STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

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Appellate Case No: 2018-001878

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THE STATE,

Respondent,

vs.

SHA'QUILLE WASHINGTON,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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III. The trial court did not err in excluding a defense witness's testimony where the witness violated the sequestration order due to defense counsel's conscious disregard of the order.

IV. The trial court did not err in declining to instruct the jury on self-defense because no evidence of self-defense was presented. Any error was harmless beyond a reasonable doubt.

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

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

## STATEMENT OF THE CASE

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

## STATEMENT OF FACTS

Larry Jenkins, Victim's first cousin, testified he went with Victim, Arianna Coakley, and Christina "Taj" Lockwood, to a club called A Place in the Woods on August 25, 2013. R. pp. 39-40.

When Jenkins arrived at the club, Washington bumped into Jenkins and stared him down. R. p. 41, lines 4-11. As the party wound down, Jenkins and Victim went outside the club. Victim was immediately hit from behind when he took his shirt off. Jenkins testified more than two people were involved in the ensuing skirmish after Victim was hit. Jenkins fought a second person he did not know, while Victim was likewise in a fight. Jenkins could not describe the person he fought. However, Jenkins saw Washington during the fight. Jenkins heard two gun shots. The person he was locked in combat with did not have a gun. R. pp. 42-44; p. 75. Neither Jenkins nor Victim brought a gun to the club. R. p. 75.

Jenkins saw Victim on the ground and saw Washington with a silver revolver fire a shot into the ground – Jenkins saw the sparks. Washington fired three shots while Victim lay on the ground. R. pp. 44-46. Washington ran away towards a car. R. p. 47.

Jenkins, Coakley, Lockwood, and an unidentified light-skinned man held Victim while waiting for law enforcement to arrive. Victim's eye was bruised. Jenkins testified he was 100% certain of his identification of Washington as the gunman. The defense stipulated Jenkins picked Washington out of a photographic lineup. R. pp. 47-51 p 77. Jenkins testified he did not see Victim drinking, but acknowledged Victim could have been drinking. R. p. 73, p. 74, lines 11-13.

Arianna Coakley testified she dated Victim on and off since she was fourteen years old. Coakley knew Washington for eight years, her cousin and Washington had problems in the past. Coakley, Lockwood, Jenkins, and Victim went to A Place in the Woods. Washington was at the club with Larry Kinloch, who she knew because he approached her the week before asking for her phone number. However, she never told Victim about Kinloch. R. pp. 80-83; p. 109, lines 6-16; p. 119,

line 25 – p. 120, line 4.

While at the club, Victim told Coakley Washington kept looking at him. R. p. 83. This rattled Victim, he told Coakley he was about to snap. R. pp. 100-01. She verified Victim was drinking that night. R. p. 103. Victim went outside the club, Washington and Kinloch followed him. R. p. 83. Sensing trouble, Coakley followed them outside to the stoop. Washington said something, Victim asked Washington "what's up," and Washington hit Victim. Meanwhile, Coakley grabbed a beer bottle. Washington turned and pointed a gun at Coakley, telling her, "I ain't playng." Coakley dropped the bottle and put her hands up. Coakley backed up before Washington "jumped down and ran around." Coakley then heard four gunshots. R. pp. 83-84; p. 88, line 22 – p. 89, line 3; p. 90, lines 12-18. Coakley explained when Washington hit Victim, Victim "started sliding down to go away, and he continued to hit [Victim]." R. p. 85, lines 17-19. Coakley testified she saw Washington hit Victim twice – one hit to the eye and the other to the back of the head as Victim spun around to get away. R. p. 85, lines 23 – p. 86, line 4. Kinloch hit Jenkins right after Washington hit Victim. Coakley explained when Washington jumped off the stoop, he ran around to the other side of a van. Coakley did not see the shooting because the van was in her way. R. p. 86, lines 9-11; p. 90, lines 12-18. Coakley verified Washington threw the first punch. R. p. 88. Coakley never saw Victim take off his shirt. R. p. 103. Victim did not have a gun. R. p. 86, lines 5-6.

Darius Alls, a cook and Washington's cousin, testified Victim told him somebody was bothering him and he felt his life was in danger. R. pp. 123-24; p. 129. Alls told Victim to sit at the bar and someone would walk him out to the car later. R. p. 124. Alls was unable to say whether Victim was under the influence that night because he was under the influence himself. R. p. 132.

