ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Kristi L. Harrington, Circuit Court Judge

Appellate Case No: 2015-002668

THE STATE,

Respondent,

vs.

SHA'QUILLE WASHINGTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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The trial court did not abuse its discretion by giving an Allen charge at the close of a day's deliberations instead of the following morning.

STATEMENT OF THE CASE

Appellant Sha'Quille Washington was indicted for murder. The jury convicted Washington of voluntary manslaughter following trial before the Honorable Kristi L. Harrington on October 12-16, 2015. Judge Harrington sentenced Washington to thirty years imprisonment.

STATEMENT OF FACTS

Larry Jenkins, Victim's first cousin, testified he went with Victim, Arianna Coakley, and Christina "Taj" Lockwood, to a remote club in Berkeley County called A Place in the Woods on August 25, 2013. They were guests at a birthday party for a musician, Slim Bubba. R. pp. 39-40. Washington bumped into Jenkins and Washington proceeded to stare Jenkins down. Jenkins testified Washington, "Just kind of like just stared us down for a little bit. So that's the first time I saw him." R. p. 41, lines 4-11.

Jenkins testified that as the party was winding down, Jenkins and Victim went outside the club. Then Victim took his shirt off. He was immediately hit from behind. Jenkins testified more than two people were involved in the ensuing skirmish after Victim was hit. Jenkins fought with a second person who he did not know while Victim was likewise in a fight. Jenkins was unable to describe the person he was fighting. However, Jenkins saw Washington during the fight. Jenkins heard two gun shots. He testified the person he was locked in combat with did not have a gun. R. pp. 42-44; p. 75. Jenkins testified neither he nor Victim brought a gun to the club. R. p. 75.

Jenkins saw Victim on the ground and saw Washington with a silver revolver fire a shot into the ground – Jenkins saw the sparks. Washington fired three shots while Victim lay on the ground. R. pp. 44-46. Washington ran away towards a car. At one point, Jenkins ran looking for him, but

Washington was already gone. R. p. 47.

Jenkins, Coakley, Lockwood, and an unidentified light-skinned man held Victim while waiting for law enforcement to arrive. Jenkins held a hat over one of Victim's wounds. Victim's eye was bruised. It took law enforcement about thirty minutes to arrive. Jenkins confirmed the club was in a remote area. Jenkins testified he was 100% certain of his identification of Washington as the gunman. The defense stipulated that Jenkins picked Washington out of a photographic lineup. R. pp. 47-51. Jenkins verified on redirect examination that he was a hundred percent certain Washington was the person who shot Victim. R. p. 77. During cross-examination, Jenkins testified he did not see Victim drinking, but he clarified he was not saying Victim was not drinking, just that he did not see it. R. p. 73, p. 74, lines 11-13.

Arianna Coakley testified she dated Victim on and off since she was fourteen years old. Coakley knew Washington because her cousin and Washington had problems in the past. She knew Washington for eight years. Coakley, Lockwood, Jenkins, and Victim went to A Place in the Woods, arriving between 2:30 and 3:00 a.m. Washington was at the club with Larry Kinloch. She knew Kinloch because he approached her the week before asking for her phone number. However, she never told Victim about Kinloch. R. pp. 80-83; p. 109, lines 6-16; p. 119, line 25 – p. 120, line 4.

While at the club, Victim told Coakley that Washington kept looking at him. R. p. 83. This rattled Victim, he told Coakley he was about to snap. R. pp. 100-01. She verified Victim was drinking that night. R. p. 103.

Victim went outside the club, Washington and Kinloch followed him. R. p. 83. Sensing trouble, Coakley followed them outside to the stoop. Washington said something to Victim, but

Coakley did not hear what. Victim asked Washington "what's up." Then Washington started hitting Victim with his left hand. Meanwhile, Coakley grabbed a beer bottle. Washington turned around and pointed a gun at Coakley, and told her, "I ain't playng." Coakley dropped the bottle and put her hands up. Coakley backed up to the door before Washington "jumped down and ran around." Coakley then heard four gunshots. R. pp. 83-84; p. 88, line 22 – p. 89, line 3; p. 90, lines 12-18. Coakley further clarified that when Washington was hitting Victim, Victim "started sliding down to go away, and he continued to hit [Victim]." R. p. 85, lines 17-19. Coakley testified she saw Washington hit Victim twice. R. p. 85, lines 23-25. She explained one hit was to the eye and the other was in the back of the head as Victim spun around to get away. R. p. 85, lines 25 – p. 86, line 4. Kinloch hit Jenkins right after Washington hit Victim. Coakley explained when Washington jumped off the stoop, he ran around to the other side of a van, out of her view. Coakley did not see the shooting because the van was in her way. R. p. 86, lines 9-11; p. 90, lines 12-18. Coakley verified Washington threw the first punch. R. p. 88. Coakley testified she never saw Victim take off his shirt. R. p. 103. She described the gun Washington pointed at her as a silver revolver. R. p. 84. Victim did not have a gun. R. p. 86, lines 5-6.

Coakley stayed with Victim until law enforcement arrived. She held and comforted him. She picked Washington out of the police lineup. R. pp. 90-94.

Darius Alls, a cook at the club, is Washington's cousin. R. p. 123. Alls testified Victim told him somebody was bothering him. Victim never said who. R. pp. 123-24. Victim told Alls he felt his life was in danger. R. p. 129. Alls told Victim to sit at the bar and someone would walk him out to the car later. R. p. 124. Alls testified he did not see or hear gunfire that night. R. p. 125. He

testified he was unable to say whether Victim was under the influence that night because he was under the influence himself. R. p. 132.

Drequan Lockwood waited with the others for EMS to arrive after Victim was shot. He did not see the shooting. He testified Victim's eye was injured. He went with Coakley to tell Victim's mother what happened. R. pp. 152-53.

Larry Kinloch, Washington's uncle, described himself as having "somewhat" of a relationship with Washington. He admitted being at the club with Washington. Kinloch testified he was not part of the fight that took place. Kinloch was then impeached with a phone call he made to his brother. He told his brother about being in a fight and blamed the shooting on Washington. R. pp. 168-70; pp. 173-74; p. 177, lines 8-13.

