

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Court of Appeals
Appellate Case No. 2015-001059

THE STATE,

Petitioner,

v.

DALONTE GREEN,

Respondent

APPENDIX

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
FINAL BRIEF OF APPELLANT.....	1
FINAL BRIEF OF RESPONDENT.....	25
OPINION NO. 2018-UP-092 (Filed Feb. 21, 2018).....	59
STATE’S PETITION FOR REHEARING (Dated March 8, 2018).....	66
ORDER DENYING PETITION FOR REHEARING (Filed April 26, 2018).....	79

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STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

DALONTE GREEN,

APPELLANT

APPELLATE CASE NO. 2015-001059

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	
1.	
The court erred by excluding the testimony of Hampton Police Officer Johnny Wells that the decedent told him "Douglas" shot him where the decedent had been shot in the face, he was badly bleeding, it appeared to Wells the decedent was about to die, and the decedent indeed died shortly thereafter, since this statement was admissible pursuant to Rule 804(b)(2) as a statement under belief of impending death	5
Relevant Facts	5
Office Johnny Wells	5
Other Evidence	9
Discussion	13
2.	
The court erred by twice ruling it would not allow defense counsel to argue for the admissibility of the dying declaration because the court had done its own research, since this was an arbitrary ruling, it violated Rule 18(a), SCRCrimP, and denied it appellant his right to be heard fully in his defense	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<u>Holmes v. South Carolina</u> , 547 U.S. 319 (2006)	17
<u>State v. Cash</u> , 138 S.C. 167, 136 S.E. 222 (1927)	19
<u>State v. Bethea</u> , 241 S.C. 16, 126 S.E.2d 846 (1962)	16
<u>State v. Gregory</u> , 198 S.C. 98, 16 S.E.2d 532 (1941)	17
<u>State v. Hall</u> , 134 S.C. 361, 133 S.E. 24 (1926)	<i>passim</i>
<u>State v. Harris</u> , 275 S.C. 463, 272 S.E.2d 636 (1980)	19, 20
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	13, 14, 15
<u>State v. Rivera</u> , 402 S.C. 225, 741 S.E.2d 694, 707 (2013)	19

Rules

Rule 18, SCRCrimP	3, 18, 20
Rule 401, SCRE	17
Rule 804	<i>passim</i>

STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by excluding the testimony of Hampton Police Officer Johnny Wells that the decedent told him "Douglas" shot him where the decedent had been shot in the face, he was badly bleeding, it appeared to Wells the decedent was about to die, and the decedent indeed died shortly thereafter, since this statement was admissible pursuant to Rule 804(b)(2) as a statement under belief of impending death?

2.

Whether the court erred by ruling it would not allow defense counsel to argue for the admissibility of the dying declaration because the court had done its own research, since this was an arbitrary ruling, it violated Rule 18(a), SCRCrimP, and it denied appellant his right to be heard fully in his defense?

STATEMENT OF THE CASE

Appellant was indicted by the Hampton County Grand Jury for the offense of murder. R. 181. His case came on for trial on February 4, 2015 before the Honorable Perry M. Buckner, III, and a jury. Steve Knight was the assistant solicitor. Robert Hughes was defense counsel. R. 1.

On February 7, 2015 the jury found appellant guilty of murder. R. 174, ll. 17-22. Judge Buckner sentenced appellant to thirty years imprisonment. R. 179, l. 23 – 180, l. 30.

This appeal follows.

ARGUMENT

1.

The court erred by excluding the testimony of Hampton Police Officer Johnny Wells that the decedent told him "Douglas" shot him where the decedent had been shot in the face, he was badly bleeding, it appeared to Wells the decedent was about to die, and the decedent indeed died shortly thereafter, since this statement was admissible pursuant to Rule 804(b)(2) as a statement under belief of impending death.

Relevant facts

Officer Johnny Wells

The defense proffered the testimony of Hampton Police Officer Johnny Wells. Wells testified on December 1, 2012, he was an officer "with the Hampton Police Department, Sergeant, night shift. We got a call, shots fired, at Gray's Paradise." R. 123, ll. 3-13. Wells waited for "backup" given the "type of incident." R. 123, ll. 10-20.

Officer Wells saw the decedent, Xavier Rodd, walking down the street. The decedent told Officer Wells : "'I got shot,' that's what he said when I encountered him. And at the time, there was other officers on [the] scene and we was trying to find out who shot him. About that time, he started to fall to the ground and I grabbed him. He was bleeding; blood was all over the place. It was kind of muffled with his talking, but there was something in his mouth, which was a lot of blood, and a lot of blood was coming out, and it was very difficult to understand exactly what he was saying, but he was trying to say something. In my experience with law enforcement and dealing with this type of situation, it appeared to me that he was about to die. *So at that time, I never asked him who shot him, there was another officer who asked him who shot him. But I was there; I*

asked him do he believe in God. And at that time, he spoke clearer than I have ever heard him speak during the whole confrontation. His response was, 'Yeah. Yeah, yeah, yeah, yeah, yeah. Yeah.' That's what he said when I asked him do he believe in God." R. 124, l. 6

- 125. l. 3. The following then occurred with Officer Wells.

And when he said that, in my mind I was thinking of John 3 and 16, "For God so loved the world that He gave His only begotten Son that whosoever believeth in Him should not perish but have everlasting life." So I wanted to make sure that he believed that because I knew that this was a very critical moment. So at that point, I began to pray for him as I held him *as he was taking his last breath.*

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

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

Q. Do you recall that name?

A. Yes, I do.

Q. What was it?

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

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

A. Yes, sir, I did.

Mr. Hughes: Your Honor, that would be basically - - -

The Court: That's your proffer?

Mr. Hughes: That's my proffer. Cross-examination.

R. 125, ll. 4-22. (emphasis added).

On cross-examination, Wells testified that the decedent told him and Officer Teddy Scott more than once that Douglas was the person who shot him. Wells said he was holding "Mr. Rodd in my hand" at the time and that he was spitting out blood and mumbling.

However, the decedent was able to tell the two police officers that "Douglas" was the man who shot him. R. 126, 3-23.

Wells also testified that the decedent "wasn't really mumbling. He answered the question. He was saying, 'my mouth, my mouth.' I know he said, 'Douglas,' and he also said, 'I don't want to die.' That's what I recall." R. 127, ll. 9-15.

The solicitor argued that there had not been any testimony from a medical expert or from "EMS," that the decedent believed his death was imminent. "I think that's part of the criteria to get a declaration in is that the victim believed that death was imminent." R. 127, l. 22 – 128, l. 4. The trial judge then interjected third party guilt into the discussion. The solicitor then claimed:

"Yes, sir, that's what it appears. There's got to be more testimony from the defendant as to the person, time, and place who did the killing; the third party, so to speak. We don't have anything. As I see the case law, and I'm sure the Court has this case, because I think you showed it to me, State v. Holmes, the criteria it laid out there. Hasn't been met in this case in his testimony at all."

R. 128, ll. 7-24. (emphasis added).

Defense counsel started to tell the judge that he did not know who Douglas was because the one witness he had "as to who Douglas was [was the decedent]." The judge cut defense counsel off at the point but defense counsel did tell the judge it was the defense's position under Rule 804(b)(2), SCRE that the decedent's statement was admissible as a dying declaration. R. 128, l. 23 – 129, l. 13.