Larry Kinloch, Washington's uncle, admitted being at the club with Washington. Kinloch claimed he was not part of the fight. Kinloch was then impeached with a phone call he made to his brother in which he discussed being in a fight and he blamed the shooting on Washington. R. pp. 168-70; pp. 173-74; p. 177, lines 8-13.

Christina "Raj" Lockwood reluctantly tetified. She was with Victim, Jenkins, and Coakley to A Place in the Woods. She saw Washington and Kinloch at the club. She confirmed Coakley held a Heineken bottle, but Lockwood did not make it outside. Lockwood was impeached with her statement to law enforcement saying Washington shot Victim, Victim said Washington kept looking at him, Washington said he was going to get Victim, and Washington kept talking about shooting somebody. R. pp. 215-31. Lockwood never saw Victim remove his shirt, but it was off. R. p. 243.

Captain Bobby Shuler interviewed Washington who denied having a gun. He also told Captain Shuler **that Victim did not have a gun** and neither did Larry Jenkins. R. pp. 337-38. Dr. Erin Presnell, a forensic pathologist, found Victim suffered blunt force trauma to the back of his head, Victim's skull bone was chipped. R. pp. 390-91. Victim also suffered two bullet wounds, one to the left back and the other to the left buttock. She recovered two projectiles from Victim's body. R. p. 336, p. 377, p. 383, p. 384-85. Dr. Presnell explained both bullet wounds indicated an upward trajectory. Dense stippling in the back indicated Victim was shot at close range. R. pp. 386-90.

Aja Williams, a bartender at A Place in the Woods, testified he served alcohol to Victim. R. pp. 417-18. When Williams observed Victim, Victim was not heavily intoxicated. Kinloch was following Victim everywhere. Williams later clarified both Kinloch and Washington followed Victim. R. pp. 420-23. According to Williams, Victim told him "**Larry** going to shoot me, they

going to kill me." R. p. 423; p. 425; p. 431 (emphasis added). Williams attended to Victim's injuries before EMS arrived and testified Victim was still wearing his shirt. R. p. 424.

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

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

Robin Williams testified she walked out of the club and saw a "young lady holding a glass bottle in Sha'Quille's face. About five seconds later, three shots were fired. R. p. 466, line 23 – p. 467, line 2. Williams claimed to see Washington running away on the second of four shots. R. p. 467, lines 3-19. Williams never saw Washington with a gun. R. p. 470, lines 8-23. On recross-examination, Williams seemed to suggest Washington was not anywhere near the fight. R. p. 480, lines 1-8, lines 20-23. She agreed Washington could not have been threatened and there was no self-defense. R. p. 480, line 23 – p. 481, line 5. Tyson Singleton, Washington's neighbor, testified he saw Washington run down the road before the first of three shots shot was fired. R. pp. 483-85. He did not see or know Victim. R. p. 492. He did not see Larry Kinloch outside and never saw the gun or the shooter. R. p. 495.

Washington did not testify, but his statement was admitted into evidence in which he claimed

he saw a scuffle between the victim, who he did not identify, and the unidentified shooter, who he referred to as the "suspect." Washington claimed to be a mere observer. Victim took off his shirt as if to fight and a fight ensued, which was "somewhat" broken up by security. Washington reports "after the fight was over the victim walked away then the suspect followed and fired a shot . . . ." R. pp. 632-34.

## ARGUMENT

**I. The trial court did not err in finding hearsay testimony inadmissible under the exception for present sense impression and counsel failed to argue for admission under any other exception.**

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

First, Washington's contention the testimony should be allowed as a prior inconsistent statement is not preserved for review. Washington attempted to elicit this testimony during Grant's direct examination and redirect examination. Each time the hearsay objection was sustained. The first time, Washington failed to provide grounds for admission. The second time, Washington only argued present sense impression without further argument or explanation. Accordingly, Washington failed to preserve for review the contention that the statement was admissible as a prior inconsistent statement. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one

theory at trial and a different theory on appeal.").

