hearing in this matter, and I am convinced beyond a reasonable doubt and so find that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward.
>
> I further find that the defendant in compliance with Miranda v. Arizona was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her;

> that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.
>
> I further find that the defendant knowingly, understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation.
>
> I find that the decision to make the statement was a product of the defendant's own unfettered will. She had the capacity to comprehend the meaning and effects of waiving her constitutional rights.
>
> This statement if offered will be admitted into evidence.

(Tr. 36-37).

In response to the trial court's ruling, defense counsel objected explaining, "[o]ur objection to this statement being admitted into evidence is that it is uncontradicted that Ms. Johnson asked a representative of law enforcement and specifically said, "I need an attorney for this." (Tr. 37). Continuing, defense counsel noted that the law says "once that implication of the need for legal counsel is made that there is to be no further questioning, no further involvement between the defendant and law enforcement or the State unless and until the defendant indicates that they wish to speak." (Tr. 37-38). Thus, defense counsel concluded that because Appellant allegedly invoked her right to counsel, the statement should not be admitted into evidence.[4] (Tr. 38).

Replying to defense counsel's argument, the State agreed that Appellant's alleged invocation was uncontradicted stating "we don't have anybody who says she ever asked that." (Tr. 40). The State then went on the highlight that Appellant had forty minutes of video

[4] Additionally, defense counsel objected to the video recording because "the audio quality is not very good." (Tr. 38). The trial court agreed with the assessment regarding the audio quality of the video recording stating, "the audio—is not good at the beginning of it but it gets stronger as it ends[.]" (Tr. 40). However, a transcript of the recording was not put into evidence due to defense counsel's repeated objections. (Tr. 38-41).

recordings and a document where she could have invoked her right to counsel but failed to do so. (Tr. 40-41).

Ruling on the objection the trial court stated:

> I would conclude that her testimony on that issue is simply not plausible in that with Officer King she had ample opportunity to express her desire for her an attorney and that's obviously, indicated not only on Mr. King's testimony but on the video itself, and I note your objection for the record, Mr. Hazzard, but my findings as previously stated will stand.

(Tr. 41).

B. The "Premature Deliberation Issue"

Following the trial court's ruling on the Jackson v. Denno issue, a Blair[5] hearing was conducted, after which, a jury was selected and sworn. (Tr. 41-79, 80-104). The trial court then gave its opening remarks and both parties presented opening statements. (Tr. 104-09). Next, the State called King as its first witness and Appellant's video statement, State's Exhibit #4, was introduced and played for the jury over defense counsel's objection. (Tr. 128-29). Immediately after the video was played, the trial court informed the jury:

> Madame Foreman, anything that is introduced into evidence including this video will be with you in the jury room during your deliberations, and of course, we'll set up if you and your jury wants to hear all or some portion of it, we'll make it available to you either in the jury room or bring you back out here.
>
> I understand, as you do, that some parts are somewhat unintelligible but it will be available for you or any member of your jury to play it back or any part of it as long as you choose.

(Tr. 129). The jury then asked whether it was "possible to have a written transcript with that[.]" (Tr. 130). Responding to this question, the trial court said "[w]e'll see if we can do so. Some portions of it are unintelligible, but we'll make appropriate inquiry." (Tr. 130). Thereafter, King

[5] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

resumed his testimony and at the end of his testimony, the trial court concluded the first day of trial. (Tr. 156).

After the instructing the jury on the appropriate time to report to the courtroom, the trial court instructed the jury as follows:

> Do not discuss this case with anyone. Permit no one to discuss it with you. You must not even discuss it among yourselves until I have given you the case for deliberation.
>
> Sometimes, two or three jurors as we break at night get around their car. They start discussing some issue in the case but that's improper for the following reason. Ultimately, your decision must be the unanimous decision of all twelve of you, and if several of you are discussing some issue, you are depriving your fellow jurors of your thought process, and they're entitled to that.
>
> So, Madame Foreman, under no circumstances let any conversation transpire in the jury room regarding issues in this case until I have given it to you for your deliberation.

(Tr. 156-57). The jury was then dismissed for the day.

The next day, prior to the start of trial, the jury sent the trial court a note stating, "[w]e are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding." (Tr. 161). The trial court then inquired into the parties positions on the matter, at which point defense counsel objected, arguing the note "indicates improper discussion regarding this case" and moved for a mistrial. (Tr. 161-62). Additionally, defense counsel objected on the ground that by playing the video recording again, it would place "undue weight" on the evidence. (Tr. 162).

Ruling on this argument the trial court found:

> First, with reference to a mistrial, there's no basis in this note for me to assume they've discussed any issue in the trial.
>
> The record will reflect and should reflect, and I say it now, the playing of the video was totally imperfect in may ways, particularly in sound, and this Court and jury could not even hear what was said.

