ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge
Appellate Case No. 2010-177006

THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

APPELLANT

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QUESTIONS PRESENTED

I. Whether the trial court erred in denying Appellant's motion to suppress a computer printout of one of the victims, Ellison Hudson, which was seized when authorities executed a search warrant at Appellant's residence.

II. Whether the trial court erred in allowing the State to admit extrinsic evidence of a prior statement made by Torrian Gleaton, pursuant to Rule 613(b) of the South Carolina Rules of Evidence.

III. Whether the admission of Torrian Gleaton's prior statement and testimony at trial violated Appellant's right to confront his accusers as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

IV. Whether the trial court erred in denying Appellant's request to charge the jury on the potential sentence of accessory before the fact of murder where there was evidence that authorities informed Torrian Gleaton, who gave a statement implicating Appellant, that there was a possibility he could be charged with "accessory to murder."

V. Whether the trial court erred in admitting evidence of a drug relationship between Appellant and one of the victims, Ellison Hudson.

VI. Whether the trial court erred in allowing the State to open on the law in closing argument.

VII. Whether the trial court erred in allowing the State the last argument in closing where Appellant chose to present a defense.

INTRODUCTION

On May 20, 2009, authorities were dispatched to Ellison Hudson's home after neighbors reported a shooting. (R. p. 171). The ensuing investigation culminated in the trial and conviction of appellant, Anthony "Bump" Hackshaw ("Appellant"). (R. pp. 1619-20).

STATEMENT OF THE CASE

Appellant was indicted during the September term of the Richland County grand jury for murder (#2009-GS-40-6689), use of a firearm during the commission of violent crime (#2009-GS-40-6696) and two counts of assault with intent to kill ("AWIK") (#2009-GS-40-6690, #2009-GS-40-6691). (R. pp. 1663-70). Following his indictment, Appellant was tried before the Honorable James R. Barber, III and a jury on October 25, through November 1, 2010 in Columbia.[1] At the conclusion of trial, the jury convicted Appellant on all charges, and on November 3, 2010, the trial court sentenced Appellant to 42 years on the murder charge, ten (10) years on each AWIK charge, and five (5) years on the weapons charge, all to be served concurrently. (R. pp. 1619-20); (R. pp. 1645-46). Appellant was represented by Tara D. Shurling and Jeremy Thompson, while the State was represented by Joanna McDuffie, Kathryn "Luck" Campbell and Nicole Simpson. (R. p. 1).

STATEMENT OF THE FACTS

A. <u>The Underlying Crimes</u>

On the afternoon of May 20th 2009, Ellison Hudson and Cleveland Joyner were in Hudson's backyard in Columbia's Greenview neighborhood, smoking marijuana, when Hudson's friend, Ebony Fogle, an 18-year-old female arrived and pulled her car into Hudson's backyard so Hudson could wash it. (R. pp. 228, 231, 282, 283). As Hudson was preparing to

[1] Pre-trial motions were conducted on October 21, 2010. (R. p. 1).

wash Fogle's car, both he and Joyner, who was rolling a second blunt of marijuana on a nearby table, observed a two-door silver Honda slowly pass by Hudson's house, which Joyner would later explain, made him nervous. (R. pp. 232-33, 274-75, 286-87, 326, 328, 233, 287). At the time the silver Honda passed by, a .38 caliber revolver registered to Hudson's mother had been placed on the table with the marijuana, because, according to Hudson, numerous people had previously shot at his house. (R. pp. 232, 286-87).

Within a five-minute span, the silver Honda passed by again, which prompted Hudson to grab the gun and proceed to the front yard to investigate. (R. pp. 233-34, 289). However, upon walking out to the front yard, Hudson saw only his neighbors and therefore returned to the backyard where he placed the gun on the table and resumed washing Fogle's car. (R. pp. 233-34, 289-90). Shortly thereafter, Hudson saw two men, one wearing a hooded sweatshirt and the other wearing a black hat, black shirt and black pants, approaching his backyard. (R. pp. 290-91, 293-94). One of the men was armed with a pistol. (R. p. 293).

Seeing the gun, Hudson yelled at Joyner, who was sitting at the table with Fogle, instructing him to grab the revolver. (R. p. 293). He then began running, at which point the men opened fire and one of the two men started chasing Hudson. (R. p. 294). As he was running away, Hudson, who explained he heard shots "whistling past" his head, pushed Fogle out of the way. (R. pp. 295, 296). He then jumped a fence running into his next-door neighbor's yard before jumping a second fence in order to escape the man who was pursuing him. (R. pp. 295-97). While he was running, Hudson heard shots coming from the direction of his house. (R. pp. 296-97).

Meanwhile, back at Hudson's house, Joyner, who had fallen to the ground after hearing the gunshots, got up and after observing one of the men run past him, grabbed the revolver before quickly retreating behind a nearby shed. (R. p. 237). Joyner later explained that as was on the ground he observed one of the attackers, describing him as being "tall and skinny," about "5'9" or 5'10" with a slim build and wearing a dark blue hooded sweatshirt. (R. p. 234-35, 236). While he was hiding behind the shed, Joyner heard Fogle scream and then heard rapid gunfire coming from the backyard. (R. 237-38). After approximately three minutes, Joyner emerged from behind the shed, saw the man in the dark blue hooded sweatshirt running down the other side of the street and fired the revolver at him. (R. pp. 238-39). Joyner then hopped the fence when he saw the silver Honda drive back down the road. (R. p. 239).

After hopping the fence, Joyner eventually returned to Hudson's backyard where he saw Fogle lying on the ground, face down. (R. pp. 240-41). After seeing Fogle, Joyner ran to Hudson's front yard where he encountered two of Hudson's neighbors who had already called police. (R. p. 241). Joyner then walked into Hudson's house, took the shells out of the revolver and hid the gun under the couch in the bedroom. (R. p. 241).

In the aftermath of the event, Hudson returned to his backyard, saw Fogle on the ground and rolled her over. (R. p. 299). Fogle was unresponsive. (R. p. 299). He then ran into his house, took the discarded revolver shells from Joyner, moved the gun from the couch to behind the headboard in his mother's bedroom and put the shells in the living room couch. (R. pp. 300-01). After this, both Hudson and Joyner returned to the backyard and tried to revive Fogle. (R. pp. 241-42). Police and EMS arrived shortly thereafter, but Fogle was already dead. (R. pp. 160-61).

B. The Investigaton

Upon arriving on the scene, police performed gunshot residue ("GSR") tests on Hudson, Joyner and Fogle. (R. pp. 1016-17). Additionally, police took statements from both Hudson and Joyner and also interviewed Hudson's neighbors to determine if they had witnessed the incident. (R. pp. 303, 236, 1020, 173, 183). Later that day, Hudson led investigators to the revolver and revolver shells he had previously hidden. (R. pp. 304, 1015).

In his initial statement, Hudson described his attackers and later that evening, lied to police telling them one of his attackers was Jonathan Bailey. (R. pp. 305-06). Specifically, Hudson explained Bailey was looking for him because a friend of Bailey's had gotten locked up for a previous shooting involving Hudson's mother's car. (R. pp. 331-32). Hudson would later explain he lied in his initial statement to police because he was scared and wanted revenge against Appellant who he knew was the actual perpetrator of the crime. (R. pp. 305-06, 321-22, 336-37, 349). Hudson would later acknowledge he only revealed Appellant's information to police once he had learned Appellant was in jail and he "wasn't going to be able to touch him." (R. p. 349).

Similar to Hudson, Joyner gave police a statement in which he described the shooter's height, build and clothing. (R. pp. 244-45). He further described the silver Honda, explaining it had tinted windows. (R. p. 244). Joyner did not implicate Bailey.

Police also spoke with Hudson's 75-year-old neighbor, Ruth Gold, who later testified that she was sitting in her home when she heard gunshots, causing her to look out of the peephole in her door. (R. p. 171). When she did, Gold explained she saw a man running up the street, and called 9-1-1. (R. p. 171). She estimated hearing between eight and nine shots, then hearing a

brief break in between with the majority of the shots coming before the break. (R. pp. 174-75). The individual she saw running was wearing all black, and it looked "like a black sweat hoodie sweat shirt." (R. p. 176). She did not see a hat on his head, nor did she see a silver Honda. (R. pp. 176-77).

Another neighbor, Zionde Harper, was interviewed by police. (R. p. 183, 1020). As Harper would later explain at trial, she was just arriving home from school when she heard gunshots from her bathroom which led her to look out of the window. (R. p. 181). Looking out the window, Harper observed two men running in the backyard. (R. p. 181). Harper stated the second man, who was pursuing the first, had a gun and described him as a black male with a black hat, wearing dark clothing and maybe "a normal black tee." (R. pp. 181-82, 187). She believes she heard one shot at first, saw the men running and then heard more shots. (R. p. 183).

After taking Hudson's statement, police secured an arrest warrant for Jonathan Bailey but continued to interview others. (R. p. 1022). Upon hearing he was wanted in connection with a murder, Bailey turned himself into police. (R. pp. 557, 558-59). Bailey was adamant about speaking to the police and provided an alibi for the time of the shooting. (R. p. 560, 552-56).

Specifically, Bailey explained he had been dropped off by his girlfriend, Whitney Caruth, at Kavae Dolphin's house between 11:00 AM and 12:00 PM on the day of the incident. (R. pp. 552-56). While he was there, Bailey was with his friend Stephanie McGowan until either 3:00 PM or 4:00 PM. (R. pp. 421, 482, 496, 554). This was corroborated by both Dolphin and McGowan who added that Bailey was picked up by a friend. (R. pp. 422, 483, 554, 428, 497).

Additionally, testimony from Bailey's mother, Mali Allen, Sgt. Norman Jenkins, an officer with the Richland County Fugitive Task Force, and Bailey revealed Bailey was on a

three-way phone call discussing an outstanding warrant in the time leading up to the incident. (R. pp. 504, 513, 555). In fact, this testimony was later corroborated by telephone records which documented there was a call between the parties, beginning at 12:21 PM and ending at 12:34 PM—just 18 minutes before the shooting was reported. (R. pp. 504-05, 653). The crime scene was located 6.4 to 6.9 miles away from Dolphin's house. (R. p. 1091).

After speaking with Bailey, Dolphin and others, police turned their investigation back to Hudson. (R. pp. 1023-28). In fact, Investigator Kevin Reese, the chief investigator in the case, obtained an arrest warrant against Hudson for obstruction of justice. (R. p. 1029).

On May 23rd, three days after the shooting, police re-interviewed Hudson. (R. p. 1030). During the interview, Hudson named "Bump" as the shooter, prompting authorities to ascertain "Bump's" identity. (R. pp. 308, 1030). They also arrested Hudson for obstruction of justice. (R. pp. 1030-31). Thereafter, on June 1st, Hudson advised police that "Bump" had previously shot at him at an apartment complex on Brighton Hill Road in Columbia and after speaking with management at the complex, learned about the previous shootout and that "Bump" was Appellant. (R. pp. 1031-32).

Two days later, police re-interviewed Joyner who gave them additional information about the relationship between Hudson and Appellant. (R. pp. 245, 1034-35). Specifically, Joyner related that Hudson had robbed Appellant on April 23rd and further explained Appellant had told him to tell Hudson "that if he didn't give him his weed or his money . . . he was coming for his head." (R. p. 246).

Upon learning of the relationship between Hudson and Appellant, police confronted Hudson for a third time on June 4th. (R. p. 1035). At that time, Hudson elaborated on his

relationship with Appellant explaining that he and his friend Sheldon McDowell, known as "Hot Boy," had gone to Appellant's apartment complex in order to buy marijuana when he noticed that one of Appellant's associates was armed, which in turn prompted him to pull a gun on Appellant. (R. pp. 310-15). When he did, Appellant immediately retreated, throwing a backpack full of marijuana into the air and running up the stairs of the apartment complex. (R. pp. 315-17). Appellant emerged from his apartment armed with a gun, came out to the breezeway of the apartment complex and began firing at Hudson and McDowell, who were now running away from the complex toward their car which was parked in the parking lot. (R. pp. 317-19). Hudson stated the backpack contained approximately eight ounces of marijuana, worth about three-thousand dollars. (R. pp. 318-20).

After Hudson admitted his involvement in the April 23rd incident, William Gonzalez, the officer assigned to investigate the April 23rd incident, sought a search warrant for Appellant's residence. (R. pp. 683-84). In the search warrant, which was secured and executed on June 5th,[2] Gonzalez explained the purpose of the search was to locate "any firearms, firearm parts or pieces, ammunition or paperwork associated with the sales, ownership or transfer of firearms and any other devices that is (sic) associated with the commission of the offense." (Search Warrant Number I-918149). As the search warrant was being executed, police found a print out of Hudson's jail photograph in Appellant's apartment. (R. pp. 684-85).