Christina "Raj" Lockwood admitted she did not want to testify. She went with Victim, Jenkins, and Coakley to A Place in the Woods. Lockwood knew Washington. He was at the club with Kinloch. She confirmed Coakley carried a Heineken bottle out of the club, but testified she failed to make it outside. She was impeached with her statement to law enforcement, State's Exhibit No. 56. In the statement, Lockwood told law enforcement that Washington shot Victim, that Victim said Washington kept looking at him, that Washington said he was going to get Victim, and that Washington kept talking about shooting somebody. R. pp. 215-31. Lockwood testified she never saw Victim remove his shirt, but that it was off. R. p. 243.

Captain Bobby Shuler interviewed Washington. Washington told Captain Shuler he did not have a gun. He also told Captain Shuler **that Victim did not have a gun** and neither did Larry Jenkins. R. pp. 337-38. Washington was able to describe the gun at the scene. R. p. 338, lines 11-

12. When Captain Shuler arrested Washington, he seized Washington's cell phone. R. p. 346.

Dr. Erin Presnell, a forensic pathologist, examined Victim. She found Victim suffered blunt force trauma to the back of his head. Victim also suffered two bullet wounds, one to the left back and the other to the left buttock. Both wounds were entrance wounds, there was no exit wound. She recovered two projectiles from Victim's body. R. p. 336, p. 377, p. 383, p. 384-85. Dr. Presnell explained both bullet wounds indicated an upward trajectory. Dense stippling in the back indicated Victim was shot at close range. R. pp. 386-90. The blunt force trauma to the back of the head was substantial – Victim's skull bone was chipped. R. pp. 390-91.

Aja Williams, a bartender at A Place in the Woods, testified he served alcohol to Victim. R. pp. 417-18. The trial court sustained the State's objection to an attempt to put in the Victim's autopsy report. R. p. 419. When Williams observed Victim, Victim was not heavily intoxicated. Kinloch was following Victim everywhere. Williams later clarified both Kinloch and Washington were following Victim. R. pp. 420-23. According to Williams, Victim told him "**Larry** going to shoot me, they going to kill me." R. p. 423; p. 425; p. 431 (emphasis added).

Williams did not see the shooting, but Williams helped apply pressure to Victim's injuries while waiting for EMS. He testified Victim was still wearing his shirt. R. p. 424.

Washington's defense was that he did not commit the shooting and was merely present. The defense put Kenneth Grant on the stand to claim that Kinloch admitted to shooting Victim, but the objection was sustained. Despite the trial court's ruling, defense counsel tried two more times to elicit this testimony. R. pp. 436-38, p. 448.

Renard Davis testified for the defense she was walking through the parking lot when she saw

an individual standing directly opposite of Larry Kinloch and she "heard them fussing." The individual removed his shirt as if ready to engage in a fight. As she went inside the club, she heard gunshots. R. pp. 459-60. She testified she did not see Washington outside. R. p. 462.

Robin Williams testified she was walking out of the club and saw a "young lady holding a glass bottle in Sha'Quille's face. And maybe like five seconds later, shots fired, three, and then that was it." R. p. 466, line 23 – p. 467, line 2. Williams claimed to see Washington running away on the second shot and she heard four shots. R. p. 467, lines 3-19. Williams clarified she never saw Washington with a gun. R. p. 470, lines 8-23. On redirect, she agreed Washington was not in the vicinity when the remaining shots were fired. R. p. 476, lines 16-22. Williams did not know whether Kinloch was outside the club at the time of the shooting. R. p. 477, lines 2-7. On recross-examination, Williams seemed to suggest Washington was not anywhere near the fight. R. p. 480, lines 1-8, lines 20-23. She agreed Washington could not have been threatened, she agreed there was no self-defense. R. p. 480, line 23 – p. 481, line 5.

Tyson Singleton, Washington's neighbor, testified he saw Washington running down the road before the first shot was fired. Singleton heard three shots total. R. pp. 483-85. He did not see Victim at the time of the shooting and did not know Victim. R. p. 492. He did not see Larry Kinloch outside, and he never saw the gun. He did not see the shooter. R. p. 495.

Washington did not testify at trial, but his statement to law enforcement was admitted into evidence and has been designated for appeal. See State's Exhibit 47. In the statement, Washington claimed he saw a scuffle between the victim, who he did not identify, and the unidentified shooter, who he referred to as the "suspect." Washington claimed to be a mere observer. Victim took off his

shirt as if to fight and then a fight ensued, which was "somewhat" broken up by security. Then "the victim walked off and the suspect fired a shot at him." Recounting the moment of the shooting once more in his statement, Washington reports "after the fight was over the victim walked away then the suspect followed and fired a shot . . . ." State's Exhibit 47.

At the conclusion of trial, Washington was found guilty of voluntary manslaughter. During sentencing, Washington apologized to Victim's family and also Jenkins' family. R. p. 631, lines 1-2.

ARGUMENT

I.

The trial court did not err in finding hearsay testimony inadmissible under the exception for present sense impression and counsel failed to argue for admission under any other exception. Further, the evidence did not meet the requirements for admission of evidence of third party guilt. Finally, any error is harmless beyond a reasonable doubt.

Washington contends the trial court erred in not allowing Quentin Kenneth Grant to testify that Larry Kinloch told them that Kinloch shot Victim. Washington contends Grant's testimony to this effect should have been allowed as (1) a prior inconsistent statement; (2) present sense impression; or (3) excited utterance. The testimony did not meet any of these exceptions. Of the three exceptions, Washington only raised present sense impression as an exception, so argument on the other two exceptions is not preserved. Further, the testimony did not meet the test for admitting third party guilt evidence.[1] Additionally, any error was harmless beyond a reasonable doubt.

First, Washington's contention the testimony should be allowed as a prior inconsistent statement is not preserved for review. Washington attempted to elicit this testimony during Grant's direct examination and redirect examination. Each time the hearsay objection was sustained. The first time, Washington failed to provide grounds for admission. The second time, Washington only argued present sense impression without further argument or explanation.