> In accordance with the jury's request, I am having additional microphones put up so that the jury will understand the contents of the tape.
>
> Obviously, they were concerned, and you will have to agree that some of it was inaudible. You will have to agree with that because it's apparent that it was.
>
> The jury has said and has specifically requested that they view now this document which is in evidence, and in accordance with their request, I'm going to do it for several reasons.
>
> One is they requested it.
>
> Two, it was entered by the first witness, and no other witness has come on the jury box—jury—on the witness stand.
>
> And, three, I'm doing it because the initial rendering of this video was imperfect in a number of ways, particularly sound, and I feel obligated to honor the jury's request who say to me 'Judge, we listened to it but we could understand it.' And that would be the contents of this letter.

(Tr. 163-64). The trial court then reiterated, "it's clear to me that the jury couldn't understand it. That's all I'm doing." (Tr. 164). The trial then stated, "I want the record to reflect that I am bringing in additional speakers at this time. We are outside the presence of the jury so that they can understand it more intelligently." (Tr. 165). With that, speakers were set up so as to amplify the situation and the trial court said, "[t]he record will reflect that she was barely in a whisper and I want this record to reflect it." (Tr. 168-69). Subsequently, the second day of trial began, and in accordance with the jury's wishes and the trial court's finding, State's Exhibit #4, the video recording, was played for the jury over defense counsel's objection. (Tr. 171, 172).

C. Defense Counsel's Requests to Charge

After the jury reviewed the video recording, the State called Davis, Cox, Peter Cestare, who supervised in the collection of evidence, Dr. Edward Proctor, an expert in forensic pathology and Owen Rodmaker, who assisted King in the investigation. (Tr. 177-214, 242-51, 254-69, 269-72). Next, the State rested, and after the denial of Appellant's directed verdict

motion, Appellant elected to present a defense providing testimony from *inter alia*, Tamika Skipper and herself. (Tr. 272, 273, 278-309, 314-78).

1. Tamika Skipper's Testimony

In particular, Skipper testified that she saw Appellant on the date in question around noon adding Appellant was with her son. (Tr. 279-80). Continuing, Skipper stated she left to get lunch at a nearby Subway and left Appellant with the key to her residence. (Tr. 282). Skipper then told the jury that upon her return to her residence, she found Appellant had locked the door. (Tr. 282). After beating on the door for what she believed was five minutes, Appellant unlocked Skipper's door. (Tr. 282). She said Appellant was apparently asleep. (Tr. 282). Next, Skipper explained Appellant asked her to take care of her son, while she went to "the bootlegger." (Tr. 283, 284). When Appellant left to go to the bootlegger, Skipper went outside before returning to her residence. (Tr. 285). Later, Skipper emerged from her residence and saw "Brittany across the street . . . Monica in a jeep backing out and then . . . the brake lights jump on and four car doors open up[.]" (Tr. 285). Skipper further told the jury that by the time everyone was out of the car, she started running. (Tr. 285).

Defense counsel then reviewed Skipper's testimony with her, confirming that Skipper came out of her house, saw the jeep backing up, saw the brake lights come on, watched as all four car doors opened, and Cox, "Liz," Davis and Victim allegedly surrounded Appellant. (Tr. 288-90). Skipper said that as she was running towards Appellant she heard a shot go off, at which point "everybody [was] screaming and hollering." (Tr. 290). Immediately afterwards, Skipper admitted telling Appellant to "run." (Tr. 290). Skipper further related that she believed the group was going to "jump" Appellant, but added "[w]hatever [Appellant] and [Victim] got going that's between her and Monica but no one else was going to touch her. (Tr. 290). Skipper

also told the jury that when the shot was fired, Appellant, whose back was towards Skipper, "wasn't that close" to Victim, but explained they were within an arm's reach. (Tr. 291). Skipper admitted she did not see the gun until after Appellant shot Victim. (Tr. 293-94).

On cross-examination, the State questioned Skipper as to her recollection of the event at issue. (Tr. 300-01). Specifically, the State asked Skipper whether she saw the entire incident to which Skipper responded that she did not. (Tr. 301-02, 304). Continuing, the State asked Skipper whether something could have happened between the time she went into her residence and the time she emerged from the residence. (Tr. 304). Answering the question, Skipper said, "I don't know" and clarified that she did not know if anything happened while she was inside the house. (Tr. 305). In fact, Skipper admitted she could not definitely say that Appellant did not strike Victim first. (Tr. 305). This was corroborated on direct examination, when Skipper again admitted she had no knowledge as to whether Appellant or Victim started the altercation. (Tr. 306-07).