Following the execution of the search warrant, police began speaking to Appellant's friends and neighbors. (R. pp. 1037-38). In particular, police determined Appellant and his wife, Rosa Grenald, had recently been driving a two-door silver Honda with tinted windows. (R.

[2] There appears to be a difference in opinion as to when the search warrant was executed as both the State and defense counsel believed the warrant was executed on June 5th (R. pp. 52-53), while Gonzalez believed the warrant was executed on June 8th. (R. pp. 683-84).

pp. 597-98, 544, 456, 701). Police also learned Appellant had asked his neighbor, Joseph Smith, about buying nine-millimeter bullets for him. (R. p. 700). Smith later testified that in addition to seeking bullets from him, Appellant had talked to him about the April 23rd incident with Hudson telling Smith he was going to handle the situation. (R. p. 700).

Police also learned from Appellant's neighbor, Nina Gordon, that on the day of the murder she observed Appellant leaving his apartment in a hooded sweatshirt with a hat on. (R. pp. 455, 465-66). Gordon added Appellant usually wore dark scrubs to work with a hooded sweatshirt and hat. (R. pp. 455, 465-66). Continuing, Gordon stated she actually visited with Appellant's wife on the afternoon of the murder and was present when Appellant called and told Appellant's wife not to go home until he said so. (R. p. 457).

In addition, police obtained a statement from Appellant's friend, Torrian Gleaton, who was also a friend of Hudson's. (R. pp. 960-62). In his statement, which was introduced through investigator Walter Mahoney when Gleaton denied making the statement to police at the Columbia Police Department on June 3rd, 2010,[3] Gleaton informed police that Appellant called him after the murder telling him he "sprayed the yard." (R. p. 980). The statement further revealed Appellant had asked Gleaton about Hudson's welfare and whether anyone suspected him of being behind the incident. (R. pp. 973-77, 999-1001).

After speaking with Appellant's neighbors, police attempted to contact Appellant and his wife regarding the silver Honda, but were unable to do so until the end of July. (R. p. 1048). However, police were able to contact Appellant's wife's friend, Shanelle Latimer, who informed them that during the course of Memorial Day weekend, Appellant's wife came to Latimer with

[3] At trial Gleaton, after consulting with his attorneys and being advised of his rights and the penalties for contempt, denied making the June 3, 2010 statement to police (R. p. 846), and added he would not cooperate since he and his families lives were threatened. (R. pp. 848-49).

the silver Honda and left the keys in her possession, telling her to drive it only in an emergency. (R. p. 522). Police also contacted Shaquenda Evans, Appellant's wife's supervisor, who later testified Appellant's wife had asked to switch cars with her. (R. pp. 528-30). Evans explained she kept the silver Honda for around two weeks until Appellant's wife eventually retrieved the car. (R. pp. 528-30).

Police also contacted the Department of Mental Health, where Appellant was employed. (R. p. 1037). There they learned that while Appellant's work hours indicated he was at work all day, William Littlejohn, a security officer who locked down the facility on the afternoon of May 20th due to a disturbance in the Greenview neighborhood, did not recall seeing Appellant when they performed the lockdown. (R. pp. 537, 544, 546). Indeed, records obtained from Appellant's physical therapist revealed he had an appointment that afternoon at 1:30 PM. (R. pp. 1046-47). While Appellant wrote on the physical therapist's sign-in sheet that he signed in at 1:00 PM, the person on the sign-in sheet immediately before him signed in at 1:09 PM.[4] (R. pp. 1046-47). In addition, police discovered Appellant was separated from his employment in the aftermath of the shooting due to three or more days of consecutive absences dating back to June 9th, 2009 when Appellant and his wife fled South Carolina after learning their apartment had been searched by police. (R. pp. 1213-14, 1157-58; 1404).

Eventually, Appellant and his wife turned themselves in. (R. p. 1048). Subsequently, Appellant's previous attorney arranged for an interview between Appellant and police. (R. p. 1052). During the interview, Appellant denied that he and his wife had access to a silver Honda, a statement which was subsequently rebutted by the testimony of Appellant's wife and her sister,

[4] However, cell phone tower records which were retrieved and plotted on a map, demonstrated Appellant was not at physical therapy at the time he had written on the sheet. (R. p. 773).

Rotania Grenald ("Rotania") who both admitted the car, which was Rotania's, was in Appellant's wife's care during the time in which the crimes were committed. (R. pp. 1152, 1028). Finally, investigators spoke with two inmates, Terran Hughey and Travis Golson, both of whom shared the "Hotel Unit" in the Alvin S. Glenn Detention Center with Appellant. (R. pp. 789, 861). Each relayed the details Appellant had told them about how he discovered where Hudson lived. (R. pp. 793-99, 864-65). In fact, both Hughey and Golson later testified Appellant revealed to them that he had a female take him to the Best Buy where Hudson's father, who lived with Hudson, worked. (R. pp. 793-99, 864-65). While in the Best Buy parking lot, she also identified Hudson's father's truck. (R. pp. 793, 864-65). Appellant then had the female take him to Hudson's home where they saw the same truck again. (R. pp. 793-99, 867). Each separately testified to several details about the incident and how Appellant believed he was going to get away with it.[5] (R. pp. 864-66).

STANDARD OF REVIEW

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

ARGUMENTS

I. The trial court properly denied Appellant's motion to suppress the photograph of Ellison Hudson because the facts contained within the affidavit supporting the warrant provided probable cause and were so closely related to the time of the issuance of the warrant as to justify a finding that probable cause continued to exist at the time the warrant was executed

[5] At trial, Appellant denied ever speaking to Hughey or Golson about his case in jail, denied speaking to Gleaton and denied asking Smith about bullets or speaking to him about the April 23rd incident. (R. pp. 1409, 1413, 1443). He also stated the value of the marijuana taken during the April 23rd incident was only two or three hundred dollars, adding he held no ill will towards Hudson. (R. pp. 1396, 1437).

Appellant first contends the trial court erred in denying his motion to suppress the photograph of Ellison Hudson found in his apartment because the information supporting the warrant no longer provided probable cause. Specifically, Appellant explains the time between the occurrence of the April 23rd incident and June 5th, when the search warrant was executed, meant there was no longer probable cause to support the warrant. The State disagrees.

A. Presentation of the Issue

This issue was first raised to the trial court via a pre-trial motion to suppress. (R. pp. 50-58). Initially, defense counsel argued there was no probable cause for the search warrant because Hudson's June 4th statement revealed the April 23rd incident occurred outside of Appellant's apartment and needed no further investigation because Hudson "gave a full accounting of the crime prior to law enforcement's search." (R. pp. 50-51). As the trial court was denying the motion, defense counsel announced a second basis for the motion, this time arguing there was no probable cause because the incident occurred on April 23rd and the warrant was executed on June 5th meaning the warrant was stale. (R. p. 52).

In response, the State handed up the search warrant and explained the April 23rd incident was first reported as a shootout by a neighbor, Carmen Rodriguez, whose car was shot during the altercation. (R. pp. 53, 678). Specifically, the State explained the incident was being investigated as a discharging a firearm and the malicious injury to real and personal property related to, among other things, the shooting of Rodriguez's car. (R. p. 53). Continuing, the State explained there was no evidence a robbery took place until June 4th when Hudson admitted he took the marijuana from Appellant. (R. pp. 54-55). The State further noted Hudson's statement indicated he took the marijuana; Appellant retreated; Hudson ran away; Appellant went into his

apartment; emerged with a gun; and began firing into the parking lot at Hudson and McDowell from the apartment complex's third floor breezeway as the duo was fleeing. (R. pp. 54-55, 315-19). The State added that the affidavit in support of the search warrant identified the gun believed to be in Appellant's apartment as one of the items to be seized. (R. p. 55). The State then passed up State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) and State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) as authority supporting a finding of probable cause. (R. pp. 56-57). In particular, the State highlighted that in Beckham, the Supreme Court of South Carolina held there was still probable cause to support a search warrant seeking a gun from the defendant's home a year after the crime had been committed when police, after receiving information the victim was murdered with a gun, sought a search warrant to look for the gun. (R. pp. 56-57).

In reply, defense counsel argued there was information identifying Appellant as the shooter on the date the incident was reported, but argued that because police did not seek a search warrant at that time, they were essentially barred from subsequently seeking a search warrant when they later received additional information corroborating previous statements regarding the shootout. (R. p. 58). The trial court denied the motion finding there was a basis for issuing the warrant and therefore allowed the state to introduce the photograph of Hudson that police found in Appellant's apartment when they lawfully executed the search warrant. (R. p. 59).

At trial, the State called William Gonzalez from the Richland County Sheriff's Department to testify regarding his investigation into the April 23rd incident including the search of Appellant's residence. (R. pp. 680-87). Gonzalez testified he had been assigned to

investigate the April 23rd incident and explained that when he initially responded to the call, which was described as a shooting, he spoke to "several individuals" who were around the complex, spoke to the manager and got a list of everybody that lived in the building so he could go door-to-door to determine if any of the residents of the complex "saw anything." (R. p. 681). Continuing, Gonzalez explained he followed-up by going door-to-door and asking residents about the shooting. (R. p. 682). Gonzalez further related that when he spoke to Appellant regarding the shooting, Appellant flatly denied any knowledge or involvement. (R. 682-83).

With respect to the search of Appellant's apartment, Gonzalez testified he and Reese, the chief investigator in the murder investigation, spoke with Hudson on June 4th regarding the April 23rd incident. (R. pp. 682-83). After Hudson confirmed Appellant had shot at him, Gonzalez sought and received a search warrant for Appellant's residence.[6] (R. pp. 683-84).

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[6] The affidavit supporting the search warrant states as follows:

> On 4/23/09 at 80 Brighton Hill in Richland County the victim Nina Gordon reported to law enforcement that while she was sitting in her living room in her apartment . . . she heard several people yelling and running up the stairs and immediately after that she heard several gunshots and one of the shots came through her living room window. Carmen Rodriguez also reported that her vehicle was struck by a bullet from the gunfire.
>
> A witness stated that he was coming from building #2 to visit a friend when he saw a light skin black male running from the breezeway carrying a bag. The witness also stated that there was another black male that was wearing red pants on the third floor breezeway that was shooting at the individual that were [leaving] in a silver grand prix. The witness pointed out to the responding officer that he believe (sic) the individual that was shooting at the car with the other individuals is the guy that is currently standing on the third floor breezeway. The responding officer made contact with that individual who was identified as Anthony Hackshaw. Anthony Hackshaw denied any involvement an any knowledge of the shooting incident.
>
> On 6/4/09 upon further investigation it was determined that Ellison Hudson was involved with the shooting at Wyndham apartments. Hudson stated that he, along with a co-defendant robbed Anthony Hackshaw, aka "Bump" of a back pack that contains several ounces of marijuana. He also stated that while they were running to the vehicle (the silver gran prix) with the back pack in his hand he was shot at. He turned around and saw Anthony Hackshaw shooting from the third floor breezeway. He then shoots back at Hackshaw while getting into the vehicle. Hudson stated that while they were fleeing the area Anthony Hackshaw continue (sic) to shoot at him. Hudson was able to identify Hackshaw from a photo lineup as the individual that was shooting.

Gonzalez was then asked the address of Appellant's residence at which point defense counsel renewed her previous objections. (R. p. 684). The trial court overruled the objection and the State then asked Gonzalez whether they recovered State's Exhibit 61, a photograph of Hudson, from Appellant's residence. (R. pp. 684-85). When Gonzalez confirmed they recovered the item in a bedroom dresser in Appellant and his wife's bedroom, the State moved the photograph into evidence over defense counsel's objection. (R. pp. 684-85). Gonzalez then testified the search warrant was executed on June 8th of 2009.[7] (R. p. 685).

B. Law Regarding Probable Cause and the Effect of the Passage of Time

When reviewing probable cause, appellate courts must determine whether the magistrate had a substantial basis for concluding probable cause existed. State v. Bellamy, 323 S.C. 199, 202-03, 473 S.E.2d 838, 840 (Ct. App. 1996). In making such a decision, an appellate court must consider the totality of the circumstances. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Where there is an issue as to whether probable cause continues to exist due to the passage of time, our appellate courts have explained "a probable cause affidavit must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." State v. Corns, 310 S.C. at 550, 426 S.E.2d at 326 (citing State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979)). This is so because, probable cause dissipates with time. Winborne, 273 S.C. at 64, 254 S.E.2d at 298. However, as noted by this Court in Corns, the lapse of time does not necessarily invalidate a warrant. 310 S.C. at 550-51;

> Based upon the totality of the circumstances it is believed that a search of 80 Brighton Hill Rd apt . . . . is necessary to further the investigation into the robbery. The affiant submits that the circumstances outlined in the affidavit are far too numerous and suspicious to be coincidental. It is believed that a search of residence may produce evidence of the crime.