Further, counsel failed to lay sufficient foundation with Kinloch, the alleged declarant. A witness may be impeached with prior statements inconsistent with or contradictory to the witness's trial testimony. Mays v. Mays, 267 S.C. 490, 229 S.E.2d 725 (1976). Before a prior inconsistent statement may be admitted, the witness alleged to make the statement must be advised on cross-examination "of the substance of the prior statement and the time when, the place where and the person to whom it was made." State v. Roper, 274 S.C. 14, 19, 260 S.E.2d 705, 707 (1979).

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

> Q: Well, let's go through this slow. You have shared with, for instance, Quinton Grant, that you did the shooting, haven't you?
>
> A: No, sir.
>
> Q: Okay. In fact, the night when the shooting took place, you ran and Quinton assisted you away from the shooting? Sir?
>
> A: No, sir.
>
> Q: Well, I'll put it – ask you another question.
> After the shooting that night, did you see Quinton Kenneth Grant?
>
> A: No, sir.

R. p. 175, line 11 – p. 176, line 6. Counsel did not question Kinloch about the time or place the alleged conversation took place. Therefore, an insufficient foundation was laid for admitting the purported inconsistent statement.

Further, the testimony did not meet the requirements for the present sense impression exception. Under Rule 803(1), SCRE, testimony is admissible under present sense impression if it is

a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The testimony does not meet the standards for present sense impression because the purported statement did not occur while Kinloch was perceiving the event or immediately thereafter. According to Grant, he did not see Kinloch until twenty or twenty-five minutes after the shooting. On direct, Grant said he went back to the club. R. p. 438, lines 13-21. On cross-examination, Grant contradicted himself saying he never went back to the club. Instead, he said he saw Kinloch at Kinloch's house. R. p. 444, lines 7-13. The trial court did not abuse its discretion because the conversation did not occur while the declarant was perceiving the event nor immediately after. Instead, the alleged conversation took place at least twenty minutes later at Kinloch's house. The bare assertion that Kinloch said he did it, without any testimony of the surrounding circumstances, fails to suggest the purported statement was more than mere reflection. "The idea of immediacy lies at the heart of the exception; thus, the time requirement underlying the exception is strict because it is the factor that assures trustworthiness." United States v. Green, 556 F.3d 151, 156 (3d Cir. 2009). Accordingly, the trial court did not abuse its discretion in sustaining the State's objection. Wilson v. Childs, 315 S.C. 431, 439, 434 S.E.2d 286, 291-92 (Ct. App. 1993) (finding in medical malpractice case, no error in excluding decedent's statement about conversation with doctor shortly before decedent's death "because the decedent had made this statement in reflection of past events."); see also United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) ("Here, too much time had passed between when Mr. Rush spoke with Mr. Manfre and when he spoke with Mr. Strozier to call the transaction a present-sense impression. At the very least, there was an intervening walk or drive between the time of the discussion with Mr. Manfre and the time

when Mr. Rush spoke with Mr. Stozier. . . . [W]e decline to expand [the present-sense-impression exception] to cover a declarant's relatively recent memories.").

Finally, Washington argues Kinloch's purported out of court statement was admissible as an excited utterance. However, no foundation was laid that Kinloch made the statement "while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. In State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), the Court of Appeals found a 911 call from a rape victim's mother failed to meet the foundation requirements of Rule 803(2), SCRE. The mother related to the dispatcher her daughter was raped and gave details her daughter disclosed to her. The court considered the 911 call to be double hearsay: while the daughter's disclosure met the standard for excited utterance, the mother's out of court statement did not meet this exception. The court noted the mother likely felt "an intense emotional reaction" upon hearing her daughter was raped: "However, the State has not shown the nature of her reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability." Id. at 533, 759 S.E.2d at 438. This Court further noted the State did not show the mother was under the stress of excitement when she actually made her statement and had time to reflect on the disclosure before calling 911. Id. at 533-34, 759 S.E.2d at 438-39.

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

No evidence links Kinloch as the shooter beyond Grant's bare assertion. No witness saw Kinloch with a weapon, much less saw Kinloch firing a weapon. While one witness testified Victim predicted Kinloch was going to shoot him, the same witness noted Victim alternatively said "they" were going to shoot him, implicating Washington. See also State v. Swafford, 375 S.C. 637, 654 S.E.2d 297 (Ct. App. 2007) (finding in felony DUI prosecution, witness's testimony she saw Swafford in the passenger seat an hour before the accident, failed to prove that Swafford was not driving at the time of the accident or the third party was driving at the scene of the accident).