2. Appellant's Testimony

As detailed above, Appellant testified in her own defense. (Tr. 314-78). During her testimony, Appellant explained she had been dating Franklin "Putty" Pyatt, who lived with Victim. (Tr. 316-17, 318). Continuing, Appellant told the jury that on August of 2007, nearly a year before the incident now at issue occurred, Victim learned that Appellant was dating Pyatt, which resulted in a confrontation between the two women. (Tr. 319-20). A couple of months later, Appellant said that she and Victim had another confrontation where Victim threatened to beat her. (Tr. 326-27). Appellant also revealed that on December of 2007, she and Victim got into a physical altercation after Appellant keyed Pyatt's vehicle. (Tr. 328, 331-32). Appellant told the Court, "I was pretty much getting the best of her and [Pyatt] jumped on me. (Tr. 332).

Appellant continued to shed light on her relationship with Victim, adding that in March of 2008, Victim had called her and told her, "whatever was between me and [Pyatt] was between me and [Pyatt], and I agreed with her, and I told her that was fine." (Tr. 339). Appellant then proceeded to tell the jury that in May of 2008, a little over a month before the shooting, Victim allegedly threatened her after hearing that Appellant was supposedly pregnant with Pyatt's child. (Tr. 341). Elaborating on the incident, Appellant testified that Victim approached her, reached into her purse, displayed the handle of the gun to her and walked away. (Tr. 341-42).

Appellant's testimony also revealed that in the days leading up to the shooting, specifically, June 23rd, she and Pyatt had gotten into a fight. (Tr. 348). Describing the incident, Appellant stated the fight was physical and afterwards, Appellant walked into Huckabee Heights and began arguing with Pyatt. (Tr. 348). Continuing, Appellant admitted she returned to Pyatt and Appellant's residence when she poured lighter fluid on Pyatt's vehicle. (Tr. 348-49). She then returned a third time, approximately twenty (20) minutes later, armed with a gun and "intentions of shooting [Pyatt]." (Tr. 350). Appellant explained she did not shoot Pyatt because, "he was gone" but admitted to threatening both Victim and Pyatt. (Tr. 350-51).

Moving to the day of the shooting, Appellant corroborated Skipper's testimony that she arrived at Skipper's residence, Skipper left and she went to sleep in Skipper's residence. (Tr. 354). In addition, Appellant offered that after she awakened and let Skipper in, the two decided to smoke marijuana, which in turn prompted Appellant to head to the bootlegger's to purchase cigars so they could smoke the marijuana. (Tr. 356). When she proceeded to the bootlegger's house, Appellant told the jury that Davis called her name, adding that Davis was in front of Victim's residence. (Tr. 357). From there, Appellant claimed she "was not sure" what happened

next, but admitted pulling the trigger. (Tr. 357, 364-65). Elaborating, Appellant explained, "I was just standing there, and I saw her in front of me with the shot going off." (Tr. 365).

On cross-examination, Appellant admitted to bringing a loaded .45 caliber handgun to Huckabee Heights, and, on the day before, standing in front of Victim and Pyatt's residence screaming, "come on out and eat—the bullets." (Tr. 369-70). Additionally, Appellant admitted she saw Victim in the vehicle with the doors open, when she went to the bootlegger's. (Tr. 370-71). Likewise, Appellant admitted that in her statement to police, she took the .45 caliber handgun out, hit Victim with the gun, they struggled momentarily, after which Appellant, who was now outside of the car, separated from her and shot Victim. (Tr. 371-72). Appellant again confirmed that when she shot Victim there was some distance between herself and Victim. (Tr. 372-73). The State then asked Appellant about the accuracy of her account of the events to which Appellant responded, "I felt like I was wrong. I killed somebody, and that was on my conscience." (Tr. 374). When asked to confirm that she killed someone, Appellant again admitted she killed Victim and agreed the State that "it was wrong." (Tr. 374-75).

3. The Charge Conference

During the charge conference, defense counsel requested a charge on, *inter alia*, self-defense and involuntary manslaughter. (Tr. 381). With respect to involuntary manslaughter, the trial court initially denied Appellant's request, but after hearing counsel's argument—that Skipper, Davis and Cox each testified in some capacity that the shooting was unintentional—told defense counsel it would consider the request. (Tr. 382). It then advised both parties to research the issue and present their arguments the next morning. (Tr. 385-86).

The trial court then addressed defense counsel's request regarding self-defense stating, "[y]ou don't have any request for self-defense" referencing defense counsel requests to charge

which were previously submitted to the trial court. (Tr. 386). Defense counsel agreed saying, "[n]o, sir, Your Honor. I was going to make that an oral motion for a standard self-defense charge."

Thereafter, the trial court ruled finding:

> The case is clear. You can't start a difficult of your own volition and it ensues into a struggle and the claim self-defense. You just can't do that.
>
> The problem you have here is uncontradicted that she loaded herself with a 45 and went to where the unfortunate victim was and was later killed by that 45. So I would decline any self-defense charge in this case.