(Search Warrant Number I918149).

[7] It appears that both defense counsel and the State believed the warrant was executed on June 5th. (R. pp. 52-53).

426 S.E.2d at 326. In fact, both this Court and our Supreme Court, in Beckham, quoted U.S. v. Steeves, 523 F.2d 33, 37 (8th Cir. 1975) for this proposition stating as follows:

> While the lapse of time involved is an important consideration and may in some cases be controlling, it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating.

Corns, 310 S.C. at 550-51, 426 S.E.2d at 326; Beckham, 334 S.C. at 316, 513 S.E.2d at 613. Under this rationale, the Corns Court determined that a search warrant for marijuana, which contained information that was 60 days old when police sought a warrant, was still supported by probable cause. Id. at 551, 426 S.E.2d at 326. Similarly, the Beckham Court determined information that was over a year old regarding the location of a gun used to hit the victim, Beckham's wife, was still supported by probable cause. Id. at 316, 513, S.E.2d at 613.

C. The Warrant was not Stale

First, Appellant's contention, that the search warrant was simply too far removed from the April 23rd incident to produce probable cause is at odds with the case law from both Corns and Beckham. Specifically, the case law explains that when assessing whether a warrant is rendered stale by the passage of time, one must continue to review the totality of the circumstances rather than simply focusing on the passage of time alone.[8] Corns, 310 S.C. at 551, 426 S.E.2d at 326 ("Considering the totality of the circumstances, we cannot say the time lapse with which we are concerned was so great as to invalidate the warrant as a matter of law.");

[8] The State notes Appellant is not arguing the warrant was never supported by probable cause, but only that the passage of time between when the April 23rd incident occurred and June 5th, when the search warrant was believed to be executed, essentially caused probable cause to turn stale.

Beckham, 334 S.C. at 316, 513 S.E.2d at 613 ("Whether averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case.").

In the present case, the warrant was not stale, because, as was the case in Corns and Beckham, the totality of the circumstances still established probable cause. For example, the police in the present case, like the police in Corns, continued to investigate the matter by attempting to corroborate the information they received—a process which clearly took time to do. Particularly, while Gonzalez was indeed aware that individuals at the apartment complex had stated the shots from the April 23rd incident came from a common area near Appellant's apartment, they were unable to determine exactly who fired the shots. (R. pp. 674-75). In fact, witnesses correctly reported there was more than one shooter. (R. p. 674). Furthermore, while one witness gave a general description consistent with Appellant, when officers attempted to corroborate this information by speaking with Appellant, he flatly denied having any knowledge of, or involvement in, the incident. (R. p. 675). In other words, as soon as police learned the identity of the parties in the shootout, they sought a search warrant to further corroborate whether Hudson's statement was true, likely believing that if Appellant shot at Hudson as Hudson claimed, the gun which shot the bullets could be compared to the spent projectiles and casings that were found at the apartment complex. (R. pp. 676, 678).

Moreover, the information contained in the search warrant was not stale because, like in Beckham, the item to be seized was not a consumable item of personal property, but was a gun and therefore, consistent with the logic of Steeves, was likely to be stored at his residence—which in fact it was. This logic is further supported by the facts of the case. Specifically,

because Appellant, based upon the information in the search warrant, was previously robbed over drugs and that robbery resulted in a shootout, it followed that Appellant would have continued to store the gun in his house, if for no other reason, as a form of protection. Indeed, the fact that in the aftermath of the incident, Appellant reportedly told Joyner he was coming for Hudson's head would seem to indicate Appellant did not dispose of the gun kept in his home, but rather retained it. Accordingly, the State submits that when considering the totality of the circumstances, the warrant was supported by probable cause and as such, the photograph of Hudson which was found during the lawful execution of the search warrant was admissible under the "plain view" exception.[9]

II. The trial court properly admitted extrinsic evidence of Torrian Gleaton's prior statement pursuant to Rule 613(b) of the South Carolina Rules of Evidence when Gleaton, after being advised of and presented with a written and recorded statement taken on June 3, 2010 at the Columbia Police Department headquarters before investigators Kevin Reese and Walter Mahoney, denied making such a statement

Appellant argues the trial court erred when it admitted Torrian Gleaton's prior statement into evidence pursuant to Rule 613(b), SCRE, because the State allegedly failed to lay the proper foundation for admitting extrinsic evidence of a prior statement. Continuing, Appellant maintains that Gleaton, despite denying he made a statement to Reese and Mahoney on June 3, 2010 at the Columbia Police Department, did not really deny making the statement, but instead was simply refusing to cooperate. (R. pp. 846-47). As a result, Appellant explains the State did

[9] See Beckham, 334 S.C. at 317, 513 S.E.2d at 613 ("Under the plain view exception to the warrant requirement, objects failing within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence.); State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986) (same); State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990) (same). Here, police were lawfully in Appellant's home due to the fact they were executing a search warrant for a firearm which was supported by probable cause when they came across a photograph of Hudson who they knew was involved in the April 23rd incident based upon Gonzalez's June 4th interview.

not lay a proper foundation for the admission of extrinsic evidence of a prior statement and further contends he was unfairly prejudiced by the admission of such a statement.

A. Presentation of the Issue

During the State's case-in-chief, Gleaton was called to the stand. (R. p. 757). During his direct-examination, Gleaton explained he was currently in federal custody and was awaiting sentencing after pleading guilty to possession of a firearm by a felon. (R. pp. 758-59). Gleaton admitted the potential punishments he could receive were up to ten years imprisonment and a $250,000 fine. (R. p. 759). Gleaton further acknowledged that if he testified truthfully he could receive a downward departure on his federal sentence. (R. p. 759). Thereafter, Gleaton responded that he also had a pending charge in state court regarding the unlawful possession of a weapon and a 2008 conviction for possession of ecstasy. (R. p. 760).

Next, in response to whether he knew Hudson, Gleaton stated he did not want to cooperate. (R. p. 760). Gleaton reiterated this when he was subsequently asked whether he knew Appellant. (R. p. 760). Continuing with its questioning, the State then asked Gleaton whether he had previously met with investigators Reese and Mahoney on June 3, 2010. (R. pp. 760-61). Gleaton admitted that he did in fact meet with investigators at which point, defense counsel objected. (R. p. 761).

Following defense counsel's objection, a bench conference was held and the State resumed questioning Gleaton. (R. p. 761). Again, Gleaton admitted meeting with investigators on June 3, 2010, but repeated that he refused to cooperate when asked about Appellant and Hudson. (R. pp. 761-62). Defense counsel objected once more and the jury was excused. (R. p. 762).

The trial court then examined Gleaton advising him that if he did not respond he could be held in contempt and could potentially receive additional time on his federal sentence. (R. p. 763). Gleaton acknowledged he understood and the court sent for Gleaton's attorney. (R. p. 763). Other witnesses were called in the meantime to ensure Gleaton had the opportunity to speak with his attorney. In the discussion that ensued, the State announced its intention to admit Gleaton's testimony under Rule 613(b) of the South Carolina Rules of Evidence as extrinsic evidence of a prior inconsistent statement of a witness. (R. p. 764).

After additional witnesses testified, the jury was excused and Gleaton's attorney relayed to the trial court that he advised Gleaton about civil contempt and criminal contempt. (R. pp. 813-14). Continuing, Gleaton's attorney stated he advised Gleaton he could receive 180 days in jail without a jury trial, but Gleaton still refused to cooperate because, "he fears for his safety and the safety of his family." (R. pp. 814-15). The trial court then responded, "that's not a sufficient reason for his coming into this court and saying that I'm not going to cooperate and refuse to answer." (R. p. 815). The State reminded the trial court it intended to introduce Gleaton's prior statement under Rule 613(b), SCRE. (R. p. 815).

Once Gleaton was given additional time to consult with his attorney, the trial court ordered Gleaton to answer the State's questions. (R. pp. 835-36). His attorney indicated to the trial court that Gleaton intended to defy the trial court's order adding, "[m]y understanding is that he's not going to admit to even having made the statement today." (R. p. 836).

The State then began to explain its basis for admitting Gleaton's previous statement stating "I believe that he is going to say he does not admit to making the statement," to which the trial court responded, "[t]hat's not my understanding . . ." (R. p. 839). At that point, Gleaton's

attorney clarified that if Gleaton was asked if he made the statement, he would deny making the statement at which point he would then refuse to cooperate. (R. p. 839). The trial court confirmed this once more with Gleaton's attorney at which point the State cited to State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009) as authority supporting the admission of Gleaton's previous statement under Rule 613(b), SCRE. (R. pp. 841-42).

Arguing for the admission of the statement, the State compared the predicament to that of the Stokes decision stating:

> [The State] called the defendant's uncle to the stand to testify. They questioned—the State asked him whether or not he made a statement to the police on November 26th of 2003 after he was taken to the hospital. He denied making the statement.
>
> Your Honor, the State was then allowed to introduce extrinsic evidence of the prior inconsistent statement. Defense counsel argued under Crawford[v. Washington, 541 U.S. 36 (2004)] that they were denied effective cross-examination of him. However, the South Carolina Supreme Court held, based on Crawford, that they were not denied the protections that Crawford affords the defendant. Because the declarant was therefore cross-examin[ed] at trial, the confrontation clause places no constraints at all on the use of prior testimonial statements. And they further went on to say that the confrontation clause does not bar admission of the statement so long as the declarant is present at trial to defend or to explain it.
>
> Your Honor, the Court went on to emphasize that it's the opportunity to cross-examine that is constitutionally protected and that in the incident case, Your Honor, we would argue the defense will have that opportunity to cross-examine the witness. He is here. He is on the stand available for cross-examination, Your Honor, and it is the opportunity to cross-examine, not the effectiveness or the—or any other thing that Crawford protects.
>
> Therefore, Your Honor, the statement would—our position is that the prior inconsistent statement would not be hearsay as defined under—I think it's 801(d)(1), Your Honor.

(R. p. 842). The trial court acknowledged that it was familiar with Stokes.

Defense counsel then responded to the State's argument, first citing to State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008), before explaining the present situation was more like Crawford with the exception that the marital privilege did not render Gleaton unavailable as the witness was in Crawford. (R. pp. 843-44). Nevertheless, defense counsel continued to argue Crawford prohibited the admission of Gleaton's previous statement. (R. p. 844).

The trial court reviewed Crawford before ruling, stating "I'm going to allow you to proceed and we'll see what he does, and we'll see if you can lay a foundation. And if you do that, the way I read this case, they can offer extrinsic evidence at some point in time in the future." (R. p. 844). Defense counsel reiterated her objection. (R. p. 844). The trial court then reiterated his understanding of Stokes stating, "[t]he way I read that case is if this fellow is available—and in reading other cases if, in fact, he says 'I don't remember,' I think the law is the Court can interpret whether he is—even if he doesn't answer is that amounts to a denial." (R. p. 845). The jury was then brought in and Gleaton, after being reminded he was still under oath, took the stand. (R. p. 845).

The following colloquy ensued:

> Q: Mr. Gleaton, I'm showing you what's been marked as State's exhibit number 68, a written statement, and State's exhibit number 69, a recorded statement. Do you admit making those statements on June the 3rd of this year, 2010, at the Columbia Police Department headquarters to Kevin Reese and Investigator Mahoney?
>
> A: No, ma'am.
>
> Q: You do not admit to making those[?]
>
> A: No, ma'am.

(R. p. 846). The State then told the trial court, "that would be the basis of our foundation for admission under extrinsic evidence." (R. p. 846). The trial court subsequently ruled, "he's denied that he made the statement." (R. pp. 846-47). Defense counsel did not object to the trial court's determination regarding the foundation for admission regarding Rule 613(b), SCRE. (R. pp. 846-47).

Defense counsel then asked on cross-examination whether Gleaton was willing to answer her questions to which he responded, "I just don't feel comfortable cooperating." (R. p. 847). Defense counsel then asked, "[w]ill you admit to me you made those statements?" to which Gleaton responded, "[n]o ma'am." (R. p. 848). The jury was excused again, and after they exited the courtroom, the trial court found Gleaton in direct contempt. (R. p. 848). The trial court then asked Gleaton's attorney if he had anything to add. (R. p. 848). In response, Gleaton's attorney said:

> [H]e has told me that he does not want to cooperate and I think it would be inappropriate to say it in front of a jury, but he feels like it will endanger his life and the life of his or the welfare of his family. He has actually discussed this with members of his family, and there are members of his family that [are]even afraid if he were to come in here today and testify against this particular man. *Even though this particular person could not harm him, he believes that this person could direct others to harm him, and he refuses to do anything to assist in the prosecution of him.*

(R. p. 849). (emphasis added). The trial court sentenced Gleaton to six months consecutive to his federal sentence. (R. pp. 849-50). Defense counsel renewed her Confrontation Clause objection, but did not object with respect to the foundational aspect of Rule 613(b), SCRE. (R. p. 853). The trial court, relying on Stokes, then ruled that Gleaton denied the statement, was available for cross-examination and noted the statement could be admitted through extrinsic evidence. (R. p. 854). Defense counsel then asked the trial court to review State v. Mitchell

before making a final ruling. (R. pp. 854-55). The trial court agreed to review Mitchell and in the meantime, the State presented another witness. (R. p. 855).