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

Further, Washington was not prejudiced by the alleged error and any error is harmless beyond a reasonable doubt. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Other defense witnesses testified they saw Washington flee while shots were still being fired. The jury clearly rejected claims that Washington was not the shooter despite testimony from these other defense witnesses. The testimony simply would not have affected the result of trial. State v. Mitchell, 286 S.C. 572, 573,

336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

**II. The trial court did not err in declining to admit a toxicology report that was not relevant and any error was harmless due to the absence of evidence Victim was actually the aggressor.**

Washington complains the trial court erred by not allowing testimony about Victim's post-mortem toxicology report. However, counsel never put on record the basis for admitting the testimony. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (The exact name of the legal doctrine employed does not need to be used, but it must be clear that the argument has been presented on that ground). Further, the trial court's exclusion of this evidence was not an abuse of its discretion.

The trial court sustained the objection because abundant testimony was presented as to whether Victim was drinking. R. p. 453, lines 10-17. The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence." State v. Hamilton, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The trial court's ruling reflects it sustained the objection based on Rule 403, SCRE. Under Rule 403, SCRE: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Hamilton, 344 S.C. at 358, 543 S.E.2d at 598.

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

Further, Washington claims the evidence should have been admitted because Victim's intoxication made it more likely he provoked difficulties. However, as discussed more fully in Issue IV, no evidence supported self-defense. The only evidence was Washington brought on the difficulty by striking the first blow. No evidence was presented Victim was armed and removing his shirt merely shows a willingness to fight supporting mutual combat at best. Accordingly, Victim's intoxication was not relevant and the danger of unfair prejudice outweighed the limited probative value of the evidence. Further, the jury returned a voluntary manslaughter verdict, so the exclusion of the evidence did not prevent the jury from finding legal provocation.

The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Forensic evidence showed Victim was shot twice in the back and suffered blunt force trauma in the back of the head. The only evidence presented was Washington was the aggressor or someone

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

**III. The trial court did not err in excluding a defense witness's testimony where the witness violated the sequestration order due to defense counsel's conscious disregard of the order.**

Washington argues the trial court abused its discretion by enforcing the sequestration order and excluding Kevin Watson's testimony. However, Washington's counsel knowingly allowed the order to be violated and the witness viewed Washington's videotaped statement. Washington was not prejudiced since the testimony was cumulative to other defense witnesses' testimony.

After Watson was called to the stand, an officer present in court advised the prosecutor they saw Watson in court during trial. Watson admitted to the court he was present while Captain Shuler was on the stand. Watson did not hear Captain Shuler testify but was present while Washington's video-taped statement was played. R. pp. 405-10. The trial court excluded the testimony. After the ruling, defense counsel Watson was not present to receive the sequestration instruction. The trial court noted counsel was aware of the instruction. Counsel responded, "He did not come to me until today and share with me that he was going to testify, so I thought it was no need for me to consider him to be sequestered." R. p. 412, lines 4-7. Therefore, counsel admitted disregarding the sequestration order. Watson testified in camera he was at A Place in the Woods and saw "some fighting" and left. He testified he saw neither Kinloch nor Washington with a weapon. R. p. 414, lines 3-11.

A circuit court may order the sequestration of any witness by order or by motion of a party. Rule 615, SCRE. The decision to sequester a witness is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 173, 682 S.E.2d 19, 33–34 (Ct. App. 2009). The purpose of

the exclusion rule is to prevent the possibility that one witness will shape his testimony to match another witness's testimony. State v. Huckabee, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010). The question of whether to exclude testimony by the offending witness depends upon the particular circumstances and "lies within the sound discretion of the trial court." Id. (quoting United States v. Leggett, 326 F.2d 613, 613–14 (4th Cir.1964)).