(Tr. 386). Defense counsel then asked that his objection be noted for the record. (Tr. 386). However, defense counsel failed to advance an argument supporting his request for a charge on self-defense.

The next morning, the trial court took up the involuntary manslaughter issue. (Tr. 389). In arguing against a charge on involuntary manslaughter the State explained that because Appellant was clearly involved in unlawful conduct when she produced the weapon, pointed and presented it and fired it Appellant was not entitled to charge on involuntary manslaughter since the conduct was likely to cause death or injury. (Tr. 389-90).

After hearing the State's argument, the trial court said, "I understand that involuntary manslaughter can be charged under certain circumstances, particularly when even an unlawful act not tending to create great bodily injury or death but the evidence is uncontradicted here that your client sought out the deceased. (Tr. 390). Continuing, the trial court noted that Appellant went to the Grand Cherokee with a loaded .45 stating "[y]ou just can't go looking for somebody, and its' uncontradicted that she did it with the gun in her hand." (Tr. 390).

In response, defense counsel highlighted that the evidence was not uncontradicted arguing Skipper's testimony showed the individuals exited the car and proceeded towards

Appellant in a threatening manner. (Tr. 390). Replying to defense counsel's argument, the trial court stated, "[t]he problem is your client admits that not only she had the gun but said, 'I shot her.'" (Tr. 390). Defense counsel then cited to State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010) and State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) for the proposition that the question is simply whether any evidence exists to support a charge on a lesser-included offense. (Tr. 391).

Next, the trial court asked the State about Skipper's testimony adding, "I don't think she said what [defense counsel] said she said." (Tr. 392). Responding to the trial court's question, the State agreed with the trial court stating Skipper testimony did not conflict with "the statements that the defendant had the gun out and, in fact, struck." (Tr. 391). Specifically, the State explained that Skipper, when asked if she could say Appellant did not strike Victim first, said she could not say that. (Tr. 391). The trial court then ruled Appellant was not entitled to an instruction on involuntary manslaughter. (Tr. 392).

Moving to the self-defense request, the trial court, again without any argument from defense counsel supporting a self-defense charge, ruled that pursuant to State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) "the defendant can't go to the scene of the difficulty, then claim self-defense." (Tr. 393). When defense counsel attempted to object, the trial court merely mentioned "I'm not going to charge involuntary manslaughter." (Tr. 393). Thereafter, the trial court charged the jury and defense counsel reiterated its previous objections following the charge. (Tr. 414). Following closing arguments, the jury deliberated for approximately two days before ultimately finding Appellant guilty or murder. (Tr. 416-50, 453-90, 492).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

ARGUMENTS

I. The trial court correctly determined Appellant's testimony during the *Jackson v. Denno* hearing regarding her alleged invocation of her right to counsel was "simply not plausible"

Appellant contends the trial court erred in failing to suppress Appellant's video statement arguing the statement was taken in violation of Appellant's Fifth Amendment right to have counsel present during custodial interrogation. Br. of App. at p. 13. Specifically, Appellant, citing to *inter alia*, Edwards v. Arizona, 451 U.S. 477 (1981) explains that because she allegedly invoked her right to counsel while in custody, the trial court, which found Appellant's testimony on this issue, "simply not plausible" erred in finding Appellant knowingly, freely and voluntarily, waived her Miranda rights. Br. of App. at p. 14-15.

In response, the State submits Appellant's argument misses the point of the trial court's credibility determination, which the State believes controls this issue. In fact, the State agrees that if the trial court had believed Appellant's testimony—that she clearly and unequivocally invoked her right to counsel while in police custody—Appellant would be correct in arguing the trial court's ruling was in error pursuant to Edwards and its progeny. However, because the trial court instead determined Appellant's testimony regarding her alleged invocation of her right to counsel was "simply not plausible" and therefore not credible evidence—Appellant's argument necessarily fails.

Indeed, the State notes that when passing on preliminary questions of admissibility, the trial court is "not bound to accept as true the defendant's testimony." State v. Boone, 228 S.C.

438, 444, 90 S.E.2d 640, 643 (1955) (quoting State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929)). Likewise, there is nothing which requires the State to present every witness who may have knowledge about a statement made by the defendant, nor can the State's failure to present every such witness subsequently render the statement inadmissible. State v. Brown, 212 S.C. 237, 247, 47 S.E.2d 521, 525-26 (1948).

In State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006) the Supreme Court of South Carolina explained appellate courts are bound by the trial court's preliminary factual findings in determining the admissibility of evidence in a criminal trial unless those findings are "clearly erroneous." 371 S.C. at 251, 639 S.E.2d at 39. Thus, when an appellate court reviews the trial court's preliminary factual findings, they do not "re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Thus, the only question left to answer is whether the trial court's decision to admit the testimony is supported by any evidence.