At the conclusion of the next witness, the trial court issued its ruling regarding Gleaton's prior statement finding, "[o]kay[,] I have read Mitchell and I have not changed my opinion after reading Mitchell." (R. p. 885). The trial court then distinguished Mitchell from Appellant's case stating:

> Mitchell—clearly there was a difference in the facts, the availability of that witness. They were removed from the courthouse. Nobody had an opportunity to talk to that witness, question him. You know, we gave you as much opportunity as we could under the facts and circumstances in this case, so I don't believe based on Stokes that—I believe Stokes is controlling in this instance, and I'm going to allow the extrinsic evidence to come in if that's what the State intends to do at some point in time.

(R. p. 885). The parties further agreed to make arrangements for additional cross-examination of Gleaton. (R. pp. 885-86).

After testimony was presented from other witnesses, defense counsel attempted to "re-address" the ruling. (R. p. 938). The trial court informed defense counsel the ruling was final prompting defense counsel to pass up a memorandum of law, which the trial court subsequently reviewed and again, denied. (R. pp. 939, 943-44). Defense counsel then noted unavailability was never argued in Stokes. (R. p. 944).

Following defense counsel's attempts to re-address the trial court's ruling, the State published a redacted transcript of Gleaton's statement through Mahoney after Mahoney verified that both he and Reese interviewed Gleaton on June 3, 2010 at the headquarters of the Columbia Police Department. (R. pp. 960-62, 963-1002). In his statement, Gleaton explained to investigators that Appellant planned to retaliate against Hudson and was actively looking for

Hudson so he could exact revenge. (R. pp. 966, 968-69, 972). Gleaton's statement further revealed Appellant was one of the two men responsible for the shooting, explaining that Appellant told him "we hit somebody" when they "sprayed" Hudson's yard. (R. pp. 990-91, 999-1001).

After the statement was published to the jury, defense counsel cross-examined Mahoney eliciting that Gleaton had been interrogated for nearly three hours in total. (R. pp. 1002). Mahoney further acknowledged Reese, during the interview with Gleaton, asked Gleaton if he was aware he was making himself an accessory to murder. (R. p. 1004).

B. The Law Regarding the Admission of Evidence and Rule 613(b), SCRE

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009).

"Under the rules of evidence, a prior inconsistent statement may be admitted when the proper foundation has been laid." Stokes, 381 S.C. at 398, 673 S.E.2d at 438. Thus, for admission under Rule 613(b), SCRE, the witness must be advised of: (1) the substance of the statement; (2) the time and place the statement was made; (3) the person to whom it was made; and (4) given the opportunity to explain or deny the statement. Rule 613(b), SCRE.

C. The Statement is Admissible due to Defense Counsel's Failure to Object

First, the State questions whether this issue is preserved for appellate review in light of the fact defense counsel, despite raising numerous objections to the admission of the statement

on Confrontation Clause grounds, clearly failed to object to the trial court's preliminary factual ruling on whether the foundational requirements of Rule 613(b), SCRE had been satisfied. In other words, because defense counsel never objected as to whether the State laid a sufficient foundation for the admission of the statement under Rule 613(b), SCRE, this particular issue is unavailable for appellate review. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

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

Here, despite multiple opportunities, defense counsel simply failed to lodge an objection as to the sufficiency of the foundation supporting the admission of the prior statement under Rule 613(b), SCRE. In particular, defense counsel never argued, as is now argued on appeal, that Appellant's failure to cooperate rendered his denial of the statement incomplete for purposes of establishing a foundation for admission under Rule 613(b), SCRE. Indeed, even in his brief,

Appellant has failed to identify which aspect of Gleaton's denial of the statement was insufficient under the rule. Instead, Appellant continuously objected under Confrontation Clause grounds citing to only Crawford and Mitchell, neither of which raised 613(b), SCRE foundational concerns. Accordingly, Appellant is now foreclosed from asserting such a claim on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (requiring an issue be raised to and ruled upon by the trial court in order to be preserved for appellate review).

D. The Statement is Admissible Pursuant to Rule 613(b), SCRE

As previously noted, Appellant contends the State failed to lay a sufficient foundation to allow for the admission of Gleaton's prior statement under Rule 613(b), SCRE, because according to his view of the evidence, Gleaton was not denying he made the statement but was instead being uncooperative. He further contends the admission of such evidence is unfairly prejudicial.[10]

In response, the State submits the trial court correctly ruled each of Rule 613(b), SCRE's foundational requirements were met when Gleaton, after much discussion with his attorney and with the trial court during the *in camera* courtroom sessions, unequivocally explained he planned to deny giving the statement to investigators Reese and Mahoney on June 3, 2010 at the Columbia Police Department headquarters and in fact did as much on the record. (R. pp. 836, 839, 846-47). Specifically, Gleaton, who initially agreed he met with investigators Reese and Mahoney on June 3, 2010 at the Columbia Police Department headquarters (R. pp. 761-62), later

[10] With respect to Appellant's claim of unfair prejudice the State notes that while Appellant is arguing he was unfairly prejudiced by the admission of Gleaton's statement, Gleaton refused to cooperate because, "he fears for his safety and the safety of his family." (R. p. 815). In fact, Gleaton, despite being advised that his failure to cooperate would result in his receiving a six-month sentence for contempt of court, decided to be held in contempt out of concern for himself and his family. (R. pp. 814-15, 849). Specifically, Gleaton's attorney explained that Gleaton's family members were even afraid to come to court due to concerns they may be harmed. (R. p. 849).

announced he would deny even making the statement (R. pp. 836, 839) and when presented with both a written and recorded copy of the statement, followed through and denied having ever done so. (R. pp. 846-47).

As detailed above, "[u]nder the rules of evidence, a prior inconsistent statement may be admitted when the proper foundation has been laid." Stokes, 381 S.C. at 398, 673 S.E.2d at 438. Thus, for admission under Rule 613(b), SCRE, the witness must be advised of: (1) the substance of the statement; (2) the time and place the statement was made; (3) the person to whom it was made; and (4) given the opportunity to explain or deny the statement. Rule 613(b), SCRE.

Here, Gleaton, despite later reversing course, clearly knew the substance of the statement since it was presented to him in both a written and recorded format. (R. pp. 846-47). This is further evidenced by the fact Gleaton acknowledged he was not cooperating out of fear for himself and his family meaning he realized his testimony regarding the statement was damaging to Appellant. (R. pp. 814-15, 849). Similarly, Gleaton was obviously aware of the time and place of the statement, as well as the people to whom the statement was made, since he was repeatedly asked this question during trial. (R. pp. 761-62, 846-47, 848). Likewise, Gleaton was clearly given the opportunity to explain or deny the statement because when he was asked, he denied making the statement multiple times. (R. pp. 846-47, 848). Accordingly, the trial court correctly determined the State met all of the conditions for the admission of extrinsic evidence of Gleaton's prior inconsistent statement.

III. The trial court correctly concluded Appellant's Confrontation Clause Rights were not violated by the admission of extrinsic evidence of Gleaton's prior statement because the trial court correctly concluded Gleaton was available for cross-examination

Appellant maintains he was denied his Sixth and Fourteenth Amendment Rights to confront the witnesses against him when Gleaton, during direct examination, stopped cooperating, which Appellant contends rendered him unavailable for cross-examination. Specifically, Appellant seeks to distinguish this case from State v. Stokes on the basis that Gleaton, unlike the witness from Stokes, was unavailable for cross-examination which he believes, results in a violation of his Confrontation Clause rights. The State disagrees.

A. Presentation of the Issue

As discussed above, Gleaton was primarily called to the stand to testify regarding his conversations with Appellant after the shooting at Hudson's residence when, after acknowledging his past criminal record, pending charges and potential for receiving a downward departure, he elected to stop cooperating. (R. pp. 758-61). Specifically, Gleaton refused to cooperate because, "he fears for his safety and the safety of his family." (R. pp. 814-15). Gleaton's attorney later engaged in a more robust discussion of Gleaton's refusal to testify stating:

> [H]e has told me that he does not want to cooperate and I think it would be inappropriate to say it in front of a jury, but he feels like it will endanger his life and the life of his or the welfare of his family. He has actually discussed this with members of his family, and there are members of his family that even afraid if he were to come in here today and testify against this particular man. *Even though this particular person could not harm him, he believes that this person could direct others to harm him, and he refuses to do anything to assist in the prosecution of him.*

(R. p. 849). (emphasis added).

After it became evident Gleaton would refuse to testify, defense counsel objected to the admission of extrinsic evidence of Gleaton's statement on Confrontation Clause grounds. (R. pp.

849-50). Arguing for the admission of the statement, the State likened the situation to a similar situation in Stokes stating:

> [The State] called the defendant's uncle to the stand to testify. They questioned—the State asked him whether or not he made a statement to the police on November 26th of 2003 after he was taken to the hospital. He denied making the statement.
>
> Your Honor, the State was then allowed to introduce extrinsic evidence of the prior inconsistent statement. Defense counsel argued under Crawford, that they were denied effective cross-examination of him. However, the South Carolina Supreme Court held, based on Crawford, that they were not denied the protections that Crawford affords the defendant. Because the declarant was therefore cross-examin[ed] at trial, the confrontation clause places no constraints at all on the use of prior testimonial statements. And they further went on to say that the confrontation clause does not bar admission of the statement so long as the declarant is present at trial to defend or to explain it.
>
> Your Honor, the Court went on to emphasize that it's the opportunity to cross-examine that is constitutionally protected and that in the incident case, Your Honor, we would argue the defense will have that opportunity to cross-examine the witness. He is here. He is on the stand available for cross-examination, Your Honor, and it is the opportunity to cross-examine, not the effectiveness or the—or any other thing that Crawford protects.
>
> Therefore, Your Honor, the statement would—our position is that the prior inconsistent statement would not be hearsay as defined under—I think it's 801(d)(1), Your Honor.

(R. p. 842). The trial court acknowledged that it was familiar with Stokes.

Defense counsel then responded to the State's argument, first citing to State v. Mitchell, before explaining the present situation was more like Crawford with the exception that the marital privilege did not render Gleaton unavailable as the witness was in Crawford. (R. pp. 843-44). Nevertheless, defense counsel continued to argue Crawford prohibited the admission of Gleaton's previous statement. (R. p. 844).

The trial court reviewed Crawford before ruling, stating "I'm going to allow you to proceed and we'll see what he does, and we'll see if you can lay a foundation. And if you do that, the way I read this case, they can offer extrinsic evidence at some point in time in the future." (R. p. 844). Defense counsel reiterated her objection. (R. p. 844). The trial court then explained his understanding of Stokes stating, "[t]he way I read that case is if this fellow is available—and in reading other cases if, in fact, he says 'I don't remember,' I think the law is the Court can interpret whether he is—even if he doesn't answer is that amounts to a denial." (R. p. 845).

After further discussion on the matter, defense counsel renewed her Confrontation Clause objection once again. (R. p. 853). The trial court, relying on Stokes, then ruled that Gleaton denied the statement, was available for cross-examination and noted the statement could be admitted through extrinsic evidence. (R. p. 854). Defense counsel then asked the trial court to review State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008) before making a final ruling on its Confrontation Clause objection. (R. pp. 854-55). The trial court agreed to review Mitchell and in the meantime, the State presented another witness. (R. p. 855).

At the conclusion of the next witness, the trial court issued its ruling regarding Gleaton's prior statement finding, "[o]kay[,] I have read Mitchell and I have not changed my opinion after reading Mitchell." (R. p. 885). The trial court then distinguished Mitchell from Appellant's case stating:

> Mitchell—clearly there was a difference in the facts, the availability of that witness. They were removed from the courthouse. Nobody had an opportunity to talk to that witness, question him. You know, we gave you as much opportunity as we could under the facts and circumstances in this case, so I don't believe based on Stokes that—I believe Stokes is controlling in this instance, and I'm

going to allow the extrinsic evidence to come in if that's what the State intends to do at some point in time.