Washington relies on Simmons and State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000). However, in both Simmons and Tisdale this Court merely held the trial court did not abuse its discretion in allowing the witnesses in violation of the sequestration order to testify. In Simmons, this Court held the trial court did not abuse its discretion in allowing the chief investigating officer to testify when any testimony he did hear would not have influenced his testimony. Simmons, 384 S.C. at 173, 682 S.E.2d at 34. In Tisdale, the Court of appeals held the trial court did not abuse its discretion in refusing to grant a mistrial based on a witness's violation of a sequestration order. The witness was present for opening argument, which refreshed his recollection of the clothing Tisdale wore the day he purchased a vehicle seen by the bank Tisdale robbed. The witness testified about the clothing. The trial court concluded it would not grant a mistrial, finding the violation of the order was neither flagrant nor intentional. Tisdale, 338 S.C. at 616-18, 527 S.E.2d at 394-95. Simmons and Tisdale merely illustrate the wide discretion afforded to the trial judge to determine what, if any, remedy is required for a violation of a sequestration order.

In the present case, defense counsel decided it was unnecessary for his witness to follow the sequestration order. Counsel's conscious decision to disregard the sequestration order for this witness is apparent through his own words ("I thought it was no need for him to be sequestered.")

As a result, Watson saw Washington's video-taped interview and could conform his testimony to Washington's statement. Accordingly, the trial court did not abuse her discretion given the potential prejudice to the State and counsel's conscious disregard of the order.

In a proffer, Watson testified he "saw some fighting, and [he] basically left." R. p. 414, line 5. Note Watson did not testify he heard shots fired or saw the gunman. Instead, he merely testified he did not see Washington with a weapon. R. p. 414, lines 6-11. This testimony is cumulative to testimony from other defense witnesses. For instance, Robin Williams claimed to see Washington running away on the second of four shots and she never saw Washington with a gun. R. p. 467, lines 3-19; p. 470, lines 8-23. Further, Tyson Singleton testified he saw Washington running down the road before the first shot was fired. R. pp. 661-63.

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

**IV. The trial court did not err in declining to instruct the jury on self-defense because no evidence of self-defense was presented. Any error was harmless beyond a reasonable doubt.**

Washington claims the trial court erred in declining to instruct the jury on self-defense. The only evidence presented was Washington, rather than Victim, was the aggressor. No evidence indicated Washington was under threat or held a reasonable belief of threat to his life or to serious bodily injury. No evidence was presented that he could not have avoided any danger by means other

than use of lethal force. Any error is harmless beyond a reasonable doubt in light of the evidence that Victim was shot in the back twice and suffered severe blunt force trauma to the back of the head.

"A jury charge on self-defense is not required unless it is supported by the evidence." State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007). The trial court's refusal to provide a requested jury instruction must be erroneous and prejudicial to warrant reversing a conviction. State v. Lockamy, 369 S.C. 378, 631 S.E.2d 555 (Ct. App. 2006). In order for a defendant to be entitled to a jury instruction on self-defense, evidence of the following four elements must be presented:

> (1) The defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was in actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

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

First, the evidence shows Washington brought about the difficulty. The evidence indicates Washington stared down Victim when Victim entered the club. R. p. 41. Further, the uncontroverted evidence is Washington and Kinloch followed Victim out of the bar. Anticipating problems, Victim's girlfriend, Coakely, followed after them with a bottle and intended to hit Washington over the head with it only **after** Washington struck Victim twice. Accordingly, Coakely's testimony only indicates she attempted to defend Victim from a fight started by Washington. Clearly, Washington brought on the difficulty which disqualifies entitlement for an

instruction on self-defense. State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) (quoting an ALR article for the rule that "one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense"). Further, Washington was armed when he began his fight with Victim. State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001) (noting that one must have a reasonable belief of imminent danger before arming himself in self-defense); see also State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (finding self-defense instruction not warranted because Slater approached an altercation with a loaded weapon by his side, "[s]uch activity could be reasonably calculated to bring the difficulty that arose in this case."). His willingness to engage in a fight disqualifies Washington's puzzling claims of self-defense. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973) ("To constitute mutual combat there must exist a mutual intent and willingness to fight."). To the extent the evidence indicates mutual combat rather than Washington simply being the aggressor, mutual combat defeats a claim of self-defense. Id.

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

Washington was in fear for his life or serious bodily harm, and the evidence presented fails to show that it would be reasonable for Washington to believe so. The evidence fails to show that Washington met either the second or third elements of self-defense.

Finally, no evidence was presented that Washington did not have other means of avoiding the danger. He avoided any danger from Coakely. Victim was unarmed and no evidence indicates Victim was an assailant. The only evidence indicates what happened next is that either Washington or an unidentified person chased Victim down and shot Victim in the back as Victim lay on the ground. There was no evidence Washington was unable to retreat or otherwise avoid the danger.