Accordingly, Washington failed to preserve for review the contention that the statement was admissible as a prior inconsistent statement. State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642,

[1] The abuse of discretion standard applies: "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

645 (1998) (holding that where counsel acquiesces in judge's limitation of his cross-examination of his cross-examination and makes no further objection, appellate review of the issue is procedurally barred). The argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Further, even if counsel argued prior inconsistent statement as a ground for admission, he failed to lay sufficient foundation with Kinloch, the alleged declarant. A witness may be impeached with prior statements inconsistent with or contradictory to the witness's trial testimony. Mays v. Mays, 267 S.C. 490, 229 S.E.2d 725 (1976). "To have an inconsistent statement, there must be a statement with which to compare it." Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261, 265 (Ct. App. 1999). Before a prior inconsistent statement may be admitted, the witness alleged to make the statement must be advised on cross-examination "of the substance of the prior statement and the time when, the place where and the person to whom it was made." State v. Roper, 274 S.C. 14, 19, 260 S.E.2d 705, 707 (1979).

In the present case, Washington argues the following from his cross-examination of Kinloch constituted the requisite foundation:

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discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001).

Q: Well, let's go through this slow.
You have shared with, for instance, Quinton Grant, that you did the shooting, haven't you?

A: No, sir.

Q: Okay. In fact, the night when the shooting took place, you ran and Quinton assisted you away from the shooting? Sir?

A: No, sir.

Q: Well, I'll put it – ask you another question.
After the shooting that night, did you see Quinton Kenneth Grant?

A: No, sir.

R. p. 175, line 11 – p. 176, line 6.

In the instant case, counsel did not question Kinloch about the time or place the alleged conversation took place. Therefore, an insufficient foundation was laid for admitting the purported inconsistent statement.

Further, the testimony did not meet the requirements for the present sense impression exception. Under Rule 803(1), SCRE, testimony is admissible under present sense impression if it is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The testimony does not meet the standards for present sense impression because the purported statement did not occur while Kinloch was perceiving the event or immediately thereafter. According to Grant, he did not see Kinloch until twenty or twenty-five minutes after the shooting. On direct, Grant said he went back to the club. R. p. 438, lines 13-21. On cross-examination, Grant contradicted himself saying he never went back to the club. Instead, he said he saw Kinloch at Kinloch's house. R. p. 444, lines 7-13. The trial court

did not abuse its discretion because the conversation did not occur while the declarant was perceiving the event nor immediately after. Instead, the alleged conversation took place at least twenty minutes later at Kinloch's house. The bare assertion that Kinloch said he did it, without any testimony of the surrounding circumstances, fails to suggest the purported statement was more than mere reflection. "The idea of immediacy lies at the heart of the exception; thus, the time requirement underlying the exception is strict because it is the factor that assures trustworthiness." United States v. Green, 556 F.3d 151, 156 (3d Cir. 2009). Accordingly, the trial court did not abuse its discretion in sustaining the State's objection. Wilson v. Childs, 315 S.C. 431, 439, 434 S.E.2d 286, 291-92 (Ct. App. 1993) (finding in medical malpractice case, no error in excluding decedent's statement about conversation with doctor shortly before decedent's death when the trial court reasoned it was inadmissible "because the decedent had made this statement in reflection of past events."); see also United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) ("Here, too much time had passed between when Mr. Rush spoke with Mr. Manfre and when he spoke with Mr. Strozier to call the transaction a present-sense impression. At the very least, there was an intervening walk or drive between the time of the discussion with Mr. Manfre and the time when Mr. Rush spoke with Mr. Stozier. The present-sense-impression exception to the hearsay rule is rightfully limited to statements made while the declarant perceives an event or immediately thereafter, and we decline to expand it to cover a declarant's relatively recent memories.").

Finally, Washington argues Kinloch's purported out of court statement was admissible as an excited utterance. However, no foundation was laid that Kinloch made the statement "while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

In State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), this Court found a 911 call from a rape victim's mother failed to meet the foundation requirements of Rule 803(2), SCRE. The mother related to the dispatcher that her daughter was raped and related details her daughter disclosed to her. Accordingly, this Court reviewed the admissibility of the 911 call as double hearsay. This Court found while the daughter's disclosure met the standard for excited utterance, the mother's out of court statement did not meet this exception. This Court noted the mother likely felt "an intense emotional reaction" upon hearing her daughter was raped: "However, the State has not shown the nature of her reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability." Id. at 533, 759 S.E.2d at 438. This Court further noted, "Moreover, the State did not show [the mother] was still under the required stress of excitement when she actually made her statement." Id. This Court additionally noted the mother had time to reflect on the disclosure before she called 911. Id. at 534, 759 S.E.2d at 438-39.

Likewise, in the instant case, Washington failed to lay any foundation showing Kinloch's reaction was such that it generated spontaneity or that Kinloch was still under the required stress of excitement when Kinloch made the purported statement twenty or twenty-five minutes after the shooting. Accordingly, the alleged out of court statement was not admissible as an excited utterance. Further, the argument was not raised to the trial court as a basis for admission, and therefore the claim of error is not preserved. Thomason, supra.

The elephant in the room not addressed by Washington is State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). In Cooper, the defendant, on trial for murder, proffered testimony from Solomon Nelson, who claimed he overheard Shirley Gilmore telling someone that Gilmore, defendant's

girlfriend, and another woman killed the murder victim. The defendant intended to first call Gilmore, expecting her to deny making the statement, and then admit Nelson's testimony as an inconsistent statement. The trial court found such testimony improper. On appeal, the Supreme court agreed, finding Rule 804(b)(3), SCRE applicable, which determines when a statement against interest is admissible. Under Rule 804(b)(3), such a statement is admissible only when the declarant is unavailable as a witness, and Gilmore was available. Id. at 548, 514 S.E.2d at 588. The Supreme Court in turn addressed the defendant's assertion he could admit the testimony as a prior inconsistent statement. The Supreme Court noted the strict limits on the admissibility of third-party guilt. The Supreme Court found the third party evidence inadmissible because "there was no credible evidence linking Gilmore to Victim's murder." Id. at 549, 514 S.E.2d at 589.