The trial judge cited to State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926) wherein the Supreme Court held that a statement by the decedent was admissible as a dying declaration. In State v. Hall our Supreme Court wrote: "To render these declarations admissible, it was

only necessary that the trial judge should be satisfied: First, that the death of the deceased was imminent at the time the declarations were made; second, that the deceased was so fully aware of this as to be without hope of recovery; third, that, the subject of the charge was the death of the declarant, and the circumstances of the death was (were?), the subject of the declaration.” State v. Hall, 134 S.C. 361, 133 S.E. 24, 26 (1926). The trial judge ruled that Officer Wells could not testify that before the decedent died he told him that “Douglas” was the person that shot him. R. 130, l. 8 – 132, l. 22. The judge reasoned:

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

Mr. Hughes: *Your Honor, may I argue?*

The Court: *No sir, no more argument because I've researched this for two days, Mr. Hughes. I think I'm very familiar with it. I think that's sufficient. The record is protected. You've made a proffer of the witness. I've listened to the testimony and allowed you to do it, and I've listened to the argument of the solicitor and you and I've ruled on the matter. I'll be happy for you to call this witness, but I sustain the objection as to the testimony as to what he heard as far as the name.*

Mr. Hughes: *May I place my objection on the record?*

The Court: *Your objection is on the record. You opposed the motion of the solicitor and it is noted on the record.*

R. 132, l. 7 – 133, l. 1. (emphasis added).

Other evidence

Varnville Police Officer Teddy Scott testified that he was dispatched to Gray's Paradise Club in the early morning hours of December 1, 2002. He was told: "There was (sic) shots fired." R. 8, ll. 2-22.

Officer Scott remembered that he talked to the owner of the club when he arrived. "After talking with Alfred Gray, I went down Tillman Avenue and met with another officer and the victim was sitting on the side of the vehicle." R. 9, ll. 6-8. The decedent was leaning against Officer Chambers' police cruiser. Officer Scott remembered: "He was bleeding and stuff, I asked who shot him . . . Mostly it was gurgle coming from him, but I do remember him asking me about the ambulance." Scott said when he asked the decedent who shot him "he mumbled something but I couldn't understand what he was saying." R. 9, l. 5 – 10, l. 5.

Officer Scott also said he tried to have the decedent write down who shot him but "apparently, he was too weak and kind of out of it from the gunshot wound . . . so he really couldn't write anything. It was more like a scribble, and I couldn't understand what it was." R. 11, l. 14 – 12, l. 5.

Officer Scott remembered that Officer Johnny Wells with the "Hampton Police Department," was also on the scene at the time. R. 14, ll. 2-22. Scott said that officer Wells was talking to the decedent but he claimed the decedent did not say anything to Officer Wells in reply. R. 14, ll. 21 – 15, l. 4.

Varnville Police Department Officer Marion Chambers was also on the scene on December 1, 2002 at Gray's Paradise Club. Chambers remembered it was approximately two o'clock in the morning. R. 16, ll. 6-24. Officer Chambers recalled that the decedent

was bleeding "profusely." R. 17, ll. 3-23. Chambers said he attempted to talk to the decedent but the decedent said "nothing." R. 17, ll. 10-13. Officer Chambers said that Officer Johnny Wells "may have" talked to the decedent also but "I wasn't present for any conversation with Johnny Wells and the victim." R. 18, ll. 2-6.

Hampton County EMS Paramedic Renatta Ford testified that the decedent had a gunshot wound "in the cheek." R. 21, ll. 5-21. EMS workers cut the decedent's clothes off, and the decedent pointed to his mouth. "That's when we realized all of his teeth on the right side were shattered." R. 22, ll. 7-12. "That's all he did the whole time was point to his mouth; no verbal communication at all . . . The only time I really see that type of agitation is when someone is having an asthma attack and unable to breath. He was agitated, had anxiety, you know, on the verge of panicking because he was having issues breathing." R. 22, l. 20 – 23, l. 5.

Q. At that time that you were treating him, was death imminent for him?

A. I cannot say that. When I had him in the back of the truck he had a heart rate. He had a lot of blood loss, but I can only talk about how he was in the back of the ambulance.

Q. How was his heart rate?

A. His heart rate was within normal limits, but the lower part of it.

R. 23, l. 19 – 24, l. 2.

On cross-examination by Defense Counsel Hughes he asked Ford "do you feel like he felt he was dying?" The solicitor objected but he did not state a reason for his objection. When defense counsel asked: "Would your gut say that he thought he was dying?" The judge sustained the objection. R. 26, ll. 7-19.

Markeisha Smith testified it was her birthday party they were celebrating at Gray's Paradise Club that night and early morning. She identified a photograph of Appellant Green and he girlfriend at the party. She identified the shirt that appellant was wearing. R. 27, l. 12 – 30, l. 22.

Taylor McQuire testified that he was a high school graduate, and he also had "a little college." McQuire knew appellant but he did not know the decedent. R. 48, ll. 3-14. McQuire testified he saw appellant with a gun that evening. R. 49, ll. 16-17; 51, ll. 13-15. McQuire was smoking marijuana that evening, but he maintained he was not drinking. R. 54, ll. 22-25.

McQuire recalled it was very dark outside when he heard a gunshot "go off." He quickly drove away in his car to "get out of there." R. 51, l. 13 – 52, l. 10.

Clarence Riley testified he went to the club that evening with appellant. Riley said that the two men "just wanted to go to the party that day." R. 55, l. 22 – 56, l. 12. Riley told the solicitor that he gave appellant a gun that evening "because he asked for it." Appellant did not give any reason for wanting his gun. R. 56, l. 20 – 57, l. 5. Despite the presence of the gun or guns the conversation was lighthearted: "Just girls and the party, stuff like that." R. 56, ll. 21-24.

Riley remembered seeing appellant "minutes" after he heard the gunshots. Riley maintained when they left the club to go to McDonalds it seemed to him that appellant "was just like somebody like he was running or something, like he was just was out of breath." R. 58, l. 22 – 59, l. 14.

Riley said the next day he got "rid of it [the gun]." Riley told the jurors: "Shit, I ain't want it. I didn't want it in my hands, if somebody did something with it." R. 60, ll. 15-22.

Joseph Smoaks was incarcerated at the time of the trial. He remembered giving a videotaped statement to Chief Tyrone Smith on January 17, 2013. Smoaks did not remember what he told Smith that day. R. 78, ll. 3-16.

When the solicitor played the four-minute videotape for the jury, Smoaks told the jurors that everything he said on the video "was a lie. And I'm willing to own up to my responsibilities . . . that statement I gave him was a lie." R. 78, l. 17 – 79, l. 24.

Pathologist Lee Marie Tormos performed the autopsy on the decedent the next morning, at "9:00 a.m. on December 2, 2012. R. 84, ll. 15-22. Dr. Tormos testified that the decedent was shot in the face: "Specifically, the lower lip." "He was also bleeding internally into the chest cavities and it was also going down his windpipe into his lungs. He was aspirating blood." "He was breathing in the blood. It was going into his lungs." The decedent was also shot in the right arm, which was painful, but it was not the deadly wound. R. 85, l. 8 – 86, l. 22.

On cross-examination Dr. Tormos acknowledged that the decedent's "internal jugular was severed." Despite that fact she was not surprised to learn the decedent had walked approximately 500 yards after he was shot. Dr. Tormos said it was also possible that the decedent talked after he was shot. R. 89, l. 22- 90, l. 4.