(R. p. 885). The parties further agreed to make arrangements for additional cross-examination of Gleaton. (R. pp. 885-86). After testimony was presented from other witnesses, defense counsel attempted to "re-address" the ruling. (R. p. 938). The trial court informed defense counsel the ruling was final prompting defense counsel to pass up a memorandum of law, which the trial court subsequently reviewed and again, denied. (R. pp. 939, 943-44). Defense counsel then noted unavailability was never argued in Stokes. (R. p. 944).

B. Law Regarding one's Right to Confrontation

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. Accordingly, the Supreme Court of the United States has generally determined the introduction of testimonial hearsay violates the Confrontation Clause if: (1) the witness is unavailable, and (2) the defendant has not had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 68 (2004). Yet where the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on the use of his prior testimonial statements. Id. at 59 n. 9. Indeed, "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id. "[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." California v. Green, 399 U.S. 149, 162 (1970).

With respect to cross-examination specifically, the Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in

whatever way, and to whatever extent, the defense might wish." U.S. v. Owens, 484 U.S. 554, 559 (1988) (internal quotation marks and citations omitted). Indeed, an opponent's opportunity for cross-examination can be considered the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19–20 (1985) (internal quotation marks and citation omitted); see also Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (explaining the Confrontation Clause's "functional purpose" as "ensuring a defendant an opportunity for cross-examination"). Thus, it is the opportunity to cross-examine, rather than effective cross-examination that is constitutionally protected by the Confrontation Clause. State v. Stokes, 381 S.C. 390, 402, 673 S.E.2d 434, 440 (2009).

Additionally, despite the general rule from Crawford prohibiting the introduction of unconfronted testimonial hearsay, the Crawford Court simultaneously recognized a limited exception to this rule writing that "a defendant, by his own 'wrongdoing,' can forfeit 'on essentially equitable grounds' his Confrontation Clause right." Id., at 62. This proposition, known as the "forfeiture by wrongdoing exception," was reiterated in Davis v. Washington, 547 U.S. 813 (2006), where the Court again recognized that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." Id., at 833.

Most recently, this common law-based Confrontation Clause exception was acknowledged in Giles v. California, 554 U.S. 353 (2008) where the Supreme Court of the United States gave a detailed historical account of the "forfeiture by wrongdoing" exception and its common law origins. Id. at 358-59. Specifically, the Giles Court, reaching back to the Confrontation Clauses' common law underpinnings, explained forfeiture by wrongdoing permitted the introduction of unconfronted testimonial statements of a witness who was

"detained" or "kept away" by the "means or procurement" of the defendant or his associates. Id. at 359. Summarizing the meaning of the "forfeiture by wrongdoing" exception, the Giles Court stated, "the scope of the forfeiture rule suggest[s] that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying" or where the defendant "uses an intermediary for the purpose of making a witness absent." Id. at 360.

In addition to the Supreme Court of the United States recognition that, as a matter of equity, one's intentional wrongdoing may result in the relinquishment of a constitutional right, the Federal Rules of Evidence, in 1997, adopted this limitation as it related to findings of unavailability. Davis, 547 U.S. at 833. Specifically, Federal Rules of Evidence Rule 804(b)(6), "codifies the forfeiture doctrine" from these cases. Id. South Carolina also recognizes the "forfeiture by wrongdoing" rule in South Carolina Rules of Evidence, Rule 804(a). Specifically, the rule states:

> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Rule 804(a), SCRE.

C. There is No Confrontation Clause Violation

Here, Appellant appears to agree the Confrontation Clause allows for only the opportunity to cross-examine, but argues that because Gleaton refused to cooperate, he was unavailable, and therefore Appellant did not have the opportunity to cross-examine the witness thereby violating his Right to Confrontation under Crawford. Quite simply, this is incorrect.

First, Appellant's contention that Gleaton was unavailable for cross-examination is simply wrong. In fact, defense counsel never formally requested the trial court make a finding of

unavailability under any of the provisions of Rule 804(a), SCRE. See Rule 804(a), SCRE (explaining the ways in which one may found to be unavailable under the Rule). Instead, defense counsel, in arguing that Stokes did not apply, generally stated that Gleaton's refusal to further cooperate rendered him unavailable without any supporting authority—an argument which the trial court overruled multiple times. (R.pp. 854, 885, 939, 943-44, 1479-1480).

Moreover, the trial court's factual determination that Gleaton was available for cross-examination was correct since Gleaton was called as a witness; was cross-examined; was subsequently recalled for additional cross-examination and was then called as a defense witness. Thus, since the trial court, after reviewing Stokes, determined that Gleaton, like the witness in Stokes, was in fact available for cross-examination and therefore, consistent with Stokes, admitted Gleaton's testimony, the trial court did not abuse its discretion. Rather, the trial court correctly applied the Stokes Court's reasoning that where the witness testifies at trial, the Confrontation Clause only protects "the opportunity to cross-examine, rather than effective cross-examination." Stokes, 381 S.C. at 402, 673 S.E.2d at 440. In light of these facts, the State submits Appellant's argument lacks merit.

Furthermore, even if defense counsel had asked the trial court to make a formal determination of unavailability under the provisions of Rule 804(a), SCRE, the trial court, consistent with Rule 804(a), SCRE's prohibition on the use of wrongdoing to support a finding of unavailability, would have denied such a request. See Rule 804(a), SCRE ("A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."). Indeed, as discussed above in IIIA,

Appellant's misconduct in intimidating Gleaton off the witness stand and into a six-month contempt sentence bars a finding of unavailability under Rule 804(a), SCRE. (R. pp. 844-45, 849). Therefore, Appellant's Confrontation Rights were not violated, since the trial court, consistent with Rule 804(a), SCRE's prohibition on unavailability by wrongdoing, correctly determined Gleaton was available for cross-examination. See Crawford, 541 U.S. at 68 ("The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").

Finally, even if this court were to find that Gleaton was unavailable, Gleaton's attorney's statement that both Gleaton and members of his family believed Appellant could order others to harm them is susceptible to an inference which would take this case out of the general rule of Crawford and into the forfeiture by wrongdoing exception. As discussed above, the Supreme Court of the United States, in Giles, elaborated on the requirements of the forfeiture by wrongdoing exception, overruling a California version of the exception which allowed for the admission of an unconfronted testimonial statement where the defendant committed wrongdoing in generally rendering the victim unavailable. Giles, 554 U.S. at 365. The Giles Court did so on the basis that the California version of the exception was not an established exception under common law at the time the Sixth Amendment was written. Giles, 554 U.S. at 365. In so finding, the Giles Court wrote that the common law wrongful forfeiture exception applied only where there was "a showing[11] that the defendant intended to prevent a witness from testifying." Id. at 361.

[11] In the wake of Giles, state courts have characterized this "showing" differently. See e.g. In re: Roland G., 232 Ill. 13, 902 N.E.2d 600, 616, 327 Ill. Dec. 479, 495 (2008) ("The doctrine of forfeiture by wrongdoing may not be employed to deny an accused his confrontation right absent evidence that, when committing the crime or other wrongdoing, the accused was motivated by the desire to prevent the witness from testifying against him at trial.");

In the present case, while the trial court never made a factual finding regarding forfeiture by wrongdoing—likely because the witness was available and defense counsel never provided a legal basis for declaring the witness unavailable—the State submits the evidence contained within the record could support an inference that Appellant threatened or otherwise influenced Gleaton not to testify. In particular, one could infer that Gleaton and his family's fear of implicating Appellant was produced as a result of Appellant, either by himself or by "procurement" of others, informing Gleaton or members of his family that Appellant had the power and the people to harm them. In support of this inference, the State notes Gleaton's interview revealed that after the shooting he and Appellant spoke nearly every day (R. p. 971), but by the time of trial, he was under the belief that Appellant "could direct others to harm him[.]" (R. p. 949). This fact suggests that Appellant or his associates conveyed this information to Gleaton or his family in an attempt to discourage him from testifying. Indeed, Gleaton's attorney's statement to the Court regarding Gleaton's discussions with his family members further demonstrates these facts. In particular, Gleaton's attorney said:

> [Gleaton] has told me that he does not want to cooperate and I think it would be inappropriate to say it in front of a jury, but he feels like it will endanger his life and the life of his or the welfare of his family. He has actually discussed this with members of his family, and there are members of his family that even afraid if he were to come in here today and testify against this particular man. Even though this particular person could not harm him, he believes that this person could direct others to harm him, and he refuses to do anything to assist in the prosecution of him.

(R. p. 849). Therefore, the State submits there is a suggestion Appellant waived his Right to Confrontation under the forfeiture by wrongdoing exception and as a result, no violation exists.

State v. Dobbs, 167 Wash. App. 905, 913, 276 P.3d 324, 328 (Ct. App., Div. 2, May 1, 2012) (explaining the State must prove that the defendant's conduct is the reason for the witness's absence and must do so by "clear, cogent, and convincing evidence.").

See Davis, 547 U.S. at 833 ("[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."); Giles, 554 U.S. at 360 (explaining the forfeiture by wrongdoing exception applies where the defendant or "an intermediary" engages in conduct designed to prevent the witness from testifying). Accordingly, the State asks this Court to affirm the trial court's ruling on this issue.

IV. The trial court correctly refused Appellant's request to charge the jury on Gleaton's potential exposure as an accessory before the fact of murder as Gleaton was never arrested as an accessory, never charged with accessory, was never told of any potential penalties if he were charged as an accessory and the information regarding the circumstances of his interrogation was already before the jury

Appellant next argues he was denied his right to due process when the trial court, perhaps realizing the limited scope of Gleaton's cross-examination, agreed to charge the jury on Gleaton's potential exposure of accessory after the fact of murder, but declined to charge the jury on Gleaton's potential exposure to accessory before the fact of murder. Arguing this error is unfairly prejudicial, Appellant repeatedly ties the failure to charge on Gleaton's potential exposure to accessory before the fact of murder to Appellant's limited opportunity to cross-examine Gleaton. In so arguing, Petitioner cites to Rule 608, SCRE, State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) and State v. Mizell, 349 S.C. 326, 563 S.E.2d 315 (2002). In response, the State notes the trial court did not err in declining to instruct the jury on accessory before the fact of murder.

A. Presentation of the Issue

As detailed above, the State published a redacted transcript of Gleaton's interview and statement through Investigator Mahoney after Mahoney verified that both he and Reese interviewed Gleaton on June 3, 2010 at the headquarters of the Columbia Police Department. (R.

pp. 960-62, 963-1002). In the interview, Gleaton said he started receiving phone calls from Appellant regarding Hudson after the April 23rd incident when Appellant realized Gleaton knew Hudson. (R. pp. 968-69). Gleaton told investigators Appellant wanted to retaliate against Hudson and was actively looking for Hudson so he could exact revenge. (R. pp. 966, 968-70, 972). Additionally, Gleaton's interview revealed Appellant was one of the two men responsible for the shooting, explaining that Appellant told him "we hit somebody" when they "sprayed" Hudson's yard. (R. pp. 990-91, 999-1001). Gleaton further explained that Appellant continued to contact him about Hudson even after the attack occurred at Hudson's residence. (R. pp. 968-69).

When investigators questioned Gleaton as to whether he gave Appellant information regarding where Hudson lived, Gleaton replied, "no" and further explained that someone else had previously given this information to Appellant. (R. p. 970). Continuing, Gleaton told investigators that he never knew where Hudson lived, except that it was somewhere in the Greenview neighborhood. (R. pp. 970-71). When asked during the interview, whether Appellant ever asked him to "set up" Hudson, Gleaton denied that Appellant ever asked him to perform any sort of "set up" explaining Appellant only asked him if he knew where Hudson "be at." (R. pp. 971, 972). Later in the interview, Gleaton again told investigators that he did not aid Appellant in his attempts to retaliate against Hudson in any way stating, "he ain't asked me to do nothing." (R. p. 987).

Investigators then turned their attention to Gleaton's conduct after the shooting at Hudson's residence at which point Gleaton informed them that Appellant, mistakenly believing that Gleaton lived in Greenview, asked Gleaton whether police were in his neighborhood. (R. p.

974). When Gleaton informed Appellant that someone got shot, Appellant then asked whether Hudson was the victim. (R. pp. 975-76). Gleaton later explained to investigators in his statement that he believed Appellant was unaware that he shot Fogle during the attack at Hudson's residence, but never denied shooting her and in fact led Gleaton to believe he was responsible for the shooting. (R. p. 1000). In his statement, Gleaton again expressed that he had nothing to do with the shooting. (R. pp. 1000-01).