Likewise, no evidence links Kinloch as the shooter beyond Grant's bare assertion. No witness saw Kinloch with a weapon, much less saw Kinloch firing a weapon. While one witness testified Victim predicted Kinloch was going to shoot him, the same witness noted Victim alternatively said "they" were going to shoot him, implicating Washington.

In State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), the Supreme Court set the standard for the admissibility of third-party guilt evidence, stating:

> [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.

Id. at 104-105, 16 S.E.2d at 534-35 (emphasis added).

In State v. Swafford, 375 S.C. 637, 654 S.E.2d 297 (Ct. App. 2007), this Court upheld the trial court's exclusion of third party guilt evidence without reaching the issue of whether hearsay testimony in support of the third party guilt evidence was admissible. In that case, the victim died in a car accident, her van was found on the side of the road. Police determined Swafford's truck was involved in the accident and found the vehicle. Swafford was a short distance away from the truck, smelled of alcohol, and told them he was alone in the truck.

A neighbor testified that looking out his window, he saw a truck spinning out of control. He drove to the accident scene and on the way, he picked up his neighbor, Gillespie. Carol Johnson testified in camera that an hour before the accident, she saw Swafford in the passenger seat of Swafford's truck, and a person meeting Gillespie's description was driving. In addition, Brian Bobo testified in camera that Gillespie told him he was driving Swafford's truck and was involved in a bad accident. Investigator Rob Nealy testified in camera Greg Townsend told him a third person told Townsend that Gillespie admitted driving the truck at the time of the accident. Gillespie denied involvement when he testified in camera, although he admitted riding with the neighbor to the scene of the accident. Id. at 639-40, 654 S.E.2d at 298-99.

This Court noted Johnson's testimony, that she saw Swafford in the passenger seat an hour before the accident, failed to prove that Swafford was not driving at the time of the accident or that Gillespie was driving at the scene of the accident. Further, this Court found no error in excluding

Bobo's testimony remarking, "Bobo could produce no support for his bare assertion that he telephoned Gillespie the night of the accident." Id. at 642, 654 S.E2d at 300.

In the instant case, no evidence was presented at trial indicating Kinloch fired or even possessed a firearm. The only evidence presented was either Washington killed Victim or that an unknown individual, for instance, Washington's "suspect," killed Victim. Regardless of whether the testimony was admissible under a hearsay exception, as in Cooper, the testimony did not meet the admissibility requirements as evidence of third party guilt.

Accordingly, the testimony did not meet the present sense impression exception, or any other exception to the extent any of those other exceptions were preserved for review, and further, the testimony was not admissible as evidence of third party guilt.

Further, Washington was not prejudiced by the alleged error and any error is harmless beyond a reasonable doubt. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Even if admissible as evidence of third party guilt, Grant's testimony lacks any detail of Kinloch's demeanor or the circumstances surrounding the purported admission. Moreover, other defense witnesses testified they saw Washington flee while shots were still being fired. The jury clearly rejected claims that Washington was not the shooter despite testimony from these other defense witnesses. The testimony simply would not have affected the result of trial. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is

harmless where it could not reasonably have changed the outcome of the trial); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (finding error harmless when it could not reasonably have affected the result of the trial).

II.

The trial court did not err in declining to admit a toxicology report where the toxicology report was not relevant and any probative value was outweighed by its prejudicial effect. Any error was harmless in light of its minimal evidentiary value and the lack of evidence that Victim was actually the aggressor.

Washington attempted to admit evidence from a toxicology report of Victim from the time of the autopsy. Washington argues on appeal that it was error for the trial court to not admit testimony about the report. However, counsel never put on record the basis for admitting the report. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground). Further, the trial court's exclusion of this evidence was not an abuse of its discretion, as the report carried little to no probative value. Finally, any error is harmless in light of evidence of overwhelming guilt and the report's extremely limited utility.

The trial court explained its ruling as follows:

> My understanding is you wish to inquire of Dr. Presnell what the blood-alcohol level is. I have sustained the State's objection . . . as to the actual amount. There has been abundant testimony as to the fact that there was drinking or not drinking by the victim, and so I have excluded this testimony, but you may continue.

R. p. 453, lines 10-17.

The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct.

App. 2005).

"While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence." State v. Hamilton, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In the instant case, the prosecutor objected based on Rule 404, SCRE. However, the trial court's ruling reflects that she sustained the objection based on Rule 403, SCRE. Under Rule 403, SCRE: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Hamilton, 344 S.C. at 358, 543 S.E.2d at 598.

"A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 839 S.E.2d 68, 71 (Ct. App. 2012).

The uncontroverted evidence showed Victim was drinking that night. Although Jenkins testified he did not see Victim drinking, he did not claim Victim was not actually drinking. On the other hand, several other witnesses testified Victim was drinking. Therefore, the report was cumulative to testimony that Victim was drinking.

Further, Washington claims the evidence should have been admitted because Victim's intoxication made it more likely he provoked difficulties. However, as discussed more fully in the State's response to Issue IV, neither the State nor Washington presented any evidence supporting self-defense. The only evidence was Washington brought on the difficulty by striking the first blow. No evidence was presented that Victim was armed and took any action further than taking off his shirt. Victim taking off his shirt merely shows a willingness to fight and therefore supports mutual combat at best. Accordingly, Victim's intoxication was not relevant and the danger of unfair prejudice outweighed the limited probative value of the evidence.

Assuming, as Washington insists, the report proved Victim was more likely to provoke a confrontation due to his intoxication, the jury returned a voluntary manslaughter verdict, so the exclusion of the evidence did not prevent the jury from finding legal provocation and acquitting Washington of murder.

The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). Forensic evidence showed Victim was shot twice in the back and suffered blunt force trauma in the back of the head. The only evidence presented was

Washington was the aggressor or someone else did the shooting. The toxicology report simply was unlikely to affect the result of trial due to the complete failure of evidence showing Victim was actually the aggressor.

III.