SLED agent Jennifer Stoner testified that she tested a "blue, white and pink plaid shirt" -- allegedly worn by appellant that night -- for gunshot residue. R. 93, ll. 16-24. "I found gunshot residue and particles that are consistent with gunshot residue on the shirt."

Stoner concluded that this meant that the shirt was near a weapon when it was fired. R. 97, l. 19 – 98, l. 16. Stoner admitted she could only testify the shirt she tested was “a sweatshirt belonging to a suspect.” R. 99, ll. 17-23.

Dontae Collins testified that he went to the Paradise Club with Taylor McQuire that evening. He did not see appellant at the club. R. 114, l. 20 – 115, l. 15.

Collins acknowledged he gave Chief Smith a statement on December 8, 2012. When that three-minute videotape of the statement was played for the jury, Collins told the jury: “I lied, and I didn’t see Dalonte shoot anybody.” R. 116, ll. 4-14. The videotape, State’s Exhibit 12, is before this Court for viewing.

Discussion

Rule 804(b)(2) provides a hearsay exception for a “statement under belief of impending death.” “In a prosecution for homicide . . . a statement made by a declarant while believing the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death” is admissible.

In State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001), the defense argued that the victim’s identification of “SP” as her killer under the dying declaration exception to the hearsay rule, 804(b)(2), SCRE was error because there was no evidence the victim believed her death was imminent. Further, the victim did not die until two weeks after making the alleged statement. The Supreme Court disagreed with the defense arguments. It held that the statement was admissible as dying declaration.

The Supreme Court wrote: “[A] statement made under the belief of impending death is not excluded by the hearsay rule if the declarant is unavailable as a witness in a prosecution for homicide, the statement is made by the declarant while believing the

declarant's death is imminent, and the statement concerned the causes or circumstances of what the declarant believed to be impending death." State v. McHoney, 344 S.C. at 92, 544 S.E.2d at 92. In McHoney the Supreme Court recognized that medical personnel assured the victim that she would be "fine." There was other evidence that the victim shook her head as if to say she did not believe the medical personnel, and she thought she was going to die. The Court noted that the person does not have to express, *in direct terms*, his or her awareness of their condition for the statement to be admissible as a dying declaration. "The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration." State v. McHoney, 344 S.C. at 93, 544 S.E.2d at 33.

The Court also held that a person can be aware of imminent death *even when he is assured he will not die and that he will be fine*. The Court further held that the length of time the person actually lives after making the dying declaration is immaterial. "The focus is on the declarant's state of mind when the statement is made, not on the eventual outcome of the decedent's injuries." See State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926). In State v. Hall, we held a dying declaration was properly admitted when the declaration was made shortly after the injury, and the declarant died thirty-three days later. We held it was the jury's duty to pass upon the credibility of the dying declaration, and the length of time between the declaration and death is just one factor to be considered. *Id* at 361, 133 S.E. at 26." State v. McHoney, 344 S.C. at 93-94, 544 S.E.2d at 34.

As seen, the autopsy on the decedent was performed at 9:00 the next morning, December 2, 2012. Law enforcement estimated the relevant events occurred around 2 A.M. on December 1, 2012. R. 84, ll. 13-24. In McHoney the victim died two weeks after her injuries. The Court wrote that this did *not* indicate the victim did *not* believe her death was

imminent at the time she gave her statement. The Court in McHoney also held that the victim's statement was, in addition, admissible as an excited utterance under Rule 803(2), SCRE. It was a statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. State v. McHoney, 344 S.C. at 94, 544 S.E.2d at 34.

In this case, the decedent knew he was badly injured because he was bleeding profusely, his teeth were shattered, blood was coming out of his mouth, and he was panicking because it was hard for him to breathe. He died the same day or early the next day.

The trial judge erred, while citing State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926), in support of his ruling. The judge reasoned that for the dying declaration to be admissible it must also meet all of the elements for evidence of third party guilt. That respectfully was error.

In State v. Hall, the victim was not shot. The victim in Hall had a compound fracture of his ribs, the fracture had pierced his lungs and it opened up raw lung tissue in connection with his windpipe. The decedent identified "Fred Hall" as his killer. The decedent lived for thirty-five days after making the dying declaration. See State v. Hall, 134 S.C. at 361, 133 S.E. at 25.

The Supreme Court in State v. Hall, which was a case prior to the adoption of the Rules of Evidence in 1995, reasoned that for a dying declaration to be admissible the judge must be satisfied of three things: "First, that the death was imminent at the time the declarations were made; second, that the deceased was so fully aware of this as to be without hope of recovery; third, that the subject of the charge was the death of the declarant

and the circumstances of the death was (were?) the subject of the declarations.” State v. Hall, 133 S.E. at 26. The Court also held that while the length of time elapsing between the making of the declaration and death was just one factor to be considered.

Rule 804(b)(2) only requires that the statement be made by the declarant “while believing that the declarant’s death was imminent, concerning the cause of circumstances of what the declarant believed to be impending death.” It then became a jury question for the trier of fact whether to believe the dying declaration actually occurred, and what it meant.

In this case, it was a jury question whether the jury believed Officer Johnny Wells was told by the decedent that Douglas shot him.. Appellant did not have a burden to establish who Douglas was, and how it was likely that Douglas and not that he, the appellant, was actually the murderer. That simply was not part of the Rule 804(b)(2), SCRE analysis.

In State v. Bethea, 241 S.C. 16, 126 S.E.2d 846 (1962), the state’s evidence was that Bethea shot his Mistress. They had argued earlier in the night about Bethea breaking off the relationship with his Mistress, the decedent. The sheriff testified that he was called to the decedent’s home at 10:30 in the evening, and that the decedent was bleeding profusely. She was unable to move her legs. The decedent told the sheriff: “‘Bill shot me,’ I asked her why he had shot her and she said, ‘for no reason at all other than he got mad,’ she further stated ‘I’m going to die and I don’t care,’ says, ‘I want him to pay.’” State v. Bethea, 241 S.C. at 21, 126 S.E.2d at 849. Our Supreme Court in Bethea held that the deceased’s statement was admissible as a dying declaration.

Here, evidence that the decedent told Officer Wells that Douglas shot him was obviously relevant. The major issue in a murder is the identity of the murderer. Rule 401, SCRE.

The judge erred as a matter of law by ruling that Rule 804(b)(2), SCRE also required a finding by the trial judge that the dying declaration was also admissible as evidence of third party guilt if the dying declaration did not identify the defendant as the killer under Rule 804(b)(2), SCRE. Respectfully, *this additional element* could easily been included in Rule 804(b)(2), SCRE if it was an additional element. The "third party guilt" qualifier is an element of Rule 804(b)(3), SCRE on a "Statement Against Interest," and it is not included in Rule 804(b)(2) on a "Statement Under Belief of Impending Death." The rule in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), did not preclude that admission of the dying declaration in this case. See, also, Holmes v. South Carolina, 547 U.S. 319 (2006).

The dying declaration was obviously relevant under Rule 401, SCRE. It met the elements of Rule 804(b)(2), SCRE and the trial court erred by excluding it on an erroneous legal basis. Appellant should be granted a new trial.

2.

The court erred by twice ruling it would not allow defense counsel to argue for the admissibility of the dying declaration because the court had done its own research, since this was an arbitrary ruling, it violated Rule 18(a), SCRCrimP, and denied it appellant his right to be heard fully in his defense.

As seen, the trial judge refused - - - twice - - to allow defense counsel to argue for the admissibility of the dying declaration. The judge let the solicitor argue. However, when it should have been the opportunity for defense counsel to argue, the judge said he had done his own research, and that he did not want to hear from defense counsel.