After finding Appellant's statement was voluntarily tendered and determining the State complied with the requirements of Miranda, defense counsel objected explaining, "[o]ur objection to this statement being admitted into evidence is that it is uncontradicted that Ms. Johnson asked a representative of law enforcement and specifically said, "I need an attorney for this." (Tr. 37). Continuing, defense counsel noted that the law says "once that implication of the need for legal counsel is made that there is to be no further questioning, no further involvement between the defendant and law enforcement or the State unless and until the defendant indicates that they wish to speak." (Tr. 37-38). Thus, defense counsel concluded that because Appellant

allegedly invoked her right to counsel, the statement should not be admitted into evidence. (Tr. 38).

Replying to defense counsel's argument, the State agreed that Appellant's alleged invocation was uncontradicted stating "we don't have anybody who says she ever asked that." (Tr. 40). The State then went on to highlight that Appellant had forty minutes of video recordings and a document where she could have invoked her right to counsel but failed to do so. (Tr. 40-41).

Ruling on the objection the trial court stated:

> I would conclude that her testimony on that issue *is simply not plausible in that with Officer King she had ample opportunity to express her desire for her an attorney and that's obviously, indicated not only on Mr. King's testimony but on the video itself,* and I note your objection for the record, Mr. Hazzard, but my findings as previously stated will stand.

(Tr. 41).

Here, the State submits the trial court's ruling that under the totality of the circumstances, Appellant's statement was freely, knowingly and voluntarily tendered and was taken in compliance with the requirements of Miranda, was supported by the evidence. First, as to Appellant's "uncontradicted" testimony regarding the invocation of her right to counsel, the State notes that under Boone and McAlister, the trial court did not have to, and in fact did not, accept Appellant's statement as true.

Additionally, the balance of the evidence adduced at the Jackson v. Denno hearing supported the trial court's decision to admit Appellant's statement. Indeed, King's testimony clearly reflected Appellant was properly advised of her Miranda rights, executed a valid Miranda waiver, and issued a voluntarily confession. Specifically, King told the trial court that prior to the interview, which last approximately thirty (30) minutes, Appellant was advised of her

Miranda rights which she subsequently waived. (Tr. 12). In particular, Appellant was advised that: (1) she had a right to remain silent (Tr. 12); (2) anything she said could be used against her (Tr. 12); (3) she had a right to an attorney (Tr. 12); (4) if Appellant could not afford an attorney, one would be provided for her before any questioning commenced (Tr. 12); and (5) if Appellant decided to make a statement, she had the right to stop at any time. (Tr. 12). Thereafter, King explained that he also provided Appellant with an advisement of rights form which contained the Miranda warnings Appellant had received. (Tr. 13). King further highlighted that Appellant signed the portion of the form which indicated she wished to waive her rights and speak with authorities. (Tr. 13-14). King added that he provided Appellant with a copy of the form. (Tr. 14). Accordingly, the State submits the trial court's ruling is supported by the evidence.

II. The trial court correctly determined the jury did not engage in premature deliberations, but instead, was merely informing the trial court it was unable to hear Appellant's statement

Appellant also argues the trial court erred in failing to grant a mistrial arguing the jury's note was evidence the jury engaged in premature deliberations, or in the alternative, that the trial court's instructions invited jurors to engage in premature deliberations. Br. of App. at p. 18. Specifically, Appellant maintains the jury's note, by the fact it says, "all in agreement" implicitly indicates the jury engaged in premature deliberations. Br. of App. at p. 18.

Quite simply, the State disagrees and submits the trial court was correct in finding there were no premature deliberations since the record clearly shows the jury simply could not hear the audio of Appellant's statement.[6] In particular, the State notes the jury, consistent with their previous requests for a transcript of the exhibit, could, without discussing the substance of the

[6] Furthermore, the State notes Appellant's argument regarding the trial court's jury instructions on this issue are not preserved for appellate review due to counsel's failure to register an objection to the instructions. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (requiring an issue be raised to and ruled upon by the trial court in order to be preserved for appellate review).

case, have simply asked one another whether they could hear the exhibit and, once they agreed they could not, written the note without discussing the merits or the issues in the case. Indeed, based upon the trial court's clear instruction to refrain from discussing the issues in this case, it would seem the jury likely did not participate in premature deliberations, especially since jurors are presumed to follow the law. See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.").

These propositions are further supported by the record which clearly establishes that the jury's note was the product of poor audio quality as opposed to evidence of premature jury deliberation. In fact, immediately after the video was played, the trial court informed the jury:

> Madame Foreman, anything that is introduced into evidence including this video will be with you in the jury room during your deliberations, and of course, we'll set up if you and your jury wants to hear all or some portion of it, we'll make it available to you either in the jury room or bring you back out here.
>
> *I understand, as you do, that some parts are somewhat unintelligible but it will be available for you or any member of your jury to play it back or any part of it as long as you choose.*

(Tr. 129). The jury then asked whether it was "possible to have a written transcript with that[.]" (Tr. 130). Responding to this question, the trial court said "[w]e'll see if we can do so. Some portions of it are unintelligible, but we'll make appropriate inquiry." (Tr. 130). Thereafter, King resumed his testimony and at the end of his testimony, the trial court concluded the first day of trial. (Tr. 156).