The trial court did not err in excluding a defense witness's testimony where the witness violated the sequestration order due to defense counsel's conscious disregard of the order, and the excluded testimony was merely cumulative to testimony from other defense witnesses.

Washington argues the trial court abused its discretion by enforcing the sequestration order and excluding Kevin Watson's testimony. The trial court did not abuse its discretion as Washington's counsel knowingly allowed the sequestration order to be violated and the witness was able to view Washington's videotaped statement. Additionally, Washington was not prejudiced since the testimony was cumulative to testimony from other defense witnesses.

After Kevin Watson was called to the stand, one of the officers present in court advised the prosecutor they recalled seeing Watson in court during trial. During the trial court's inquiry, Watson admits he was present while Captain Shuler was on the stand. Watson did not hear Captain Shuler testify but he was present while Washington's video-taped statement was played. R. pp. 405-10.

The trial court ruled to exclude the testimony. After the ruling, defense counsel explained Watson was not originally on the witness list, so Watson was not in a position to receive the sequestration instruction. The trial court noted counsel was aware of the instruction. Counsel responded, "He did not come to me until today and share with me that he was going to testify, so I thought it was no need for me to consider him to be sequestered." R. p. 412, lines 4-7. Therefore, counsel admitted disregarding the sequestration order when he was approached by Watson to testify.

The trial court allowed counsel to proffer Watson's testimony. Watson testified in camera that he was present at A Place in the Woods and saw "some fighting" and left. He testified he saw

neither Kinloch nor Washington with a weapon. R. p. 414, lines 3-11.

A circuit court may order the sequestration of any witness by order or by motion of a party. Rule 615, SCRE. The decision to sequester a witness is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 173, 682 S.E.2d 19, 33–34 (Ct. App. 2009). The purpose of the exclusion rule is to prevent the possibility that one witness will shape his testimony to match another witness's testimony. State v. Huckabee, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010). If a witness violates the order, he may be disciplined by the court. Id. The question of whether to exclude testimony by the offending witness depends upon the particular circumstances and "lies within the sound discretion of the trial court." Id. (quoting United States v. Leggett, 326 F.2d 613, 613–14 (4th Cir.1964)).

Washington relies on Simmons and State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000). However, in both Simmons and Tisdale this Court merely held the trial court did not abuse its discretion in allowing the witnesses in violation of the sequestration order to testify. In Simmons, this Court held the trial court did not abuse its discretion in allowing the chief investigating officer to testify when any testimony he did hear would not have influenced his testimony. Simmons, 384 S.C. at 173, 682 S.E.2d at 34. Additionally, the chief investigating officer's testimony was critical to the state's case. Id.

In Tisdale, this Court held the trial court did not abuse its discretion in refusing to grant a mistrial based on a witness's violation of a sequestration order. The witness was present for opening argument, which refreshed his recollection of the clothing Tisdale wore the day he purchased a vehicle seen by the bank Tisdale robbed. The witness testified about the clothing. The trial court

concluded it would not grant a mistrial, finding the violation of the order was neither flagrant nor intentional. Tisdale, 338 S.C. at 616-18, 527 S.E.2d at 394-95. Simmons and Tisdale merely illustrate the wide discretion afforded to the trial judge to determine what, if any, remedy is required for a violation of a sequestration order.

In the present case, defense counsel knew about the sequestration order, but decided it was unnecessary for his witness to follow the order. Counsel's conscious decision to disregard the sequestration order for this witness is apparent through his own words ("I thought it was no need for him to be sequestered.") As a result, Watson saw Washington's video-taped interview and was in a position to conform his testimony to Washington's statement. Accordingly, the trial court did not abuse her discretion in prohibiting the witness from testifying given the potential prejudice to the State and counsel's conscious disregard of the order.

In a proffer, Watson testified that he "saw some fighting, and [he] basically left." R. p. 414, line 5. Note Watson did not testify that he heard shots fired or saw the gunman. Instead, he merely testified that he did not see Washington with a weapon. R. p. 414, lines 6-11. Importantly, this testimony fails to establish Washington did not actually possess a weapon.

Moreover, this testimony is cumulative to testimony from other defense witnesses. For instance, Robin Williams claimed to see Washington running away on the second shot and she heard four shots. R. p. 467, lines 3-19. Williams clarified she never saw Washington with a gun. R. p. 470, lines 8-23. Further, Tyson Singleton testified he saw Washington running down the road before the first shot was fired. R. pp. 661-63.

Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell,

302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). Watson's testimony, at best, was merely cumulative to Williams and Singleton's testimony. See State v. Brown, 344 S.C. 302, 543 S.E.2d 568 (Ct. App. 2001) (finding, in a speeding prosecution, that even if magistrate should have allowed the video of the roadway into evidence, it was cumulative to testimony concerning the roadway and a diagram of the road that was used at trial) *overruled on other grounds by* State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011). Since the substance of the testimony Washington sought to elicit from Watson was presented to the jury through other witnesses, Washington was not prejudiced by the purported error.

IV.

The trial court did not err in declining to instruct the jury on self-defense. Appellant brought on the difficulty. No evidence was presented that Appellant was in danger of death or serious bodily injury or could reasonably harbor such a belief. No evidence was presented that Appellant could not retreat or otherwise avoid the use of lethal force. Any conceivable error was harmless beyond a reasonable doubt.

Washington claims the trial court erred in declining to instruct the jury on self-defense. The only evidence presented was Washington, rather than Victim, was the aggressor. No evidence was presented that Washington was under threat or a reasonable belief of threat to his life or to serious bodily injury. No evidence was presented that he could not have avoided any danger by means other than use of lethal force. Any error is harmless beyond a reasonable doubt in light of the evidence that Victim was shot in the back twice and suffered severe blunt force trauma to the back of the head.

"A jury charge on self-defense is not required unless it is supported by the evidence." State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007). "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) (citation and internal quotation marks omitted). The trial court's refusal to provide a requested jury instruction must be erroneous and prejudicial to warrant reversing a conviction. State v. Lockamy, 369 S.C. 378, 631 S.E.2d 555 (Ct. App. 2006).