Rule 18(a), SCRCrimP, states "counsel should not attempt to further argue any matter after he has been heard and ruling of the court has been announced." (Emphasis added). The judge erred by refusing to allow the defense to be heard on the admission of the dying declaration. Respectfully, the judge having conducted his own legal research was immaterial to the right of the defense to present its argument and its research supporting its argument. Further, the judge's ruling that the dying declaration also had to be admissible as third party guilt evidence was certainly subject to serious debate or argument (since that is incorrect).

If defense counsel had been allowed to be heard, the trial judge may have been convinced that the statement by the decedent was admissible as a dying declaration under Rule 804(b)(2), SCRE. Yet, as seen above, the judge did not even allow defense counsel the right to ask Hampton County EMS Paramedic Renatta Ford if she thought the decedent was dying. R. 26, ll. 3-18. Most respectfully to the trial court,, this record leads to the inescapable conclusion that the court had made up its mind on the dying declaration issue.

In State v. Cash, 138 S.C. 167, 136 S.E. 222 (1927), the Supreme Court recognized the defendant has a right to be fully heard in his defense by himself or through counsel. The court held that the limitation on closing argument to one hour was reversible error.

It was an arbitrary abuse of discretion in this case for the judge to refuse to allow the defense to be heard after allowing full and specious argument by the solicitor as to why the dying declaration, in the solicitor's opinion, was not admissible. The right to be heard goes to the core of the right to a fair trial, and in this case the defense was denied the right to be heard on the admissibility of the evidence of the identity of the killer – the dying declaration.

Appellant respectfully submits that the denial of the right to be heard in this case was not an error amenable to a harmless error analysis, and therefore it must be considered a structural error. In State v. Rivera, 402 S.C. 225, 249, 250, 741 S.E.2d 694, 707 (2013), the Court considered the trial judge's refusal to allow Rivera to testify because he wanted to confess to another unrelated murder in the presence of the jury. In reversing Rivera's conviction the Supreme Court noted that "the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify 'is either respected or denied; its deprivation cannot be harmless.' As such, the error is structural in that it is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" State v. Rivera, 402 S.C. 225, 249, 250, 741 S.E.2d 694, 707 (2013). (Court's emphasis; internal citations omitted).

In State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980), the Supreme Court held that the trial judge did not abuse his discretion in limiting the parties scope of opening

statements. However, the Court noted that “an example of an abuse *might be where a trial judge gave the solicitor an opportunity to address the facts but then denied defense counsel the same privilege.* In this case the solicitor did not outline the facts in his opening, nor did he seek leave to do so. Another example of an abuse would be where the effect of the denial by the trial judge would be *to substantially impair a criminal defendant's right to be heard on his defense.*” 275 S.C. at 465-466, 272 S.E.2d at 638.

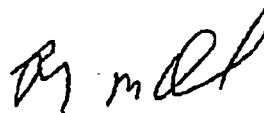
The trial court arbitrarily abused its discretion by allowing the solicitor to be heard, but denying the defense the right to argue for the admissibility of the dying declaration because it had conducted its own research. This violated Rule 18, (a), SCRCrimP, it denied appellant his fundamental right to be heard on the critical evidentiary issue in the case, and it denied appellant a fair trial.

Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Hampton County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

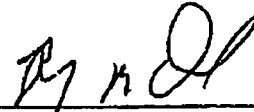
ATTORNEY FOR APPELLANT

This 11th day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

October 11th, 2016



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Perry M. Buckner, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

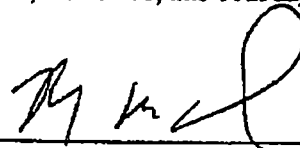
V.

DALONTE GREEN,

APPELLANT

CERTIFICATE OF SERVICE

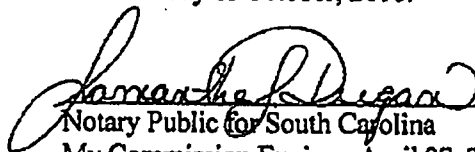
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Susannah R. Cole, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of October, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of October, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.

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

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

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
APPELLANT'S STATEMENT OF ISSUES ON APPEAL.....	1
RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
ARGUMENT	12

I.

The admissibility of the victim's statement is not preserved for review because Appellant refused to argue the statement's relevance at trial, stating, "I'm not exactly saying the third party did it. I'm just wanting the jury to hear the victim's final words" and now argues an inconsistent position on appeal. However, the trial judge properly excluded evidence a law enforcement officer heard Victim say the name "Douglas" after he was shot because the statement created mere conjecture a third party shot the victim and did not meet the requirements for third party guilt. 12

II.

After hearing arguments from the State and the defense, the trial court made a thorough and well-reasoned ruling on the admissibility of evidence of third party guilt in accordance with the guidelines of SCRCrimP Rule 18(a) and (b). The court's refusal to allow further argument after the ruling was within his discretion and was not structural error, which is rarely determined and only found in limited circumstances. 22

CONCLUSION	25
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TABLE OF AUTHORITIES

Federal Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	21
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	22
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006).....	15
<i>McKaskle v. Wiggins</i> , 465 U.S. 168, (1984).....	22
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	22
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	22
<i>United States v. Davila</i> , 133 S. Ct. 2139, 186 L. Ed. 2d 139 (2013).....	22
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984).....	22

State Cases

<i>Lorenzen v. State</i> , 376 S.C. 521, 657 S.E. 2d 771 (2008).....	16
<i>Miller v. State</i> , 379 S.C. 108, 665 S.E.2d 596 (2008).....	15
<i>State v. Adams</i> , 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).....	14
<i>State v. Benton</i> , 338 S.C. 151, 156–57, 526 S.E.2d 228, 231 (2000).....	13
<i>State v. Bethea</i> , 241 S.C. 16, 126 S.E.2d 846(1962).....	18, 22
<i>State v. Bixby</i> 388 S.C. 528, 698 S.E.2d 572 (2010).....	14
<i>State v. Breeze</i> , 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008).....	13
<i>State v. Burgess</i> , 391 S.C. 15, 703 S.E.2d 512 (2010).....	15
<i>State v. Cooley</i> , 342 S.C. 63, 536 S.E.2d 666 (2000).....	14
<i>State v. Cope</i> , 385 S.C. 274, 684 S.E.2d 177 (Ct.App.2009).....	15
<i>State v. Gaster</i> , 349 S.C. 545, 564 S.E.2d 87 (2002).....	14
<i>State v. Graham</i> , 314 S.C. 383, 444 S.E.2d 525 (1994).....	19, 20
<i>State v. Gregory</i> , 198 S.C. 98, 16 S.E.2d 532 (1941).....	15, 16
<i>State v. Hall</i> , 134 S.C. 361, 133 S.E. 24 (1926).....	17, 18
<i>State v. Hamilton</i> , 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).....	14
<i>State v. Holder</i> , 382 S.C. 278, 676 S.E.2d 690 (2009).....	14
<i>State v. Horton</i> , 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004).....	14
<i>State v. Kelley</i> , 319 S.C. 173, 460 S.E.2d 368 (1995).....	13
<i>State v. Lee</i> , 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012).....	14
<i>State v. McDonald</i> , 343 S.C. 319, 540 S.E.2d 464 (2000).....	13
<i>State v. McHoney</i> , 344 S.C. 85, 544 S.E.2d 30 (2001).....	17
<i>State v. McLeod</i> , 362 S.C. 73, 606 S.E.2d 215 (S.C. App. 2004).....	14
<i>State v. Mitchell</i> , 286 S.C. 572, 336 S.E.2d 150 (1985).....	19, 21
<i>State v. Rivera</i> , 402 S.C. 225, 741 S.E.2d 694 (1013).....	21, 22
<i>State v. Russell</i> , 383 S.C. 447, 679 S.E.2d 542 (2009).....	14
<i>State v. Salley</i> , 398 S.C. 160, 727 S.E.2d 740 (2012).....	14
<i>State v. Saltz</i> , 346 S.C. 114, 551 S.E.2d 240 (2001).....	13
<i>State v. Shelton</i> , 270 S.C. 577, 243 S.E.2d 455 (1978).....	24
<i>State v. Sinclair</i> , 275 S.C. 608, 274 S.E.2d 411 (1981).....	24
<i>State v. Swafford</i> , 375 S.C. 637, 654 S.E.2d 297 (Ct.App.2007).....	15
<i>State v. Tuckness</i> , 257 S.C. 295, 185 S.E.2d 607 (1971).....	24
<i>State v. Tynes</i> , 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013).....	14