After the statement was published to the jury, defense counsel cross-examined Mahoney eliciting that Gleaton had been interrogated for nearly three hours in total. (R. p. 1002). Mahoney further acknowledged Reese, during the interview with Gleaton, asked Gleaton if he was aware he was making himself an accessory to murder, which Mahoney admitted could be "a pretty scary possibility for a young man." (R. p. 1004). Mahoney also confirmed Reese, during the course of the investigation, told Gleaton, "I've got no qualms about putting you in jail[.]" (R. p. 1006).

During the presentation of Appellant's defense, defense counsel requested that she be allowed to cross-examine Gleaton on whether he was aware of the penalties for accessory to murder since Reese had previously asked Gleaton if he realized that his attempts to evade questions concerning the murder may make him an accessory. (R. p. 1203). Continuing, defense counsel suggested that if Gleaton did not respond to her questions, she should be entitled to inform the jury of Gleaton's potential exposure regarding the penalties for both accessory before the fact of murder, and accessory after the fact of murder. (R. pp. 1203-04). In response, the State argued that Gleaton was not subject to liability as an accessory before the fact of murder because although there were phone calls between he and Appellant prior to the murder, the

evidence showed he only had knowledge of the attack on Hudson's residence after it occurred. (R. pp. 1204-05). Continuing, the State explained they would object to the trial court taking judicial notice of anything regarding accessory before the fact of murder. (R. p. 1205). Thereafter, the trial court declined to take judicial notice of the penalty of accessory before the fact of murder reasoning, "I don't remember any testimony that [Gleaton] had a conversation with [Appellant] prior to the incident in May because he couldn't have. It hadn't occurred. He may have had some conversation with him about something, but he couldn't have had a conversation about that." (R. p. 1205). The trial court added it would take judicial notice of the penalty for accessory after the fact of murder. (R. p. 1206).

Prior to closing arguments, defense counsel broached the subject again, re-asserting her previous argument that the telephone calls between Appellant and Gleaton prior to the attack on Hudson's residence were susceptible to an inference that Gleaton could be charged as an accessory before the fact of murder. (R. p. 1473). Again, the trial court ruled it would instruct on accessory after the fact of murder, but declined to instruct on accessory before the fact of murder. (R. p. 1473). The trial court subsequently instructed the jury regarding accessory after the fact of murder. (R. p. 1571).

B. Law on Charging the Jury about Potential Punishments a Witness may Face

In support of his claim of trial court error, Appellant cites to Rule 608(c), SCRE, State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) and State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) each of which deal with counsel's ability to cross-examine a witness regarding sources of potential bias, prejudice or motive to misrepresent.

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009).

Rule 608(c), SCRE provides that a witness may be impeached to show "[b]ias, prejudice or any motive to misrepresent" either by "examination of the witness" or by "evidence otherwise adduced." In the notes related to subsection (c) of Rule 608, it explains that "[s]ubsection (c) was added to address impeachment by showing bias or impartiality" citing to *inter alia* State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). S.C. Ann. Ct. Rules, Notes to Rule 608(c), SCRE, (2010 Ed.) at p. 801.

In Brewington, the Supreme Court affirmed the trial court's ruling that the State should be able to cross-examine Brewington's accomplice, Bethea, on the fact that he previously pled guilty to assault and battery of a high and aggravated nature ("ABHAN"). 267 S.C. at 100-01, 226 S.E.2d at 250-51. Continuing, the Brewington Court explained that because Bethea was testifying on Brewington's behalf and stated he was the only person who participated in the attack on the victim, a claim which was contrary to the victim's testimony, the State should be able to cross-examine Bethea on his previous guilty plea related to the incident since it provided the jury was a source of potential interest, bias or partiality regarding Bethea's version of events. 267 S.C. at 101, 226 S.E.2d at 250.

A similar issue was presented to the Supreme Court of South Carolina in State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). In Mizzell, the Court reversed two brothers' burglary

convictions when the trial court limited the cross-examination of Steele, a State's witness who was charged with the same offense as both brothers. 349 S.C. at 330, 563 S.E.2d at 317. Specifically, the Mizzell Court explained the brothers' Confrontation Clause Rights were violated when the trial court failed to allow cross-examination on the possible punishments Steele could receive. Id. In particular, the Mizell Court, analyzing the case under the rubric of Delaware v. Van Arsdall, 475 U.S. 673 (1986) stated, "[a] criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . .could appropriately draw inferences relating to the reliability of the witness." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (citing Van Ardsall, 475 U.S. at 680) (internal quotations omitted). Continuing, the Mizzell Court observed that trial courts retain discretion to impose reasonable limits on the scope of cross-examination and further noted that before a trial court limits the scope of cross-examination regarding bias on the part of the witness, the scope of such cross-examination must be clearly inappropriate. Id. Finally, the Mizzell Court explained that in order to reverse the trial court's ruling on such an issue, the defendant must be "unfairly prejudiced by the limitation[.]" Id.

C. The Trial Court Correctly Declined to Charge the Jury on Accessory Before the Fact of Murder as a Means of Showings Bias, Prejudice or Partiality

Appellant's argument that the trial court, pursuant to Rule 608(c), SCRE and the accompanying case law, should have instructed the jury regarding Gleaton's potential exposure on the charge of accessory before the fact of murder is without merit. Initially, while Rule 608(c), SCRE, does allow that a witness may be impeached either by examination or by

"evidence otherwise adduced" neither Rule 608(c) nor any of the cases cited by Appellant allow the *trial court* to impeach the witness by charging the jury on a potential source of bias, prejudice or partiality. Rather, both the rule and the case law clearly contemplate that *counsel* rather than the court is responsible for impeaching the witnesses' credibility either through examination or through "evidence otherwise adduced." Indeed, the idea that *counsel* rather than the *trial court* is responsible for impeaching a witness is reflected most clearly by Rule 607, SCRE, which states "the credibility of a witness may be attacked by *any party*, including the party calling the witness." (emphasis added). In other words, only parties may impeach a witness, not the court, and under Rule 608(c), they may do so only by: (1) examination; or (2) through "evidence otherwise introduced."[12] Therefore, the State submits the trial court was not required, at least under the authority cited by Appellant, to aid counsel in attempting to impeach Gleaton by charging the jury with anything regarding the witnesses' potential exposure to criminal liability, since this responsibility lies with counsel and not the trial court.

Yet even if Rule 608(c), SCRE could be construed as allowing the trial court, as a means of offering impeachment evidence, to instruct the jury on a potential source of bias, prejudice or partiality, the trial court did not err in failing to instruct the jury on accessory before the fact of murder since there was no evidence to support such a charge. Specifically, while Appellant argues the trial court erred "because [it] did not allow the jury to know that, at the time Gleaton was being interrogated by law enforcement, he was being threatened with a potential life sentence" there is no support for this proposition in the record. Br. of App. at 29.

[12] This proposition is further demonstrated in both Brewington and Mizzell where the source of the trial courts' errors were founded not upon *their failure* to impeach a witness, but rather upon *their failure to allow counsel* to impeach witnesses regarding bias, prejudice or partiality.

First, Gleaton, unlike the witnesses in Brewington and Mizzell, was never charged with accessory to murder. Furthermore, while Appellant insinuates Gleaton was being threatened with a potential life sentence at the time he spoke with police, there is no evidence to support such a claim. In fact, there is nothing in the record to suggest that Gleaton was advised of the potential sentences for either accessory before the fact of murder, or accessory after the fact of murder. In other words, even though Reese made the isolated comment regarding the fact that Gleaton could be charged as an accessory, he never explained whether he could be charged as accessory before or after the fact of murder and certainly never advised Gleaton that he could face between 0-15 for accessory after the fact or murder, or 30-life for accessory before the fact of murder. Accordingly, Appellant's assertion that Gleaton's statement was essentially the product of coercion is unsupported by the record.

Moreover, the facts of the case do not support Appellant's theory that Reese's comment was referencing accessory before the fact of murder. Section 16-1-140 of the South Carolina Code explains that, "[a] person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon." Thus, for criminal liability as an accessory before the fact of murder, the defendant must have: (1) advised and agreed, or urged and in some way encouraged the principal to commit murder; (2) the defendant must not have been present when the murder was committed; and (3) the principal must have actually committed the murder. State v. Bixby, 373 S.C. 74, 75 n. 2, 644 S.E.2d 54, 55 n.2 (2007). Here, because Gleaton consistently denied aiding Appellant and in particular denied helping "set-up" Hudson,

instead maintaining he never knew where Hudson lived, there is simply no evidence to suggest Gleaton could have been charged with accessory before the fact of murder. (R. pp. 970-72, 987). Accordingly, even under a Mizzell/ Van Ardsall analysis,[13] the trial court did not err in declining to impeach Gleaton by instructing the jury on Gleaton's potential for criminal liability as an accessory before the fact of murder since there was no foundation to support asking such a question in cross-examination. See Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (holding a trial court may limit the scope of cross-examination where the scope of such cross-examination is clearly inappropriate).

Finally, even assuming the trial court erred in failing instruct the jury about Gleaton's potential exposure as an accessory before the fact of murder as a means of impeaching Gleaton, such a failure does not result in unfair prejudice as the case law so requires. See Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (explaining that in order to reverse the trial court's ruling on the scope of cross-examination the defendant must be unfairly prejudiced by the limitation). Specifically, as discussed in argument III *supra* because Gleaton's testimony was limited by the fact Appellant intimidated Gleaton, an act which subsequently led Gleaton to refuse to cooperate and resulted in his limited opportunity for cross-examination, any error by the trial court in failing to impeach Gleaton by declining to charge the jury on accessory before the fact of murder as means of essentially making up for this limited opportunity, is not unfairly prejudicial. Therefore, the State asks this Court to affirm the trial court's ruling on this issue.

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[13] In light of the Supreme Court of South Carolina's holding in State v. Stokes, 381 S.C. 390, 402, 673 S.E.2d 434, 440 (2009) that the Confrontation Clause protects only the opportunity to cross-examine, rather than effective cross-examination, the State questions whether the Mizell Confrontation Clause analysis remains good law. See Stokes, 381 S.C. at 401-02, 673 S.E.2d at 439 ("[T]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.") (internal quotations omitted).

V. The trial court did not abuse its considerable discretion when it allowed the State to introduce evidence that Hudson had previously taken marijuana from Appellant since the motive for Appellant attacking Hudson and killing Fogle was to seek revenge on Hudson for his role in the prior incident in which Hudson took Appellant's marijuana at gunpoint

Appellant contends the trial court erred when it allowed the State to reference the existence of a drug relationship between Appellant and Hudson claiming the probative value of the evidence was substantially outweighed by the risk of unfair prejudice under Rule 403, SCRE. In particular, Appellant argues "the drug component was not necessary for the State to prove motive, since any robbery and shoot out would have provided motive[.]" Br. of App. at 31. In response, the State submits the trial court correctly found the April 23rd incident and the property taken during the April 23rd incident, marijuana, were "so interrelated" to the motive for the murder that taking the drug component out of the incident would not sufficiently explain the distinction between the culture of violence regarding guns and drugs as opposed to the reactions of a typical crime victim.

A. Presentation of the Issue

Prior to trial, defense counsel moved to preclude the State from introducing evidence related to the drug component of the crime. (R. pp. 24-25). Specifically, defense counsel, while acknowledging the State's theory of the case was that Appellant was retaliating against Hudson for the April 23rd incident when he attacked Hudson's residence and in the process killed Fogle, argued the marijuana, which was the subject of the robbery, was unfairly prejudicial to Appellant. (R. p. 25). Defense counsel then added "there are numerous other witnesses referred to . . . throughout discovery that claim to know [Appellant] as a result of some prior marijuana deals with him." (R. p. 26). Based upon these facts, defense counsel reasoned the State should

be precluded from introducing any testimony regarding the drug component of the crime. (R. p. 26).

In response to defense counsel's motion, the State argued Hudson only knew Appellant because of prior drug dealings and explained the prior drug dealings with Appellant provided the basis for the April 23rd incident noting Hudson took the marijuana from Appellant because he knew, based upon his previous interactions with Appellant, that Appellant would have large quantities of marijuana on hand. (R. pp. 26-27). Continuing, the State apprised the trial court the April 23rd incident went to identity and motive since the only relationship Hudson had with Appellant was based upon Hudson buying marijuana from Appellant. (R. p. 27). The State further told the trial court that while it did not intend to go into a number of drug transactions, the fact that Hudson's and Appellant's relationship was solely based upon buying and selling drugs, it was "necessary to present an accurate presentation of the facts for the jury." (R. p. 28).

Summarizing its argument, the State highlighted that evidence of the marijuana provided a strong logical relevance between the April 23rd incident and the attack on Hudson's residence since it showed motive and identity. (R. pp. 28-29). Supporting this proposition, the State cited to State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006), a severance case which it contended, was authority establishing the relevance of the drug relationship between the parties. (R. p. 28). In particular, the State explained that in Rice, the State was allowed to introduce evidence of motive where the victim stole a car which he knew contained drugs after which, the defendant retaliated against the victim by killing him. (R. p. 28).