In order for a defendant to be entitled to a jury instruction on self-defense, evidence of the following four elements must be presented:

> (1) The defendant must be without fault in bringing on the difficulty;
> (2) the defendant must have been in actual imminent danger of losing

> his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was in actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000).

First, the evidence shows Washington brought about the difficulty. The evidence indicates Washington stared down Victim when Victim entered the club. R. p. 41. Further, the uncontroverted evidence is that Washington and Kinloch followed Victim out of the bar. Anticipating problems, Victim's girlfriend, Coakely, followed after them.

Coakely testified she grabbed a bottle and intended to hit Washington over the head with it only **after** Washington struck Victim twice. Accordingly, Coakely's testimony only indicates that she attempted to defend Victim from a fight started by Washington. Clearly, Washington brought on the difficulty which disqualifies entitlement from an instruction on self-defense. State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) (quoting an ALR article for the proposition that "one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense"); Wigington, 375 S.C. at 32, 649 S.E.2d at 188 (quoting Bryant). Further, Washington was already armed when he began his fight with Victim. State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001) (noting that one must have a reasonable belief of imminent danger before arming himself in self-defense); see also State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (finding trial court did not err in declining to instruct jury on self-defense because Slater approached an altercation already underway with a

loaded weapon by his side, "[s]uch activity could be reasonably calculated to bring the difficulty that arose in this case."). His willingness to engage in a fight disqualifies Washington's puzzling claims of self-defense. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973) ("To constitute mutual combat there must exist a mutual intent and willingness to fight."). To the extent the evidence indicates mutual combat rather than Washington simply being the aggressor, mutual combat defeats a claim of self-defense. Id.

Further lacking is any evidence indicating Washington fired his weapon under imminent fear of losing his life or suffering serious bodily injury. Assuming Washington, already engaged in mutual combat, was entitled to arm himself in self-defense against Coakely and her bottle, there is no evidence he should have been in fear of imminent harm **from Victim** who was unarmed. Coakely testified she retreated, and both Washington and Victim were out of her eyesight when Victim was gunned down. Further, evidence Victim took his shirt off may indicate a willingness to fight; however, no evidence indicated Victim was armed. Instead, taking his shirt off indicates no more than willingness for a weaponless struggle. Quite simply, there is no evidence Washington was under threat of death or serious bodily harm from Victim, and clearly the danger from Coakley passed when Coakely dropped the bottle and retreated. Accordingly, no evidence was presented that Washington was in fear for his life or serious bodily harm, and the evidence presented fails to show that it would be reasonable for Washington to believe so. The evidence fails to show that Washington met either the second or third elements of self-defense.

Finally, no evidence was presented that Washington did not have other means of avoiding the danger. He avoided any danger from Coakely. Victim was unarmed and no evidence indicates

Victim was an assailant. The only evidence indicates what happened next is that either Washington or an unidentified person chased Victim down and shot Victim in the back as Victim lay on the ground. The only evidence is this was an assassination. There was no evidence Washington was unable to retreat or otherwise avoid the danger.

In the instant case, no evidence was presented establishing self-defense. Instead the evidence shows Washington pursued and willingly entered an altercation with Victim while armed and while Victim was unarmed. Further, Victim taking off his shirt in anticipation of a weaponless fight did not create a reasonable fear for Washington for his safety from loss of life or for bodily harm. Simply put, an unarmed person taking their shirt off does not give another person the right to lawfully shoot that person. Accordingly, the trial court did not err in declining to instruct the jury on self-defense.

Further, any conceivable error was harmless. The uncontroverted physical evidence shows this is not a self-defense case. Victim was shot in the back twice. He also suffered blunt force trauma to the back of the head, resulting in a chipped skull. Washington's statement to the police and Coakley's trial testimony confirm the same thing: Victim was chased down and murdered. Any error in declining to instruct the jury on self-defense was harmless beyond a reasonable doubt. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (noting the harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)).

V.

The trial court did not err in instructing the jury on accomplice liability and Appellant was not prejudiced by the instruction.

Washington's counsel objected to an instruction on accomplice liability, claiming no evidence was presented that Kinloch, rather than Washington, shot Victim. Counsel admitted, however, that the defense "tried to make some suggestions or inference" that Kinloch was the shooter. R. p. 532, lines 20-21.

The trial court did not err in providing the instruction. Under Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011), an instruction on accomplice liability is warranted where the evidence is equivocal as to the identity of the shooter. In that case, Barber had several co-defendants and only Barber was identified as the shooter. However the Supreme Court ultimately found the instruction was warranted. Id. In the instant case, as counsel admitted, he expended much energy suggesting Kinloch was the shooter, and his assertions coupled with evidence supports the trial court's determination that an instruction was warranted.

The defense called Aja Williams, a bartender at A Place in the Woods, as a witness. Williams testified Kinloch followed Victim around the bar that night. R. p. 421, lines 1-10. Williams testified the last thing Victim said to him was "Larry going to shoot me, they going to kill me." R. p. 423, lines 8-11. Just so the jury could hear it again, defense counsel clarified by asking, "Said Larry's going to shoot him." And Williams confirmed this comment. R. p. 423, lines 8-13. On redirect, Williams agreed that he met with the solicitors and told them Victim said "Larry is going to shoot me." R. p. 430, lines 13-25. Defense counsel confirmed that Victim said Larry two more times. R. p. 430, lines 24-25; p. 431, lines 8-9. The trial court noted this testimony during

argument on the propriety of an accomplice liability instruction. R. p. 533, lines 9-11.

While cross-examining Kinloch, defense counsel referenced Kinloch's phone call to his brother who was in prison. He suggested Kinloch called knowing the conversation would be recorded so that blame could be placed on Washington for the shooting. This culminated with counsel's question, "[Y]ou had already laid the groundwork to protect yourself because you then had already conversated, talked to Patrick, who was in jail for murder, to clear yourself and put it squarely on the shoulders of your nephew; isn't that true?" R. p. 177, lines 8-12. Kinloch disagreed. R. p. 177, line 13.