<i>State v. Wiles</i> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	14
<i>TNS Mills, Inc. v. South Carolina Dep't of Revenue</i> , 331 S.C. 611, 503 S.E.2d 471(1998)	13

State Rules

Rule 18 SCRCrimP	23, 24
Rule 401 SCORE.....	13, 14
Rule 403, SCORE.....	14
Rule 801(c), SCORE.....	17
Rule 802, SCORE.....	17
Rule 804(b)(2), SCORE.....	17, 18
SCRCrimP Rule 18(a).....	i, 1, 21, 23

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

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

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

This appeal follows.

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How the Issue Was Presented at Trial

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

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

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

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

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

Q: Do you recall that name?

A: Yes, I do.

Q: What was it?

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

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

A: Yes, sir, I did.

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

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

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

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

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

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

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

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

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

Q: Did repeat himself? "Douglas" more than once?

A: Yes, he did.

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

A: Yes.

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

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

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

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

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

THE COURT: Repeat the question.

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

Q: How did he do that?

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

Q: But he was mumbling, correct?

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

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

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

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

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

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

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

MR. HUGHES: It's hearsay.

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

MR. HUGHES: That is my position.

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

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

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

The Court's Ruling on Evidence of Third Party Guilt

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

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

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

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

Evidence which can have no other effect other than to cast a bare suspicion upon another or to raise a conjectural inference as to the commission of the crime by another is not admissible under our rules for third party guilt. I've looked at a number of third party guilt cases, including the case you provided to me in a number of cases that my law clerk provided to me.

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

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

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

And this Court, following the rule that was announced -- and that assumes you're correct that this is a dying declaration. But the rule announced in Gregory says that "Evidence offered by the accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and as such facts as raised a reasonable inference, or presumption, as to his own innocence. Evidence which can have no other affected," in this case the word single quote Douglas," than to cast a bare suspicion upon another or to raise a conjectural inference as to the commission of the crime by another is not admissible."

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

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

ARGUMENT

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

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

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

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

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

The Relevance of the Statement Is Not Preserved for Review

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

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

Standard of Review

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

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

Relevance and Rule 403

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

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

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

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

The admissibility of evidence of third-party guilt is governed by the rule set forth in *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). See *State v. Cope*, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct.App.2009) (quoting *State v. Gregory* as the rule governing admissibility of evidence of third-party guilt); *State v. Swafford*, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct.App.2007) (affirming application of *State v. Gregory*). In *Gregory*, our Supreme Court stated:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. 98, 104-105, 16 S.E.2d 532, 534-35(1941) (emphasis added). The United States Supreme Court clarified the above-outlined rule regarding the admission of third-party guilt in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). *Holmes* found

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

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

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

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

Statement Upon Belief of Impending Death

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

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

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

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

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

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

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

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

Harmless Error

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 30, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

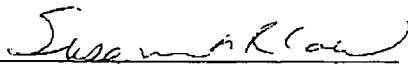
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DALONTE GREEN,

Appellant.

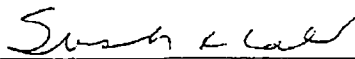
Appellate Case No. 2015-001059

PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same via inter-agency mail, addressed to his attorney of record at:

Robert Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of September, 2016.



Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Dalonte Green, Appellant.

Appellate Case No. 2015-001059

Appeal From Hampton County
Perry M. Buckner, III, Circuit Court Judge

Unpublished Opinion No. 2018-UP-092
Heard December 5, 2017 – Filed February 21, 2018

REVERSED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Susannah Rawl Cole, all of Columbia;
and Solicitor Isaac McDuffie Stone, III, of Bluffton, for
Respondent.

PER CURIAM: Dalonte Green appeals his conviction of murder, arguing the circuit court erred in (1) excluding the testimony of Sergeant Johnny Wells under

the third-party guilt rule and (2) refusing to allow defense counsel to argue for the testimony's admissibility after ruling it was not admissible. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On December 1, 2012, police officers responded to a shooting at a nightclub and found Xavier Rodd (Victim) bleeding profusely from a gunshot wound to his mouth, which lacerated his jugular vein and proved to be fatal. Multiple officers claimed Victim could not speak due to his injury. Although he attempted to write the name of the shooter, Victim's handwriting was illegible because his wound rendered him weak and delirious. Ten days after the shooting, police discovered a plaid shirt with gunshot residue at an abandoned residence, approximately thirty-five feet from the nightclub.

At trial, witnesses testified to events surrounding the shooting. Markeisha Smith testified she saw Green at the nightclub wearing the same plaid shirt found by police. Clarence Riley testified Green was wearing a white shirt and had a plaid shirt around his shoulders while outside the nightclub; however, after the shooting, Riley recalled Green wore only the white shirt. Riley testified he gave Green a gun outside the nightclub. Moreover, Taylor McQuire testified he saw Green with a gun in the nightclub parking lot and heard a gunshot. Riley claimed Green gave the gun back to him that night, but the next day, Riley disposed of the gun because he heard Green "did something with [it]." Additionally, Riley stated that minutes after the shooting, he, Green, Green's girlfriend, and another female drove away from the nightclub together. Riley recalled Green was out of breath "like he was running or something" and Green's girlfriend was "[p]icking something off his shirt."

Out of the presence of the jury, Green proffered the testimony of Sergeant Wells as to Victim's dying declaration under Rule 804(b)(2), SCRE.¹ Sergeant Wells testified that, while waiting for backup from other officers, he discovered Victim walking down the street when Victim told him, "I got shot."

¹ "In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" is not excluded by the hearsay rule if the declarant is unavailable as a witness. Rule 804(b)(2), SCRE.

As Sergeant Wells and the other officers sought to identify the shooter, Victim started to fall, prompting Sergeant Wells to grab him. Sergeant Wells described Victim was difficult to understand because of the amount of blood coming from his mouth; nevertheless, Sergeant Wells believed Victim was attempting to convey a message. Sergeant Wells testified,

In my experience with law enforcement and dealing with this type of situation, it appeared to me that he was about to die. So at that time, I never asked him who shot him, there was another officer who asked him who shot him. But I was there; I asked him d[id] he believe in God. And at that time, he spoke clearer than I have ever heard him speak during the whole confrontation. His response was, 'Yeah. Yeah, yeah, yeah, yeah, yeah. Yeah.' That's what he said when I asked him do[es] he believe in God.