Defense counsel replied to the State's argument reiterating its position that the incident could be testified to without mentioning the property taken during the April 23rd incident was

marijuana, which defense counsel continued to argue, was inherently prejudicial. (R. p. 28). Thereafter, the trial court told both parties it would take the matter under advisement and after reviewing Rice, would issue a ruling. (R. p. 31).

Later, the trial court, recognizing it had taken the matter under advisement, asked the State to provide it with additional information regarding the facts of the case. (R. p. 106). At that time, the State explained the motive in the case was that Appellant retaliated against Hudson for his role in the April 23rd incident highlighting that Hudson and McDowell went to meet Appellant under the guise of buying marijuana from him when Hudson produced a weapon and "basically robbed" Appellant. (R. pp. 106-07). Describing the incident, the State explained that Hudson, after pulling the weapon on Appellant, took a backpack full of "exotic weed" when Appellant threw the backpack up in the air and retreated up his stairwell upon seeing Hudson pull the gun. (R. pp. 1096-07). Continuing, the State highlighted that in the aftermath of the April 23rd incident, Joyner was told by Appellant that if Hudson did not return the marijuana or give him money for the marijuana, he would retaliate against Hudson. (R. pp. 107-08). The State then connected Appellant to the attack on Hudson's residence and the murder of Fogle by reviewing the results of the investigation that was conducted after the attack on Hudson's residence. (R. pp. 108-110). Concluding, the State explained the April 23rd incident was extremely important to prove motive and identifying the property taken during the April 23rd incident was necessary to a full presentation of the case. (R. pp. 110-11).

After hearing the State's factual recitation, the trial court asked why it was important to identify the property taken during the April 23rd incident as marijuana. (R. p. 111). Responding to the trial court's question, the State explained:

> [W]e think [the drug background] makes a difference as to why [Appellant] would go to this extreme. You know, if the typical victim gets robbed, they aren't going to back and retaliate by spraying multiple people in a back yard. It's when you get into the fact that this is based over drugs it makes sense, Your Honor, we feel like without it, it doesn't make sense.

(R. pp. 111-12). Seeking to clarify the State's rationale for introducing testimony identifying the marijuana as the property that was taken during the April 23rd incident, the trial court asked, "[s]o your position is the drug culture is a different element than . . . somebody else robbing a TV or stereo or cash . . ." (R. p. 112).. In response, the State confirmed that this was their position adding that shooting Fogle at close range was further evidence of this distinction. (R. p. 112). Thereafter, defense counsel argued the State's position regarding the marijuana amounted to an improper propensity argument at which point the trial court disagreed with defense counsel explaining it would allow the testimony identifying marijuana as to property that was taken from Appellant. (R. p. 113). In so doing, the trial court found the April 23rd incident and the property taken during the April 23rd incident were "so interrelated" to the motive for the murder and the fact that the property taken part of a "different situation" referencing street culture, that the probative value of identifying the stolen property as marijuana was "not substantially outweighed" by its "prejudicial value." (R. p. 115).

Following the trial court's ruling, defense counsel asked that "witnesses other than" Hudson "be limited" in their testimony concerning prior drug dealing. (R. p. 115). In response, the trial court informed defense counsel he would not categorically limit such testimony from others since it was the basis for the State's theory of the case—that Appellant attacked Hudson and killed Fogle as a means of seeking revenge. (R. pp. 115-16). The trial court then informed defense counsel to object to such testimony when she believed it to be an issue. (R. p. 116).

In its opening statement, the State, in keeping with its theory that Appellant's motive for the attack on Hudson's residence was revenge for the April 23rd incident, told the jury as much stating Appellant shot and killed Fogle because of his desire to seek revenge against Hudson. (R. pp. 132-33). Continuing, the State highlighted that Hudson had a previous "business relationship" with Appellant wherein he would buy marijuana from Appellant, when on April 23rd, Hudson and McDowell decided to take Appellant's marijuana at gunpoint. (R. pp. 133-34). The State then went into the threats Appellant relayed to Hudson through Joyner and connected Appellant to the attack on Hudson's residence by summarizing the results of the police investigation. (R. pp. 134-35, 136-42). Defense counsel did not object.

At trial, defense counsel objected during Hudson's direct examination when the State asked Hudson to give the basis for his relationship with Appellant. (R. p. 309). In response, Hudson stated, "[d]rugs." (R. p. 309). Later, McDowell, who aided Hudson in the April 23rd incident in which the marijuana was taken from Appellant, testified, without objection, that he accompanied Hudson to buy marijuana from Appellant. (R. p. 569). Subsequently, as McDowell began explaining how the events transpired, defense counsel renewed its previous objection. (R. p. 570). Defense counsel also objected when Travis Golston began to testify regarding his relationship with Appellant. (R. p. 862).

After the State rested, defense counsel called Appellant as its final witness. (R. p. 1389). In his testimony, Appellant, on direct examination admitted Hudson was going to buy marijuana from him on April 23rd. (R. p. 1392). Continuing, Appellant confirmed that Hudson and McDowell had taken the marijuana from him at gunpoint, but because he only had approximately three ounces of marijuana in the backpack, he was only out between $200 and

$300. (R. p. 1393). Appellant further noted that he lied to the police regarding the April 23rd incident because there was no way he could report the incident to police without admitting that he was in possession of marijuana. (R. p. 1396). He further testified he contacted Hudson in an attempt to get the marijuana back. (R. pp. 1397-98). Near the conclusion of his testimony on direct, Appellant admitted to selling marijuana, but denied any involvement in the attack on Hudson's residence stating he would not jeopardize his future over $200 to $300 of marijuana. (R. pp. 1423-24).

On cross-examination, Appellant recounted the April 23rd incident, again admitting he was selling marijuana and explaining the reason he lied about the April 23rd incident was because the property that Hudson had taken was marijuana. (R. pp. 1433, 1435). Appellant even added he was not "mad" at Hudson for taking the marijuana from him. (R. pp. 1436-37). Finally, when asked about the extent of he and Hudson's relationship, Appellant said Hudson purchased marijuana from him. (R. p. 1441).

B. Law Regarding the Admission of Evidence and Appellate Review of a Trial Court's Application of Rule 403, SCRE's Balancing Test

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

"Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." State v. Wiles, 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009) (citing Rules 401, SCRE and Rule 402, SCRE). Furthermore, "evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Despite this, otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Rule 403, SCRE. Pursuant to Rule 403, SCRE, "the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice." State v. Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 496 (Ct. App. 2011). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." Wiles, 383 S.C.at 158, 679 S.E.2d at 176. "The determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case." State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

C. The Trial Court Did not Abuse its' Discretion in Allowing the State to Introduce Evidence that Hudson had Previously taken Marijuana from Appellant since the Motive for Appellant Attacking Hudson and Killing Fogle was to seek Revenge on Hudson for his Role in the Prior Incident

Initially, the State notes that Appellant is not challenging the trial court's ruling that the April 23rd incident was relevant to prove motive pursuant to Rule 404(b), SCRE, but is instead arguing only that the trial court erred in its Rule 403, SCRE ruling which allowed testimony that

the property taken during the April 23rd incident was marijuana. See Br. of App. at 31 (citing Rule 403, SCRE) ("The drug component was not necessary for the state to prove motive, since any robbery and shoot out would have provided motive, and its introduction was unduly prejudicial."). As to this question, the State submits the trial court did not abuse its considerable discretion when it correctly determined that: (1) the April 23rd incident and the property taken during the April 23rd incident were "so interrelated" to proving motive that they could not be separated; and (2) the April 23rd incident and the marijuana taken during the April 23rd incident were admissible because of the unique nature of drugs, namely that since they are illegal and could not be recovered by simply reporting them stolen, identifying them simply as property would not sufficiently explain why Appellant would retaliate against Hudson in the way that he did.

D. The Evidence was Probative

At the outset, the State notes that appellate courts must give "great deference to the trial court's judgment under Rule 403 and . . . should be reversed only in exceptional circumstances." Smith, 391 S.C. at 364, 705 S.E.2d at 497 (citing State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009). Quite simply, this case is not one of those exceptional circumstances. As detailed above, the State submits the testimony establishing the property taken was marijuana was probative for two reasons.

First, the trial court found the April 23rd incident *and* the fact that marijuana was the property taken during the April 23rd incident *both* went to Appellant's motive for the murder—revenge against Hudson for taking his marijuana. (R. pp. 114-15). Indeed, this was noted throughout argument on the issue where the State continually highlighted that revenge would be

the State's theory of the case. (R. pp. 26-27,28, 28-29, 106-111). It was subsequently confirmed in the State's opening and closing. (R. pp. 132-33, 134-42, 1543-44). Thus, because the April 23rd incident and the drug component of this case were "so interrelated[,]" the State maintains that proving the incident and the basis for the attack on Hudson's residence without telling the jury what was stolen would simply fail to give the jury all of the relevant facts needed to assess the credibility of the State's theory of the case. See State v. Adams, 322 S.C. 114, 116-17, 470 S.E.2d 366, 370-71 (1996) (holding that under the theory of *res gestae*, prior bad acts evidence may also be admissible where "the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .[and] is admissible to provide . . . full presentation of the offense.").

Second, identifying the property taken during the April 23rd incident was probative because, as noted by both parties and the trial court, the nature of drugs, by virtue of the fact that they are illegal, meant that unlike normal property, Appellant had no lawful means of recovering his property, a distinction which the trial court believed shed light on Appellant's reaction to the April 23rd incident. (R. pp. 111-12, 112, 115, 1396, 1433, 1435). The State noted this distinction in argument on the issue stating:

> [W]e think [the drug background] makes a difference as to why [Appellant] would go to this extreme. You know, if the typical victim gets robbed, they aren't going to go back and retaliate by spraying multiple people in a back yard. It's when you get into the fact that this is based over drugs it makes sense, Your Honor, we feel like without it, it doesn't make sense.

(R. pp. 111-12). Clarifying, the trial court asked the State, "[s]o your position is the drug culture is a different element than . . . somebody else robbing a TV, or stereo or cash . . ." (R. p. 112).

The State submits this distinction is key because Appellant, despite his testimony to the contrary, was clearly angry with Hudson and was seeking revenge against him *unless* Hudson gave him either, the marijuana, or money from the sale of the marijuana, which according to Hudson, was worth about $3,000. (R. pp. 246, 320). Indeed, even Appellant admitted he wanted Hudson to return the marijuana or give him money for the marijuana. (R. pp. 1397-98). Accordingly, identifying that marijuana was the property taken during the April 23rd incident was crucial because it answered what would have surely been lingering questions as to why Appellant could not have simply called police, reported his property stolen and relied upon police to reclaim his property. Therefore, the State submits that identifying the property taken during the April 23rd incident was extremely probative because it supported the State's revenge theory while simultaneously explaining why Appellant would have reacted to the April 23rd incident in such a violent manner instead of cooperating with police.

E. The Prejudicial Effect of the Evidence Did not Substantially Outweigh its Probative Value

Moreover, the State submits the prejudicial effect of the introduction of the evidence regarding the drug component did not substantially outweigh its probative value because Appellant eventually testified to this information in his direct examination. See Holder, 382 S.C. at 293, 676 S.E.2d at 698 ("The determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case."). Specifically, Appellant admitted on direct examination that: (1) Hudson was going to buy marijuana from him on April 23rd (R. p. 1392); (2) Hudson and McDowell had taken the marijuana from him at gunpoint, but the value of the marijuana was only between $200 and $300 (R. p. 1393); (3) he lied to the police regarding the April 23rd incident because there was no way

he could report the incident to police without admitting that he was in possession of marijuana (R. p. 1396); (4) he contacted Hudson in an attempt to get the marijuana back (R. pp. 1397-98); and (5) while he sold marijuana, he would not jeopardize his future by seeking revenge against Hudson over a mere $200 to $300 of marijuana. (R. pp. 1423-24). Accordingly, the State submits the trial court did not abuse its considerable discretion in admitting testimony regarding the drug component of this case, especially since Appellant eventually used the drug component of the case as the basis for a portion of his defense.

VI. The trial court correctly overruled Appellant's objection that the State's opening on the law violated the South Carolina Constitution

Appellant contends that Article V, § 21 of the South Carolina Constitution should prohibit the State from opening on the law arguing that by doing so, the State essentially usurps the trial court's role of declaring the law. The State disagrees.