Counsel further examined Kinloch as follows:

> Q: You understand that it's pretty good to get on the phone and clear your name pretty good in reference to anything that happened at Slim Bubba's birthday party?
>
> A: No, sir.
>
> Q: And who better place to put that as on the jail. Have you ever spent any time in Berkeley detention jail?
>
> A: No, sir.
>
> Q: Now, you know for a fact that every conversation in Berkeley County Detention center is recorded, because you've been there; isn't that true?
>
> A: I've been in jail.
>
> Q: Yeah. And you know that is about the stupidest thing in the world, to get on the phone and talk about incrimination. You smart, you even use the word incrimination; isn't that true?
>
> A: [No response]
>
> Q: Well, that's what the telephone conversation said. You used the

word incriminating, did you not?
Sir?

A: Yes, sir.

Q: Now, that's so smart that when you're doing self-serving statement, you smart enough, though, to incriminate someone else?

A: No, sir.

Q: Sacrifice your nephew? . . .

R. p. 180, line 14 – p. 181, line 14.

Later, defense counsel asked, "So you were drunk that night to the point that when you ran and saw Darlene [phonetic] Washington and you told and said, I did the shooting, you don't recall saying that?" R. p. 185, line 25 – p. 186, line 3. He also asked, "You don't recall saying, I had a .357 Magnum . . . in your possession?" R. p. 186, lines 4-6.

Counsel asked, "Sir, isn't it fair to say from the very onset of this tragic situation that you have always been described as the person who did the shooting in this case?" adding, "In the streets, that is. Isn't that true?" R. p. 186, lines 13-18.

Counsel concluded cross-examination as follows:

Q: Do you owe an apology to your nephew, sir?

A: Sir?

Q: Do you owe an apology to your nephew, Sha'Quille Washington?

A: For what?

Q: You know the answer.

R. p. 189, lines 11-16. Counsel also later asked Christina Lockwood if she saw Kinloch in

possession of a weapon. R. p. 258, lines 19-21.

Additionally, even though the objection to Grant's testimony claiming Kinloch told Grant that he shot Victim was sustained and struck, Washington's counsel persisted in attempting to elicit this testimony despite the trial court's ruling. The testimony first arose as follows:

> Q: You returned to the club?
>
> A: Yes. Yes. Larry Kinloch told – said he did it.
>
> Q: Larry said he did it?
>
> A: He said he did it.
>
> Prosecution: Objection, Your Honor.
>
> A: He told me he did it.

R. p. 436, line 25 – p. 437, line 5. The trial court sustained the objection and told the jury to strike the "last statement." R. p. 437, lines 11-19. Despite the trial court's explicit ruling, defense counsel tried to elicit the statement again, examining his witness as follows:

> Q: . . . How soon after the shooting did you see . . . Larry Kinloch?
>
> A: Probably about I would say twenty, twenty-five minutes later.
>
> Q: Within that twenty-five minute frame of time?
>
> A: Yes.
>
> Q: Okay. And that's when you heard what he said?
>
> A: Yes.
>
> Q: That, in fact, he had did it?
>
> A: Yes.

R. p. 438, lines 10-21. The trial court sustained the objection and again struck the comment. R. p. 438, lines 22-25.

Counsel again attempted on redirect to elicit the hearsay statement:

Q: He asked you why are you here today. Why are you here?

A: I'm here today to say that Larry –

R. p. 448, lines 3-5. The prosecution objected and the objection was sustained. R. p. 448, lines 6-10.

Additionally, Washington called Renard Davis as a witness, who testified that an individual who removed his shirt was "fussing" with Kinloch. R. pp. 459-60. Further, while cross-examing Coakley, defense counsel tried to suggest the conflict was between Victim and Kinloch because Kinloch approached Coakley and "hit" on her the week before. R. pp. 98-99.

The Supreme Court addressed when an instruction for accomplice liability was appropriate in Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011), and ultimately concluded a charge on the hand of one is the hand of all is appropriate where the evidence is equivocal as to which of several persons acting in concert physically committed the crime. The Supreme Court held, "Like a lesser-included offense, an alternate theory of liability may only be charged **when the evidence is equivocal on some integral fact** and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Id. at 236, 712 S.E.2d at 439 (emphasis added). In Barber, this Court framed the question as follows: "To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." Id. at 237, 712 S.E.2d at 439. In Barber, the robbers wore masks and some question existed as to which robbers were armed with which

weapons, including the murder weapon. However, the testifying co-defendants insisted Barber shot the victims and none of the other codefendants were positively identified as the shooter. The Supreme Court found the accomplice liability instruction was appropriate because "the sum of the evidence presented at trial, both by the State and defense, **was equivocal** as to who was the shooter." Id. at 236, 712 S.E.2d at 439 (emphasis added).

In the instant case, Washington asserted Kinloch was the shooter: his counsel accused Kinloch of being the shooter while Kinloch was being cross-examined. The bartender claimed Victim told him Kinloch was going to shoot him. Further, even after the trial court struck Williams' testimony claiming Kinloch admitted shooting Victim, Washington managed to elicit the same claim that Kinloch said he shot Victim two more times, even though the trial court struck it. Washington should not profit by this malfeasance where he intentionally elicited the same testimony the trial court already admonished the jury to disregard.

Washington relies on Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) to argue the instruction was not warranted and was prejudicial. Wilds is distinguishable. In Wilds, Wilds was tried for armed robbery and murder. Both of his co-defendants testified to their participation in the robbery and testified Wilds was the triggerman in the robbery. During deliberations, the jury sent a note to the trial court asking, "[I]f we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?" Over Wilds' objection, the trial court instructed the jury on accomplice liability. Subsequently, the PCR court found Wilds' appellate counsel ineffective for not challenging the instruction on appeal. Id. at 435-37, 756 S.E.2d at 388-89.

This Court affirmed the PCR court, noting the jury may have doubted the codefendant's

testimony, but finding accomplice liability "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." Id. at 439, 756 S.E.2d at 390. This Court found Wilds was prejudiced because the jury instruction was given in response to the jury's question, enabling it to unanimously find a verdict. Id. at 439, 756 S.E.2d at 391.