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

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

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

The trial court did not err in providing the instruction. Under Barber v. State, 393 S.C. 232,

712 S.E.2d 436 (2011), an instruction on accomplice liability is warranted where the evidence is equivocal as to the identity of the shooter. In that case, Barber had several co-defendants and only Barber was identified as the shooter. However the Supreme Court ultimately found the instruction was warranted. Id. In the instant case, as counsel admitted, he expended much energy suggesting Kinloch was the shooter, and his assertions coupled with evidence supports the trial court's determination that an instruction was warranted.

The defense called Aja Williams, a bartender, who testified Kinloch followed Victim around the bar that night and testified the last thing Victim said to him was "Larry going to shoot me, they going to kill me." R. p. 421, lines 1-10; p. 423, lines 8-11; p. 423, lines 8-13. On redirect, Williams agreed he met with the solicitors and told them Victim said "Larry is going to shoot me." R. p. 430, lines 13-25. Defense counsel confirmed Victim said Larry two more times. R. p. 430, lines 24-25; p. 431, lines 8-9. The trial court noted this testimony during argument on the propriety of an accomplice liability instruction. R. p. 533, lines 9-11.

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

Counsel further suggested during Kinloch's cross-examination he made the call to clear his name by making a self-serving statement and putting the blame on Washington, knowing the phone

call was recorded. R. p. 180, line 14 – p. 181, line 14. Later, defense counsel asked, "So you were drunk that night to the point that when you ran and saw Darlene [phonetic] Washington and you told and said, I did the shooting, you don't recall saying that?" R. p. 185, line 25 – p. 186, line 3. He also asked, "You don't recall saying, I had a .357 Magnum . . . in your possession?" R. p. 186, lines 4-6.

Counsel asked, "Sir, isn't it fair to say from the very onset of this tragic situation that you have always been described as the person who did the shooting in this case?" adding, "In the streets, that is. Isn't that true?" R. p. 186, lines 13-18. Counsel concluded cross-examination by asking if Kinloch owed Washington an apology, and then telling Kinloch that Kinloch knows the answer when Kinloch replied, "For what?" R. p. 189, lines 11-16. Counsel also later asked Christina Lockwood if she saw Kinloch in possession of a weapon. R. p. 258, lines 19-21.

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

Q: You returned to the club?

A: Yes. Yes. Larry Kinloch told – said he did it.

Q: Larry said he did it?

A: He said he did it.

Prosecution: Objection, Your Honor.

A: He told me he did it.

R. p. 436, line 25 – p. 437, line 5. The trial court sustained the objection and struck the "last statement." R. p. 437, lines 11-19. Despite the trial court's explicit ruling, defense counsel tried to

elicit the statement again, asking his witness if he heard Kinloch say he did it. R. p. 438, lines 10-21. The trial court sustained the objection and again struck the comment. R. p. 438, lines 22-25. Counsel yet again attempted on redirect to elicit the hearsay statement by asking the witness why the witness was at trial. The witness said, "I'm here today to say that Larry – " The prosecution objected and the objection was sustained. R. p. 448, lines 3-10.

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

This Court found an accomplice liability was appropriate in Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011), concluding, "Like a lesser-included offense, an alternate theory of liability may only be charged **when the evidence is equivocal on some integral fact** and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Id. at 236, 712 S.E.2d at 439 (emphasis added). In Barber, this Court framed the question as follows: "To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." Id. at 237, 712 S.E.2d at 439. In Barber, the robbers wore masks and some question existed as to which robbers were armed with which weapons, including the murder weapon. Even though the testifying co-defendants insisted Barber shot the victims and none of the other codefendants were positively identified as the shooter, this Court found the accomplice liability instruction appropriate because "the sum of the evidence presented at trial, both by the State and defense, **was equivocal** as

to who was the shooter." Id. at 236, 712 S.E.2d at 439 (emphasis added).