A. Presentation of the Issue

Prior to closing arguments, defense counsel objected to the State "making an opening on the law." (R. p. 1474). In doing so, defense counsel noted that she recognized opening on the law was a common law tradition, but argued the South Carolina Constitution "states that it is the purview of the Court to determine what law is appropriate in a case and that the jury is to receive the law from the bench." (R. p. 1474). On that rationale, defense counsel concluded the practice of allowing the State to open on the law is inconsistent with the South Carolina Constitution. (R. p. 1474). In response, the State said "we would argue that it's the State's position not only to close last in this case because the defendant has presented evidence, relying on [State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930)] and also [State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005)]" but added "we would rely on [State v. Rodgers, 269 S.C. 22, 235 S.E.2d 808

(1977)] for the proposition that the State is entitled to open the closing argument to the jury . . ." (R. p. 1476).

Defense counsel responded stating "I don't believe either of the cases cited by the State were argued on the constitutional principle put forth to the Court today." (R. p. 1476). Thereafter, the trial court overruled defense counsel's objection on the claim finding "the State has a right to open on the law, and I'm going to find that the State has a right to open on the law . . ." (R. p. 1476).

B. Law Interpreting S.C. Const. Art. V § 21 and the State's Right to Open on the Law

Article V, Section 21 of the South Carolina Constitution provides "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." "The purpose of this section is to prevent trial judge from intimating to jury his opinion of the case, what weight should be given to the evidence, and participating in any manner with jury's finding of fact." Enlee v. Seaboard, etc., Ry. Co., 110 SC 137, 146, 96 SE 490, 492 (1918). Further interpreting the "declare the law" portion of Article V, Section 21, the Supreme Court of South Carolina has explained "this simply means that the judge shall state the controlling principles of law applicable to the case in the light of the pleadings and the evidence[.]" Coleman v. Lurey, 199 S.C. 442, 446, 20 S.E.2d 65, 66 (1942). Yet, there is nothing within the text of the section which specifically designates the trial court as the *only* person who may *discuss* the law.

In fact, South Carolina Courts have previously recognized that the State must include a discussion of the law when opening on the law in closing arguments.[14] See Rodgers, 269 S.C. at

[14] A variety of other states also allow for counsel to discuss the law with the jury during closing arguments. See Whisnant v. State, 178 Ga. App. 742, 344 S.E.2d 536 (1986) (explaining it is proper for counsel to state, argue or comment on the law relevant to the case); Grinstead v. State, 845 N.E.2d 1027 (Ind. 2006) (same); State v. Griffin,

25, 235 S.E.2d at 809 ("There is nothing in Circuit Court Rule 58 which limits the initial closing argument to the law of the case, it simply requires a discussion of the law to be included in that argument if demanded by the defendant."); State v. Lee, 255 S.C. 309, 317, 178 S.E.2d 652, 656 (1971) (overruled on other grounds) (explaining the State must discuss the law when opening on the law in closing arguments). Additionally, our Supreme Court has recognized that "[t]he right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." Rodgers, 269 S.C. at 24-25, 235 S.E.2d at 809. Thus, in South Carolina, "[t]he solicitor is entitled to open the closing arguments to the jury unless the defendant has offered no evidence" Gellis, 158 S.C. at 487, 155 S.E. at 855; and further, *must* discuss the law with the jury when doing so. Rogers, 269 S.C. at 25, 235 S.E.2d at 809; Lee, 255 S.C. at 317, 178 S.E.2d at 656.

C. The trial court correctly overruled defense counsel's objection

Here, the State submits the trial court correctly overruled defense counsel's objection because, as detailed above, Article V, Section 21, in no way designates the trial court as the *only* person who may discuss the law with the jury and South Carolina law clearly holds the State's right to open the closing arguments to the jury should include a discussion on the law. Rogers, 269 S.C. at 25, 235 S.E.2d at 809; Lee, 255 S.C. at 317, 178 S.E.2d at 656. Indeed, as detailed above, Article V, Section 21 merely provides that the trial court is responsible for *declaring the law*, which under South Carolina law, means it is ultimately responsible for determining the law *to be charged to the jury*. Coleman, 199 S.C. at 446, 20 S.E.2d at 66. (emphasis added). Thus, Section 21—a section which simply defines who determines the facts and who declares the

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279 Kan. 634, 112 P.3d 862 (2005) (same); State v. Williams, 447 So. 2d 495 (La. Ct. App. 3d Cir. 1984) (writ denied 450 So. 2d 969 (La. 1984)) (same); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986) (same); State v. Dowell, 705 S.W.2d 138 (Tenn. Crim. App. 1985) (same).

law—is not in conflict with the State's well-established right to open on the law where the defendant has introduced evidence at trial since the State, by opening on the law, is merely discussing the law *with* the jury as opposed to declaring the law *to be charged to* the jury.[15] Indeed, this distinction is noted during the course of the State's opening on the law when the State explains "[i]f I misquote the law in any way, please take the law as the judge gives it to you. He is the person that determines what the law is that you must apply to the facts." (R. p. 1490). Accordingly, the State asks this Court to affirm the trial court's ruling as to this issue.

VII. The trial court correctly overruled defense counsel's objection that Appellant's Due Process Rights were violated by the practice of allowing the State to have last closing when the defendant elected to present a defense

In his final argument, Appellant maintains his Due Process Rights were violated when the trial court, pursuant to long-established law, found that Appellant was not entitled to last closing since he presented a defense. Continuing, Appellant argues this practice "improperly punishes him" for exercising a legal right. Br. of App. at 35. In response, the State submits this state procedural practice does not improperly punish Appellant for asserting a legal right and adds that

[15] Indeed, it is clear the jury, who is sworn to follow the law and presumed to do so, is aware that the judge, not the prosecuting attorney, is the sole judge of the law, since the judge routinely instructs the jury as to each of the parties' roles throughout the case. See e.g. R. p. at 77 (void dire instructions identifying that the State's role is to prove the defendant guilty beyond a reasonable doubt while the defendant has no burden of proof and is presumed innocent); R. pp. at 103-04 (pre-trial instructions reminding the jury to keep in mind that defendant is presumed to be innocent and has no burden while the State's role is to prove the defendant guilty beyond a reasonable doubt); R. pp. 127-28 (preliminary instructions informing the jury that the defendant has entered a plea of not guilty and the State has the burden of proving the defendant guilty beyond a reasonable doubt); R. pp. 130-31 (explaining the purpose of closing arguments is for each side to review the evidence and highlight what they believe to be important); R. pp. 130-31 (detailing that the role of the judge is to instruct and charge the jury on the law); R. p. 131 (telling the jury they are the judge of the facts and he is the judge of the law); R. p. 131 (noting to the jury that arguments are not evidence and to remember the attorneys are advocates for their respective clients); R. p. 1489 (explaining the state will open on the law, then defense counsel will make its closing argument after which the State will make a closing argument); R. pp. 1573-74 (charging the jury on defense counsel's and the State's respective roles at trial); R. p. 1576 (charging the jury that the trial judge is the sole and only instructor of the law and that it must accept the law as the judge charges it).

Due Process in fact allows states to impose a variety of procedural requirements on a criminal trial.

A. Presentation of the Issue

Before closing arguments commenced, defense counsel asked that Appellant "be given the final closing statement to the jury in this case." (R. p. 1474). In support of this request, defense counsel argued that "there should be nothing which occurs in the judicial setting that in any way punishes the defendant for exercising his constitutional right to put forth a defense to criminal charges." (R. pp. 1474, 1475). In particular, defense counsel explained the common law practice of allowing a defendant last closing only where he does not present evidence essentially punishes a defendant for presenting a defense and thus violates his due process rights. (R. p. 1474).

Responding to this argument the State said "we are entitled . . .to have the last closing argument" citing to State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930) and State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005). Replying to the State's argument, defense counsel stated, "I don't believe either of the cases cited by the State were argued on the constitutional principle put forth to the Court today." (R. p. 1476). Thereafter, the trial court ruled on the issue stating, "I'm going to find that the State has the right to make the last—last argument." (R. p. 1476). Explaining the basis of the ruling the trial court said "[t]he defendant did put forth evidence in the case, and as a result, because the burden falls on the State of South Carolina to prove this defendant guilty of all charges beyond a reasonable doubt, they have the right to—to make that argument." (R. p. 1476). Notably, the trial court failed to rule on the Due Process

claim, instead limiting its ruling to the state procedural question of whether Appellant was entitled to last closing based upon the evidence in the record.[16]

B. The State's Right to regulate the procedural aspects of a trial and the reach of Due Process as it relates to the Exercise of a Legal Right

In Herring v. New York, 422 U.S. 853 (1975) the Supreme Court of the United States determined a New York law giving judges in a nonjury criminal trial the authority to deny counsel the opportunity to present a closing argument violated Herring's Sixth and Fourteenth Amendment Rights to the assistance of counsel. 422 U.S. at 863. In so holding, the Court, after explaining that the assistance of counsel guaranteed "the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process" 422 U.S. at 858; elaborated on the importance of closing arguments stating:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
>
> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more

[16] Based upon the fact the trial court failed to rule upon the Federal Constitutional claim which was the basis of Appellant's Due Process objection, but instead ruled on the state procedural question—whether Appellant was entitled to last closing when the record demonstrated he had presented evidence—the State questions whether this issue is available for appellate review. Indeed, even defense counsel essentially acknowledged that neither Gellis nor Pinkard "were argued on the constitutional principle put forth to the Court today" implying they were based upon the state law procedural question highlighted above as opposed to the due process issue. Therefore, the State submits this issue is not preserved for appellate review. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

> important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Id. at 862. (internal citation omitted). Continuing, the Herring Court noted that while the right to assistance of counsel in closing arguments was indeed a fundamental right, state courts and judges have considerable rights in controlling and limiting closing arguments writing:

> This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion.

Id. (internal citations omitted).

Consistent with Herring, South Carolina trial courts are vested with broad discretion in dealing with the range and propriety of closing argument. State v. Reddick, 348 S.C. 631, 641, 560 S.E.2d 441, 446 (Ct. App. 2002). Similarly, Section 40-5-330 of the South Carolina Code empowers the trial court to limit argument to two hours. See S.C. Code Ann. 40-5-330 ("No attorney, solicitor or counselor (sic) shall be allowed to occupy more than two hours of the time of the court in the argument of any cause, unless he shall first obtain the special permission of the court to do so."). Moreover, trial courts, in their discretion, may limit the length of closing arguments to substantially less time if they see fit. In fact, in State v. El, 286 S.C. 560, 335 S.E.2d 544 (1986) the Supreme Court of South Carolina upheld a twenty minute limitation on closing arguments in a forgery case finding that the defendant's right to be heard in his defense under Article I, Section 14 of the South Carolina Constitution was not violated, despite the fact that § 40-5-330 had previously been construed in *dicta* to allow for two hours in closing as a matter of right. El, 286 S.C. at 561, 335 S.E.2d at 544. In other words, both the Supreme Court

of the United States, as well as the Supreme Court of South Carolina have determined that despite a criminal defendant's right to be heard, trial courts are still vested with the discretion to place procedural limits on closing argument which in turn may affect even the *substance* of closing argument.

C. Appellant's Due Process Rights were not Violated

Here, Appellant contends he was punished for asserting a legal right citing to North Carolina v. Pearce, 395 U.S. 711 (1969) arguing he was essentially punished by not having last closing because he exercised his right to present a defense. However, Pearce merely announces the legal showing *a court* must make in resentencing *where Petitioner prevailed after successfully challenging the legality of the same conviction and is again convicted.* See Pearce, 395 U.S. at 725 ("Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial . . . [i]n order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."). Stated simply, the present case is an entirely different scenario from Pearce because the trial court did not *punish* Appellant for presenting a defense, but rather, consistent with the Supreme Court's ruling in Herring decided to utilize its broad discretion in adhering to the common law principle reiterated in Gellis and Pinkard that when the defense introduces evidence, the party with the burden of proof will go last. Indeed, Appellant despite not going last in closing, still consistent with his right to be heard, was able to be heard on everything in closing argument. In other words, the trial court's ruling that Appellant forfeited his last argument, unlike the procedural limitations placed on closing

argument that can actually affect *the substance* of a closing argument, limitations the Herring Court actually approved of, in *no way* affected Appellant's right to be heard. Accordingly, Appellant was in no way punished when the State, pursuant to established common law, went last in closing argument since the jury was able to hear the entirety of defense counsel's closing argument. Therefore, the State asks the Court to affirm on this issue.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the judgment and sentence imposed by the trial court.

Respectfully Submitted,

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December 6, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge
Appellate Case No. 2010-177006

THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

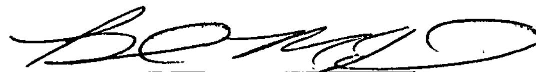
APPELLANT.

PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Susan Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201-3332.

I further certify that all parties required by Rule to be served have been served.

This 6th day of December, 2012.



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 6th day of December, 2012.

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