Sergeant Wells recalled praying for Victim while he took his final breath. Green questioned Sergeant Wells on direct examination:

[Green:] Did he answer the question of who killed him?

[Sergeant Wells:] Well, I do believe he said a name.

[Green:] Do you recall that name?

[Sergeant Wells:] Yes, I do.

[Green:] What was it?

[Sergeant Wells:] The name I heard him say at that time was Douglas.

[Green:] And you were sure enough to write that time in an incident report?

[Sergeant Wells:] Yes, sir, I did.

On cross-examination, Sergeant Wells testified Victim told him and another officer multiple times that Douglas was the person who shot him. Sergeant Wells clarified Victim was not mumbling, answered the question, and repeated "my mouth."

Moreover, Sergeant Wells asserted he knew Victim said "Douglas" and Victim also said he did not want to die.

The State argued against the admission of Sergeant Wells's testimony because the rule regarding evidence of third-party guilt required Green to provide more testimony regarding the person, time, or place detailing who did the killing. In response, Green asserted he did not solicit the testimony to assign guilt to a third party; rather, he only wished to introduce the statement as a dying declaration. The circuit court stated that while the statement could be admissible as a dying declaration, it needed to examine the evidence under the third-party guilt rule. The court determined Green's evidence "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." Accordingly, the court sustained the State's objection, finding Sergeant Wells's testimony merely "raise[d] the bare suspicion of third[-]party guilt without any other evidence to support that conclusion," and ruled Sergeant Wells could not testify to hearing the name Douglas.² Subsequently, the circuit court declined to hear any more arguments on the matter.

The jury convicted Green of murder, and the circuit court sentenced him to thirty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law" *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "The [circuit] court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).

LAW/ANALYSIS

² Green declined to call Sergeant Wells as a witness and also elected not to testify.

Green argues the circuit court erred in excluding the testimony of Sergeant Wells under the third-party guilt rule because it was within the exclusive province of the jury to determine whether Sergeant Wells's testimony was credible. We agree.

"All relevant evidence is admissible." *State v. Pagan*, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App. 2004), *aff'd as modified*, 369 S.C. 201, 631 S.E.2d 262 (2006). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). However, hearsay is not admissible unless it fits within an exception or exclusion to the hearsay rule. Rules 801 and 802, SCRE. A statement made under the belief of impending death is not excluded by the hearsay rule if the declarant is unavailable as a witness in a prosecution for homicide, the statement is made by a declarant while believing the declarant's death is imminent, and the statement concerned the causes or circumstances of what the declarant believed to be impending death. Rule 804(b)(2), SCRE.

In the instant case, Green proffered Sergeant Wells's testimony as a dying declaration by Victim. We find the testimony qualified as a dying declaration because Victim was unavailable as a witness, Green was on trial for murder, the circumstances showed Victim believed his death was imminent, and Victim's statement concerned the cause of what he believed to be his impending death—the name of the person who shot him. *See State v. McHoney*, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001) ("A declarant does not have to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration. The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration.").

The United States Supreme Court clarified the third-party guilt rule in *Holmes v. South Carolina*, 547 U.S. 319 (2006), which vacated our supreme court's decision in *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004). The Supreme Court held the exclusion of defense evidence of third-party guilt—on the ground that the proffered evidence did not raise a reasonable inference as to the defendant's own innocence—denied the defendant a fair trial. *Holmes*, 547 U.S. at 331. The Court emphasized "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Id.* at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). The Court explained,

Just because the [State]'s evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And whe[n] the credibility of the [State]'s witnesses or the reliability of its evidence is not conceded, the strength of the [State]'s case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact

Id. at 330. The Court affirmed the third-party guilt rule but cautioned that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331.

The circuit court found Sergeant Wells's testimony as to Victim's dying declaration was inadmissible because it raised the bare suspicion of third-party guilt without any other evidence to support that conclusion. We find reversible error in the circuit court's exclusion of the testimony on the basis of third-party guilt. After the circuit court determined Sergeant Wells's testimony qualified as a dying declaration, it became a jury question whether Victim actually told Sergeant Wells that Douglas was the shooter. The determination of the weight to give Sergeant Wells's testimony was within the exclusive province of the jury. *See State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) ("The assessment of witness credibility is within the exclusive province of the jury."); *Soulis v. Mills Novelty Co.*, 198 S.C. 355, 364, 17 S.E.2d 869, 874 (1941) ("[T]his [c]ourt has more than once held that the jury is the judge of which contradictory statement of the witness is the truth."). Green did not have a burden to establish Douglas's identity or the likelihood that Douglas, and not Green, was the actual shooter. Green's right to present witnesses in his own defense was fundamental, and the jury had a right to evaluate the strength of both parties' evidence. *See Holmes*, 547 U.S. at 331 ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."). Therefore, we reverse the order of the circuit court and remand the case for a new trial.³ *See State v.*

³ Because we reverse and remand the case for a new trial based on this issue, we need not address the remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an

Hester, 137 S.C. 145, 161, 134 S.E. 885, 890 (1926) (providing the jury is entitled to hear all competent testimony presented, and the failure to give it such opportunity is generally prejudicial error).

REVERSED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

appellate court need not address remaining issues when its determination of another issue is dispositive of the appeal).

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Opinion No. 2018-UP-092

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

Appellate Case No. 2015-001059

PETITION FOR REHEARING

In its February 21, 2018, opinion, this Court reversed the trial judge's decision finding inadmissible the testimony of Sergeant Jonny Wells regarding the name of a presumed third party, though Appellant expressly rejected third party guilt or identity as the basis for the testimony's admission. Initially, Green only offered the context of the victim's dying words as the basis for admission,¹ then later agreed with the Court's assessment under SCRE 804(b)(2). The Court failed to address Respondent's contention Appellant did not preserve the testimony's relevance on the basis of third party guilt for this Court's review. Respondent respectfully

¹ Counsel for defense argued, "Well, Your Honor, I'm not exactly saying that the third party did it. I'm just wanting the jury to hear the victim's final words." (R. p. 129, lines 17-19.) This could be construed as arguing for admission to frame the context of the crime, or, a *res gestae* argument. Green did not, however, argue the words were relevant to the identity of the perpetrator.

submits the Court's opinion misconstrues or misapprehends important facts of record and erroneously construes and improperly applies well-established Supreme Court precedent. Therefore, pursuant to Rule 221(a), SCACR, Respondent, State of South Carolina, seeks modification of the erroneous opinion to be consistent with our State Supreme Court.

- I. **The Court of Appeals decided an issue of relevance that was not raised or relied upon by the defense for the admissibility of evidence. In so doing, the Court of Appeals misconstrued clearly established law of the Supreme Court of South Carolina.**

The procedural bar overlooked by the Court of Appeals concerns the relevance of the evidence offered by the defense, not its admissibility pursuant to either a dying declaration or third party guilt. For purposes of issue preservation, the Court of Appeals misconstrues the argument before the trial court on the basis for admission of the testimony. The trial court initially understood the testimony of Sergeant Wells was only relevant to the identity of the killer. Indeed, it is hard to imagine another basis for relevance. Nonetheless, when asked by the trial court whether the admission of the victim's statement "Douglas" shot him was in the implicated third party guilt, trial counsel rejected that argument, saying, "I'm not exactly saying that the third party did it." (R. p. 129, lines 17-19.)