After the instructing the jury on the appropriate time to report to the courtroom, the trial court instructed the jury as follows:

Do not discuss this case with anyone. Permit no one to discuss it with you. You must not even discuss it among yourselves until I have given you the case for deliberation.

Sometimes, two or three jurors as we break at night get around their car. They start discussing some issue in the case but that's improper for the following reason. Ultimately, your decision must be the unanimous decision of all twelve of you, and if several of you are discussing some issue, you are depriving your fellow jurors of your thought process, and they're entitled to that.

So, Madame Foreman, under no circumstances let any conversation transpire in the jury room regarding issues in this case until I have given it to you for your deliberation.

(Tr. 156-57). The jury was then dismissed for the day.

The next day, prior to the start of trial, the jury sent the trial court a note stating, "[w]e are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding." (Tr. 161). The trial court then inquired into the parties positions on the matter, at which point defense counsel objected, arguing the note "indicates improper discussion regarding this case" and moved for a mistrial. (Tr. 161-62). Additionally, defense counsel objected on the ground that by playing the video recording again, it would place "undue weight" on the evidence. (Tr. 162).

Ruling on this argument the trial court found:

First, with reference to a mistrial, there's no basis in this note for me to assume they've discussed any issue in the trial.

The record will reflect and should reflect, and I say it now, the playing of the video was totally imperfect in many ways, particularly in sound, and this Court and jury could not even hear what was said.

In accordance with the jury's request, I am having additional microphones put up so that the jury will understand the contents of the tape.

Obviously, they were concerned, and you will have to agree that some of it was inaudible. You will have to agree with that because it's apparent that it was.

> The jury has said and has specifically requested that they view now this document which is in evidence, and in accordance with their request, I'm going to do it for several reasons.
>
> One is they requested it.
>
> Two, it was entered by the first witness, and no other witness has come on the jury box—jury—on the witness stand.
>
> And, three, I'm doing it because the initial rendering of this video was imperfect in a number of ways, particularly sound, and I feel obligated to honor the jury's request who say to me 'Judge, we listened to it but we could understand it.' And that would be the contents of this letter.

(Tr. 163-64). The trial court reiterated, "it's clear to me that the jury couldn't understand it. That's all I'm doing." (Tr. 164). The trial then stated, "I want the record to reflect that I am bringing in additional speakers at this time. We are outside the presence of the jury so that they can understand it more intelligently." (Tr. 165). With that, speakers were set up so as to amplify the situation and the trial court said, "[t]he record will reflect that she was barely in a whisper and I want this record to reflect it." (Tr. 168-69).

Accordingly, the State submits the trial court correctly denied defense counsel's motion for a mistrial since the evidence clearly shows the jury did not engage in premature deliberations, but instead simply could not hear the audio portion of Appellant's statement. Therefore, the State asks this Court to affirm on this issue.

III. The trial court was correct in declining to charge the jury regarding self-defense where: (a) defense counsel failed to present an argument supporting such a suggestion at trial; and (b) the record demonstrates Appellant, after approaching the car in which the victim was seated and hitting her with a handgun, then pointed and presented a firearm at the victim and shot her

Here, Appellant, citing to State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), a case which trial counsel used to support an instruction on involuntary manslaughter (Tr. 381), argues

Skipper's testimony supports a charge on self-defense. Br. of App. at p. 22-23. The State disagrees for two reasons.

A. The Issue is Not Preserved

First, defense counsel failed to present Appellant's current argument to the trial court in support of a charge on self-defense, instead presenting this argument as a request for the lesser-included offense of involuntary manslaughter. (Tr. 390-92). See State v. Rios, 388 S.C. 335, 341-42, 696 S.E.2d 608, 611 (Ct. App. 2010) (concluding an appellant may not raise an objection to a jury charge for the first time on appeal); Rule 20(a), SCRCrimP. (West 2012) (explaining all requests for legal instructions to the jury shall be submitted at the close of evidence or earlier and must include accurate citation to authority); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

While trial counsel admittedly made a request for a charge on self-defense, the State submits this argument, which by counsel's own admission was not a written request and thus could not have contained any citation to authority as required by Rule 20(a), SCRCrimP., was conclusory and failed to alert the trial court to any authority supporting the charge. Specifically, the trial court, after reviewing defense counsel's written requests to charge, said "[y]ou don't have any request for self-defense" referencing defense counsel's requests to charge which were previously submitted to the trial court. (Tr. 386). Defense counsel agreed saying, "[n]o, sir, Your Honor. I was going to make that an oral motion for a standard self-defense charge."