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

Washington relies on Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) to argue the instruction was not warranted and was prejudicial. Wilds is distinguishable. In Wilds, both of Wilds's co-defendants testified to their participation in the robbery and testified Wilds was the triggerman in the robbery. During deliberations, the judge received a jury note asking in essence if they needed to find Wilds pulled the trigger to be guilty of murder. In response, the trial court instructed the jury on accomplice liability for the first time. Id. at 435-37, 756 S.E.2d at 388-89. This Court affirmed the PCR court's grant of relief, because counsel did not preserve the issue. This Court observed the jury may doubt the codefendant's testimony, but accomplice liability "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." Id. at 439, 756 S.E.2d at 390. This Court found Wilds was prejudiced because the instruction was responsive to the jury's question. Id. at 439, 756 S.E.2d at 391.

This case differs from Wilds because no evidence supported the instruction in Wilds. On the other hand, in the instant case, Washington presented testimony from Davis suggesting the

confrontation was between Victim and Kinloch. Additionally, Williams testified Victim thought Kinloch was going to kill him. Finally, defense counsel's conduct in continuing to attempt to elicit testimony from Grant despite the trial court's ruling justifies providing the instruction. The evidence and defense counsel's assertion support the instruction sufficient to create equivocal evidence as to the shooter sufficient to justify the instruction pursuant to Barber.

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

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

Washington claims the trial court's decision to provide an Allen instruction to the jury before the jury was dismissed in the evening instead of the next morning was error. The trial court did not abuse its discretion, and it is speculative the timing of the Allen instruction affected the result. The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997). In the instant case, the trial judge did not abuse its discretion in giving the charge at 5:30 p.m., before sending the jurors home for the evening. An Allen charge is given by a court when the jury has reached an impasse in its deliberations and is unable to reach a consensus. United States v. Burgos, 55 F.3d 933, 935-36 (4th Cir.1995); Allen v. United States, 164 U.S. 492 (1896). The decision to give such a charge is within the discretion of the trial court. Id. at 935. "[T]he trial judge who is in the best position to observe the jury's demeanor

should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict." Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000). In assessing the prejudicial impact of jury instructions, the test is whether the particular language employed, in the context and under the circumstances of the case, coerced the jurors into reaching a guilty verdict. Jenkins v. United States, 380 U.S. 445, 446 (1965).

In the instant case, Washington's counsel did not challenge the language of the Allen instruction. R. p. 610, lines 13-15. Instead, he challenged the timing of the Allen instruction, based on a personal preference rather than any legal authority that it was better to provide the instruction the following morning and not before the jury was dismissed in the evening. R. p. 605, lines 19-23.

Washington relies on Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002), a medical malpractice case not considering the issue. In Strickland, the trial court excused the jury and brought the jury back the next day for further deliberations after providing an Allen charge. Id. However, this Court did not suggest providing the instruction in the morning was preferable or required. Id.

Washington also relies on State v. Tillman 304 S.C. 512, 521, 405 S.E.2d 607, 612 (Ct. App. 1991) where the trial judge excused the jury at 9:30 p.m. and provided the jury the Allen instruction the next morning. The opinion does not require the trial judge to provide the Allen instruction the next day. Instead, in Tillman the appellant argued the trial court gave the instruction too soon. Id. at 519 (holding there was no indication the trial judge tried to coerce a verdict; "appellant's argument as to the timing of the charge meritless").

Further, Washington was not prejudiced as the outcome of the trial was not affected. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (an error is harmless where it could not

reasonably have changed the outcome of the trial). The trial court reminded the jurors prior to resuming deliberations that she provided the Allen instruction the previous night. The jury **deliberated five more hours** the following day. R. p. 618, lines 17-22; p. 619, lines 6-9. Obviously, the Allen instruction did not coerce the verdict.

## CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 20, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

NOV 20 2018

S.C. SUPREME COURT

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

Appellate Case No: 2018-001878

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THE STATE, Respondent,

v.

SHA'QUILLE WASHINGTON, Petitioner.

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**PROOF OF SERVICE**

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I, Anne Mueller, certify that I have served the within Return to the Petition for Writ of Certiorari on Petitioner by depositing one copy of the same in the United States mail, postage prepaid, addressed to each of his attorneys of record:

Jack B. Swerling, Esquire
1720 Main St., Suite 301
Columbia, SC 29201

Katherine C. Goode, Esquire
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Winnsboro, SC 29180

I further certify that all parties required by Rule to be served have been served.
This 20th day of November, 2018.

Anne Mueller

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