Although the Court of Appeals notes this rejection of relevance in the opinion, the Court ultimately adopts the argument new presented on appeal for the first time by ruling on third party guilt and refusing to conduct a harmless error analysis. The Court's opinion addresses the relevance argument raised on appeal, not the argument raised at trial, in violation of Supreme Court of South Carolina precedent. *See TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded in the trial court cannot be argued on appeal); *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995) (a party cannot argue one ground below and then argue another ground on appeal); *State v. Benton*, 338 S.C. 151, 156-57, 526

S.E.2d 228, 231 (2000) (finding Appellant could not argue a palm print was direct evidence at trial and then argue the print was circumstantial evidence on appeal).

The Court of Appeals found the statement admissible as a dying declaration, but the statement's qualification as a hearsay exception does not end the analysis of admissibility. Admissibility must be consistent with all the Rules of Evidence to ensure fairness in the proceedings for all parties. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). Moreover, Rule 103, SCRE, provides the following:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

(emphasis added).

The defense is obligated to present its case within the confines of these rules. Green told the trial court he was not offering Wells' testimony to show a third party shot the victim. If the defense was not offering the statement for the identity of the shooter, then there was no clear relevance offered. The opinion says "Green did not have a burden to establish Douglas' identity

or the likelihood that Douglas, and not Green, was the actual shooter.” Green did, however, have a burden to show the relevance of his proffer of admission in accordance with Rule 103. If the defense sought to offer the statement to show the identity of the killer, as conceded on appeal (FBOA at p. 17), then Green was required to argue identity as the basis for admission to the trial court, particularly when the court questioned admissibility under Rule 403. Green never proffered a basis for admission, and he declined to offer relevance. Further, when pressed by this Court at oral argument, appellate counsel could not explain why trial counsel did not argue admissibility to show the identity of the killer.

Nonetheless, after suggesting the trial court’s consideration of admissibility beyond a dying declaration was improper, the Court then appears to assume relevance and assesses the testimony pursuant to the third party guilt standard. Thus, even though the Court misconstrues the holding in *Holmes*, as will be discussed in the following section, the Court’s finding on the merits of the third party guilt argument ignores the procedural bar forbidding the merits consideration of an unpreserved claim. The statement’s relevance is not preserved for review, should not be addressed by the Court of Appeals, and the court’s opinion should be vacated to the extent it addressed an issue that was not preserved. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995)).

II. Prior to Any Admission, the Trial Court Must Subject Third Party Guilt Evidence to Some Scrutiny, As Required by *Gregory*² and *Holmes*.³

Next, the Court’s opinion misconstrues the holding of *Holmes v. South Carolina* to preclude the courts from making any assessment of the evidence offered by the defense to

² *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

³ *Holmes v. South Carolina*, 547 U.S. 319 (2006).

support a third party guilt argument, instead finding the evaluation of the evidence to be within the exclusive province of the jury. The Court found the following:

Green did not have a burden to establish Douglas's identity or the likelihood that Douglas, and not Green, was the actual shooter. Green's right to present witnesses in his own defense was fundamental, and the jury had a right to evaluate the strength of both parties' evidence. *See Holmes*, 547 U.S. at 331 ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.").

This finding ignores the gatekeeping function of the trial court to make a threshold determination of the admissibility of the evidence, as mandated by *Gregory* and *Holmes*, when the defense invokes the theory of third party guilt by specifically naming a presumed⁴ third party. Respectfully, Respondent submits this finding is in error.

In *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004), the Supreme Court of South Carolina evaluated the strength of the State's case against Holmes in determining whether the evidence of another perpetrator was admissible as third party guilt. The Supreme Court concluded Holmes could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." *State v. Holmes*, at 343, 605 S.E.2d at 24. The Supreme Court of the United States vacated and remanded the state court's decision, finding the state court the erroneously considered the strength of the prosecution's case in determining admissibility. *Holmes v. South Carolina*, 547 U.S. at 329. Despite the state court's error, *Holmes* confirmed the *Gregory* standard for third party guilt as the controlling standard. *Gregory* said "before such

⁴ Because the issue of identity was not developed, we do not necessarily know if the name "Douglas" was, in fact, a third party. "Douglas" could have been a mishearing of "Dalonte," Green's first name. In other words, this testimony could have been beneficial to the defense or the State. The victim's statement is uncertain, in light of the testimony of the injuries to his mouth, and the lack of evidence pointing to an identifiable third party named Douglas. However, the Court of Appeals erroneously assumes this was an identification of a third party.

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.” *Gregory*, at 104-105, 16 S.E.2d at 534-35.

In its opinion, the Court of Appeals noted the U.S. Supreme Court’s additional warning in *Holmes* that “by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.” *Holmes* at 331. The Court of Appeals misconstrues this holding to suggest the trial court has no role in the evaluation of the defense’s proffer of third party evidence. The Court’s finding Green has no burden to establish Douglas’ identity is incorrect. If Green attempts to introduce evidence of a presumed third party’s guilt, *Holmes* and *Gregory* make it clear he does have some burden to establish a “proof of connection” “before the testimony can be received.”

Holmes did not forbid the trial court from examining the defense’s third party guilt evidence. Instead, *Holmes* found the trial court erred by considering the strength of the State’s case rather than determining the corroboration of the third party guilt by the defense. *Id.* at 328-29. Indeed, by affirming the *Gregory* standard, the U.S. Supreme Court necessarily required the trial court to make a threshold evaluation of the third party guilt evidence to determine whether “the proof of connection” exists. The Court of Appeals’ holding that this evaluation is within the exclusive province of the jury misconstrues the *Holmes* finding and would otherwise mandate the admission of any evidence of third party guilt, regardless of whether it cast only a bare suspicion of third party guilt. The opinion is also inconsistent with its holding in *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), overruled on other grounds by *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011), in which it found the trial court properly excluded evidence of

third party guilt when the witness had given an inconsistent statement to a fellow inmate naming an unknown third party as the perpetrator of the crime. The Court of Appeals cited *Holmes* and *Gregory* and said the following:

The trial court adhered to the *Gregory* rule and applied the proper standard for admission of third-party guilt evidence—there must be such proof of connection with the crime, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. The evidence Rice asserted in support of introducing the third-party guilt testimony implicated Nikki at times, and Tiki at times, with no clarification as to whether they were the same individual. The record is void of facts or circumstances, other than Bryant's inconsistent statements, linking anyone other than Rice to Brennan's murder. The proffered evidence casts a mere "bare suspicion" on Nikki or Tiki and fails to connect either to the murder by way of the facts and circumstances surrounding the crime.

Rice, at 322, 652 S.E.2d at 419. In *Rice*, the Court of Appeals affirmed the trial court's ruling on its threshold determination of the admissibility of the evidence. The Court's instant opinion appears to abandon the *Rice* line of reasoning.

Holmes also held that though the trial court erred in denying the admissibility of the statement, the limitations on the admissibility of third party guilt as outlined in *Gregory* do not deny a defendant his right to present evidence. *Id*; see also, *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (2010); *Miller v. State*, 379 S.C. 108, 114, 665 S.E.2d 596, 599 (2008). *Holmes v. South Carolina* preserves *Gregory* as the appropriate standard for evaluating the admissibility of evidence of third-party guilt. In other words, Appellant's offer of third party guilt evidence is subject to scrutiny by the trial court before its credibility falls within "the exclusive province of the jury."