Thereafter, the trial court ruled finding:

> The case is clear. You can't start a difficult of your own volition and it ensues into a struggle and the claim self-defense. You just can't do that.
>
> The problem you have here is uncontradicted that she loaded herself with a 45 and went to where the unfortunate victim was and was later killed by that 45. So I would decline any self-defense charge in this case.

(Tr. 386). Defense counsel then asked that his objection be noted for the record, and the parties recessed for the day with instructions to research the question of involuntary manslaughter. (Tr. 386-88).

The following day, defense counsel argued Skipper's testimony supported a charge on involuntary manslaughter explaining the testimony allegedly showed the individuals exited the car and proceeded towards Appellant in a threatening manner. (Tr. 390). Replying to this argument the trial court stated, "[t]he problem is your client admits that not only she had the gun but said, 'I shot her.'" (Tr. 390). Defense counsel then cited to State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010) and State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) for the proposition that the question is simply whether any evidence exists to support a charge on a lesser-included offense. (Tr. 391).

Continuing the discussion on the involuntary manslaughter charge, the trial court asked the State about Skipper's testimony adding, "I don't think she said what [defense counsel] said she said." (Tr. 392). Responding to the trial court's question, the State agreed with the trial court stating Skipper's testimony did not conflict with "the statements that the defendant had the gun out and, in fact, struck." (Tr. 391). Specifically, the State explained that Skipper, when asked if she could say Appellant did not strike Victim first, said she could not say that. (Tr. 391). The trial court then ruled Appellant was not entitled to an instruction on involuntary manslaughter. (Tr. 392).

Moving to defense counsel's prior self-defense request, the trial court, again without any argument from defense counsel supporting a self-defense charge, ruled that pursuant to State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) "the defendant can't go to the scene of the difficulty, then claim self-defense." (Tr. 393). When defense counsel attempted to object, the trial court merely mentioned "I'm not going to charge involuntary manslaughter." (Tr. 393). Thereafter, the trial court charged the jury and defense counsel reiterated its previous objections following the charge. (Tr. 414).

In I'On, the Supreme Court of South Carolina explained the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*." 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

Here, the State submits this issue is not properly preserved for appellate review because defense counsel did not comply with the dictates of I'On and Rule 20(a), SCRCrimP. by failing to provide the trial court with any authority supporting its request to charge. Thus, the argument itself, that Skipper's testimony allegedly supported a charge on self-defense, is not preserved for appellate review.

B. Appellant is not entitled to an Instruction on Self-Defense

Even if this issue is properly before this Court, the State submits the trial court was correct in finding Appellant was not entitled to an instruction on self-defense as there was no evidence contradicting the testimony the Appellant hit Victim with the gun and then pointed and

presented a firearm before shooting the Victim. As such, there is nothing to show Appellant did not bring about the difficulty.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request; Williams, 367 S.C. at 195, 624 S.E.2d at 445 and the evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). Nevertheless, "[a] self-defense charge is only required when the evidence supports it." State v. Jackson, 384 S.C. 29, 35, 681 S.E.2d 17, 20 (Ct. App. 2009) (citing State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)).

There are four elements required by law to establish a case of self-defense. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

Id.

Under South Carolina law, "one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense[.]" State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). In fact, "[a]ny act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Jackson 384 S.C. at 36, 681 S.E.2d at 20 (quoting Bryant, supra). An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary. Jackson, 384 S.C. at 29, 681 S.E.2d at 20-1.

Here, Appellant contends the trial court erred when it found Skipper's testimony did not contradict the evidence regarding the events leading up to the shooting. As detailed above, the trial court denied Appellant's request for a self-defense charge because the uncontradicted evidence showed Appellant brought about the difficulty by loading a .45 caliber handgun, hitting Victim with the handgun and then pointing and presenting the handgun at Victim before shooting her. (Tr. 386, 392). Thus, while Appellant argues she has the right to act on appearances, noting that Skipper's testimony revealed that four women got out of the car and surrounded Appellant, this statement ignores that Skipper, whose back was to Appellant, admits she did not see the entirety of the incident.

Specifically, the State asked Skipper whether she saw the entire incident to which Skipper responded that she did not. (Tr. 301-02, 304). Continuing, the State asked Skipper whether something could have happened between the time she went into her residence and the time she emerged from the residence. (Tr. 304). Answering the question, Skipper said, "I don't know" and clarified that she did not know if anything happened while she was inside the house. (Tr. 305). In fact, Skipper admitted she could not definitely say that Appellant did not strike

Victim first. (Tr. 305). This was corroborated on direct examination, when Skipper again admitted she had no knowledge as to whether Appellant or Victim started the altercation. (Tr. 306-07). Therefore, any testimony by Skipper regarding who brought about the difficulty could not entirely contradict Davis and Cox's testimony regarding how the events unfolded. Accordingly, because the only evidence in the record established that Appellant hit Victim while she and the rest of its occupants were inside the car, something which Skipper admits she was not present to observe, the evidence adduced at trial supports the trial court's denial of the self-defense charge on this basis.[7] (Tr. 185-86, 188-89, 222-23).