This case differs from Wilds because no evidence supported the instruction in Wilds. On the other hand, in the instant case, Washington presented testimony from Davis suggesting the confrontation was between Victim and Kinloch. Additionally, Williams testified Victim thought Kinloch was going to kill him. Finally, defense counsel's conduct in continuing to attempt to elicit testimony from Grant despite the trial court's ruling justifies providing the instruction. The evidence and defense counsel's assertion support the instruction sufficient to create equivocal evidence as to the shooter sufficient to justify the instruction pursuant to Barber.

Additionally, Washington was not prejudiced by the instruction. In Wilds, the jury was given the accomplice liability instruction in direct response to their question, unduly emphasizing accomplice liability. In the instant case, since the instruction was provided with the standard instructions, the concept was not unduly emphasized. Accordingly, Washington was not prejudiced, particularly in light of the abundant evidence of guilt.

VI.

The trial court did not abuse its discretion by giving an Allen charge at the close of a day's deliberations instead of the following morning.

Washington claims the trial court's decision to provide a correct Allen instruction to the jury before the jury was dismissed in the evening "altered the manner in which juries conduct their deliberations," arguing the trial court should have waited until the next morning to give the instruction. The trial court did not abuse its discretion, and it is highly speculative at best that the timing of the Allen instruction affected the result.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). In the instant case, the trial judge did not abuse its discretion in giving the charge at 5:30 p.m., before sending the jurors home for the evening. An Allen charge is given by a court when the jury has reached an impasse in its deliberations and is unable to reach a consensus. United States v. Burgos, 55 F.3d 933, 935-36 (4th Cir.1995); Allen v. United States, 164 U.S. 492 (1896). The decision to give such a charge is within the discretion of the trial or sentencing court. Id. at 935. "[T]he trial judge who is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict." Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000). The test for determining whether a given charge is unconstitutionally coercive is fact intensive. Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001). Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the

circumstances." Lowenfield v. Phelps, 484 U.S. 231 (1988). The same fact intensive inquiry applies to the determination of the manner in which the charge is given. See State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979). In assessing the prejudicial impact of jury instructions, the test is whether the particular language employed, in the context and under the circumstances of the case, coerced the jurors into reaching a guilty verdict. Jenkins v. United States, 380 U.S. 445, 446 (1965). Note jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). In the absence of coercion, the trial court is merely discharging the trial court's duty to the public and litigants by urging the jury to reach a verdict. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981).

In the instant case, Washington's counsel did not challenge the language of the Allen instruction. R. p. 610, lines 13-15. Instead, he challenged the timing of the Allen instruction, based on a personal preference rather than any legal authority that it was better to provide the instruction the following morning and not before the jury was dismissed in the evening.[2]

Washington first relies on Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002), a medical malpractice case where the Court did not even consider that issue.[3] Washington's reliance on this case underscores the lack of authority to support his trial counsel's musings because the Supreme Court did not address whether or not the Allen charge – or its timing – was coercive or prejudicial. 350 S.C. at 308. Id. In Strickland, the jury deliberated for four hours before sending a

[2] See R. p. 605, lines 19-23 ("I would prefer that we do the Allen charge in the morning . . . But you're the judge.").

[3] The Issues on Appeal in Strickland were limited to the following: (1) whether the trial court erred in granting a directed verdict on Harvey's claims; (2) whether the trial court erred in denying Harvey's motion to amend his complaint; and (3) whether the trial court improperly excluded testimony of a

note out that indicated they could not agree. Id. The trial court excused the jury for the day and brought the jury back the next day for further deliberations after an Allen charge. Id.[4] However, the Supreme Court did not suggest providing the instruction in the morning instead of immediately upon discharging the jury that evening was preferable, much less required. Id. Accordingly, Strickland fails to provide any support for the proposition that the trial court in the instant case failed to follow proper procedure or otherwise abused its broad discretion.

Washington also relies on State v. Tillman to support its argument that the trial judge is **bound** to provide the Allen charge in the morning after the jury returns for further deliberations. 304 S.C. 512, 521, 405 S.E.2d 607, 612 (Ct. App. 1991). In Tillman, the trial judge excused the jury at 9:30 p.m. and provided the jury the Allen instruction the next morning. However, the language of this Court's opinion does not require the trial judge "to send the jury home with instructions to return the next day and give the charge the next day immediately before the jury resumes its deliberations" as Washington asserts. Br. of App., p. 16. Instead, in Tillman the appellant argued the trial court gave the instruction too soon. This Court disagreed and found no evidence the trial court tried to coerce a verdict. Tillman merely reinforces the wide discretion trial courts hold in conducting the trials in a way they deem fair for both parties. Id. at 519 (holding there was no indication the trial judge tried to coerce a verdict; "appellant's argument as to the timing of the charge meritless").

Just as the Court in Tillman held the timing of the charge did not indicate the trial judge tried

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hospital liaison worker. Strickland, 350 S.C. at 308, 566 S.E.2d at 532.

[4] In Strickland, the jury deliberated further before returning unable to return a verdict. The plaintiff asked if there was some way to seek appellate review without having to retry the case and the trial court granted a directed verdict for the defense. Id. at 307-08, 566 S.E.2d at 532. Since no verdict was reached, obviously Strickland does not involve an allegation of a coerced verdict.

to coerce a verdict, the Court should reach the same conclusion here. Tillman merely reinforces the wide discretion vested in trial courts to determine when Allen instructions are required. In the instant case, the trial court did not err.

Further, Washington was not prejudiced as the outcome of the trial was not affected. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). In the instant case, the jury deliberated the following day from 9:36 a.m. to 2:41 p.m. R. p. 619, lines 6-9. Prior to the jury resuming deliberations, the trial court reminded the jurors that she provided the Allen instruction the previous night. R. p. 618, lines 17-22. Since the jury continued its deliberations for an additional five hours the next morning, this Court should feel secure in the view that the Allen instruction did not coerce the verdict. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 8, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Kristi L. Harrington, Circuit Court Judge

Appellate Case No: 2015-002668

THE STATE,

Respondent,

vs.

SHA'QUILLE WASHINGTON,

Appellant.

CERTIFICATE OF COUNSEL

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

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