To be clear, Respondent does not suggest the State is relieved of its burden to prove the identity of the perpetrator. Nor is the defense hamstrung from offering evidence that suggests the defendant is not the perpetrator. For example, in a six person photo lineup, if a witness chose photograph 1 and the defendant was pictured in photograph 5, the defense would be entitled to

offer evidence the witness could not identify him as the perpetrator. Similarly, if fingerprints were found at a crime scene that did not match those of the defendant, a jury would be entitled to hear such evidence offered by the defense. In the instant case, however, Green did not argue the evidence was admissible to show the victim did not identify him as the shooter. As noted before, he argued no relevance at all. The testimony offered, however, specifically named an individual. When a presumed third party is specifically named in evidence offered by the defense,⁵ the limitations of *Gregory* and *Holmes* are necessarily implicated. The Supreme Courts of South Carolina and the United States have affirmed the trial court's determination of some proof of connection to a third party. The Court's finding the statement is entitled to be submitted to the jury renders the holding in *Gregory* and *Holmes* meaningless. If the statement is not properly excluded here, when counsel denies its relevance to a third party, when would third party guilt evidence ever be excluded?

The trial court properly made a threshold determination of Green's proffer in accordance with prevailing case law. In reversing the trial court, the Court of Appeals erred.

III. There Was No Abuse of Discretion Pursuant to the *Holmes* and *Gregory* Standard.

Further, the Court of Appeals failed to show how the trial court abused its discretion when the court found Green failed to argue relevance by offering sufficient "proof of connection" "or circumstances, as tends clearly to point out such other person as the guilty party" for Wells' testimony to be admissible. Again, the trial court repeatedly questioned Green on the relevance of his offer of evidence pursuant to third party guilt, and Green declined to make that

⁵ Using the photo lineup and fingerprint examples, a defendant could certainly offer the testimony of the officer or the witness to show the defendant was not the individual chosen by the witness. This offer would not be in violation of Rule 403. The defense would not, however, be allowed to name the party identified in the lineup and argue that person's guilt without further proof of a connection of that third party to the crime.

offer. Green admitted he could not identify who “Douglas is because of the one witness I have as to who Douglas was.” (R. p. 128, lines 21-22.) Thus, unlike in other cases in which the third party was an identifiable person, in the instant case no other evidence was offered to show the third party actually exists. Even Appellant acknowledged this. As the trial court found, the mere mention of a name cannot give rise to a “reasonable inference or presumption as to [Appellant’s] innocence.” *Gregory*, 198 S.C. 98, 16 S.E.2d at 534. The opinion fails to acknowledge and give appropriate deference to the factual findings of record. The record fully and fairly supports Judge Buckner’s findings. To hold the trial court abused its discretion in refusing to admit the statement, when the record is replete with evidence supporting the trial court’s efforts and failure to elicit an argument on relevance from Green, is improper.

IV. Because the statement was not offered for identity, it was not relevant. Because it was irrelevant, its exclusion was harmless. The Court erred in assuming relevance and failing to conduct a proper harmless error analysis.

The Court of Appeals adopts appellate counsel’s new argument on appeal that the statement is clearly relevant to the identity of the killer despite trial counsel’s apparent rejection of that argument. The Court assumes relevance despite the trial court’s findings no other evidence supports the existence of a third party named Douglas. That assumption of relevance is not supported by the record because the identity of Douglas was never developed by the defense. It would be a harsh result to indemnify a murderer by construing the victim’s last words as an identification of a third party, when in actuality the declaration could be an error in hearing or a mistake in name.

Further, the Court offers no explanation why the failure to admit the testimony, even if considered error, was not subject to a harmless error analysis. The opinion cites only to *State v. Hester*, 137 S.C. 145, 161, 134 S.E. 885, 890 (1926) (providing the jury is entitled to hear all

competent testimony presented, and the failure to give it such opportunity is generally prejudicial error) for its conclusion Green was prejudiced by the refusal to allow Wells' testimony. The Court's neglected to weigh the evidence excluded against the other evidence admitted at trial. *See State v. Byrd*, 318 S.C. 247, 250, 456 S.E.2d 922, 924 (Ct. App. 1995) ("where the error may be weighed against the other evidence properly admitted during a trial, the Court must conduct such a weighing, rather than merely reversing the decision below wholesale.") Had the Court of Appeals conducted a prejudice analysis specific to this case, the Court's erroneous conclusions on the admissibility of the statement would have been revealed.

For the failure to admit the evidence to have prejudiced Green in any way, the testimony must have been relevant pursuant to third party guilt, an argument flatly rejected by Green at trial. Arguably, Green offered a limited basis of relevance as the context of the victim's last words, but he certainly never argued the words were relevant to identity. If the testimony were only offered as a dying declaration and nothing more, as repeatedly asserted by Green, there is no prejudice in trial court's discretion to preclude the testimony. The Court's citation to *Hester* assumes the testimony is "competent" without explaining how it is competent exculpatory evidence Green was entitled to admit. The Court did not consider the statement in light of the State's case against Green. Had the Court done so, it would have reached the same conclusion as that of the trial court – no other evidence connected a third party, much less a man named Douglas, to the crime. Error is harmless when it "could not reasonably have affected the result of the trial." *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971). The admission of an assertion of one witness who believed he heard the victim say the name "Douglas," when the victim was shot in the mouth and the defendant's first name was "Dalonte" cannot be said to have reasonably affected the outcome of the trial. Taking trial counsel at his word, the statement was merely the

victim's last words, not an assertion of the identity of the killer. The Court of Appeals misconstrued prevailing case law in disregarding the procedural bar to Green's unpreserved claim of relevance, assuming relevance asserted by appellate counsel, and finding the trial court's ruling prejudicial without weighing the evidence in this case.

CONCLUSION

For all the foregoing reasons, Respondent submits this Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion the trial court impermissibly refused to allow the admission of Sergeant Wells' testimony, and that the error was not harmless. Respondent respectfully asks this Court to reconsider its position considering the unique facts of Appellant's case in rehearing this matter and affirming Appellant's convictions.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Appellant's convictions and sentence.

Respectfully submitted,

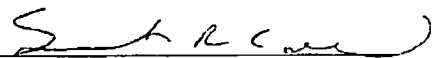
ALAN WILSON
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SUSANNAH R. COLE
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ATTORNEYS FOR RESPONDENT

March 8, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

THE STATE,

Respondent,

v.

DALONTE GREEN,

Appellant.

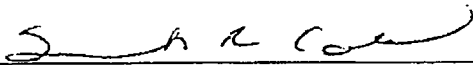
Appellate Case No. 2015-001059

PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Petition for Rehearing on Appellant by depositing two (2) copies of the same via United States Postal Service, addressed to his attorney of record at:

Robert Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 8th day of March, 2018.



Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383

The South Carolina Court of Appeals

The State, Respondent,

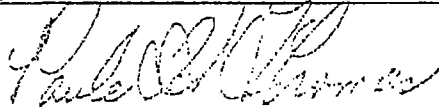
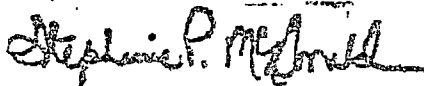
v.

Dalonte Green, Appellant.

Appellate Case No. 2015-001059

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	J.
	J.
	J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
 Alan McCrory Wilson, Esquire
 Donald J. Zelenka, Esquire
 Susannah Rawl Cole, Esquire
 Isaac McDuffie Stone, III, Esquire

FILED

April 26, 2018