IV. The trial court correctly declined to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that Appellant approached the victim, who was sitting in a car, began hitting her with a handgun, pointed and presented a .45 caliber handgun and admitted shooting the victim

Appellant contends the trial court erred in declining to charge the jury with involuntary manslaughter. In support of this argument, Appellant argues defense counsel's cross-examination of Davis yielded evidence supporting an inference that Appellant and Victim were allegedly struggling when the gun discharged. Br. of App. at p. 25. Additionally, Appellant maintains Cox's testimony on cross-examination was susceptible to an inference that Appellant was unaware that she shot Victim. Br. of App. at p. 25. The Stated disagrees.

It is the evidence presented at trial that determines the law with which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323

[7] Additionally, the State submits both Cox's and Davis' testimony regarding Appellant's statements, "I told you I was going to get you, bitch" support the trial court's ruling that Appellant, who admitted she was armed with a .45 caliber handgun, intended to approach Victim. (Tr. 193, 194, 227, 229). Moreover, as there is no evidence Appellant, by being surrounded by a group on unarmed women, was in imminent danger or *believed* she was in imminent danger, Appellant would be unable to show she is entitled to a charge on self-defense.

(2007). However, a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

As to lesser-included offenses, the law requires that a jury must be charged on a lesser-included offense if, "there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Conversely, a trial court may eliminate instructing the jury on a lesser-included offense where there is no evidence tending to reduce the crime from the greater offense to the lesser. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). When determining whether a defendant is entitled to a charge, the court reviews the facts in the light most favorable to the defendant. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010). "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." Pittman, 373 S.C. at 571, 647 S.E.2d at 167. "A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Crosby, 355 S.C. at 52, 584 S.E.2d at 112. "The negligent handling of a loaded gun will support a charge of involuntary manslaughter." State v.

Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). In addition, evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge." Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008).

Initially, the State submits the first prong of involuntary manslaughter simply does not apply to the facts of this case since the conduct at issue—hitting someone with a loaded, .45 caliber handgun and then pointing it at them and firing—while unlawful activity, is clearly unlawful activity which *does tend to cause death or great bodily harm.* Thus, the remaining question is whether Appellant was "engaged in lawful activity with reckless disregard for the safety of others[,]" such that she should have receive a charge on involuntary manslaughter.

The State submits Appellant is not entitled to a charge on involuntary manslaughter as the trial court correctly determined Appellant was not engaging in a lawful activity when she approached Victim with a loaded .45 caliber handgun and struck her. Understanding this, Appellant cannot demonstrate that at any point following her decision to assault Victim, she was acting in a lawful manner as South Carolina law so requires. Therefore, Crosby and Tisdale do not apply because Appellant was not entitled to arm herself in self-defense, since the uncontroverted testimony, as discussed above, shows she initiated the encounter with the Victim by pistol-whipping her and thus bringing about the difficulty. Likewise, because the only evidence within the record shows that Appellant initiated the encounter with Victim and was the first and only person to pistol-whip anyone, Appellant cannot demonstrate that she was merely handling the weapon negligently when it unintentionally discharged as Appellant contends. Accordingly, the State submits the trial court did not abuse its discretion.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this court to affirm the rulings of the trial court as well as Appellant's underlying conviction and sentence.

Respectfully Submitted,

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2011-185926

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Respondent agrees with Appellant's initial proposal to include the following in the Record on Appeal:

(1) True-billed indictment;
(2) Trial transcript, pp. 1-80; p. 90; pg 100; pp. 104-157; pp. 161-273; pp. 278-395; pp. 397-414; pp. 416-469; pp. 472-475; pp. 477-483; pp. 485-490; pp. 492-506;
(3) Court's Exhibit #8 (juror note);
(4) Court's Exhibit #9 (memorandum of law);
(5) State's Exhibit #4 (DVD—Video Statement)
(6) Sentencing Sheets

I certify that this designation contains no matter that is irrelevant to this appeal.

Respectfully Submitted,

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November 15, 2012.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2011-185926

The State of South Carolina,

Respondent,

v.

Brittany Johnson,

Appellant.

PROOF OF SERVICE

I, Brendan J. McDonald, Counsel for Respondent, certify that I have this date served the ***Initial Brief of Respondent and Designation of Matter*** on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Breen Richard Stevens, Esq.
SCCID/Division of Appellate Defense
1330 Lady Street, Ste. #401
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This 15th day of November, 2012.

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ATTORNEY FOR RESPONDENT