STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

The State, Respondent,

vs.

Theodore Manning, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in admitting the photograph. The Court took measures to keep any prejudice to a minimum and the photograph was highly probative of Appellant's intent and state of mind.

Appellant contends the trial court erred in failing to exclude the photograph, exhibit 226, of the victim's body when it was first discovered in the burned out trunk of her car. He asserts the admission was calculated to arouse the sympathies of the jury and was prejudicial. The trial court limited the admission to a single photograph depicting the condition of the body when it was found. Further, the photograph presents evidence from which the jury could infer the killing of the victim was committed with malice—the central issue during the trial.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (emphasis added). Admitting photographs which serve to corroborate testimony is not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008).

Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on

an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

The Courts of this state have considered the admissibility of graphic photographs in several different settings. In Kelley, the Supreme Court found two photographs of the victim's nude body lying on the living room floor with her face and body visibly swollen from the beating by the defendant, as well as photographs showing blood smeared on the walls and floor were admissible to demonstrate the crime scene and the "excess nature of the killing." Id. at 178, 460 S.E.2d at 370-371. In State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986), the defendant maintained a photograph of the victim with her breast exposed was inflammatory and unfairly prejudicial because he was on trial for assault with intent to commit criminal sexual conduct in addition to murder. Id. at 213, 349 S.E.2d at 340. The Supreme Court explained: "The photograph at issue here corroborated the pathologist's testimony regarding the location of the bullet wound. The Respondent was not prejudiced by its introduction because there was explicit testimony that the victim's blouse and brassiere had been removed by medical personnel when they arrived at the scene in order to administer medical aid." The Court found it was the corroborative effect, as well as the fact other testimony explained what was in the photographs, that allowed them to be admissible without constituting unfair prejudice.

The South Carolina Supreme Court considered graphic photographs in the recent case of State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010). The Court explained the general rule: "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or

conditions." Id. at 623, 703 S.E.2d at 228. In Torres, the Supreme Court specifically held: "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Id. at 623, 703 S.E.2d at 229. The Court continued: "autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant." Id. (emphasis added). The Court explained:

> The doctor who performed the autopsy used the introduced photographs during his testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed. We do not suggest that these autopsy photographs are mild and easy to view; some of the photographs are close-ups of the victims' injuries and are graphic in nature. However, the purpose of the close-ups was to help identify the nature of each particular injury. The net effect of the photographs was to show what Torres did to the Emerys, which goes straight to circumstances of the crime.

Id. at 624, 703 S.E.2d at 229 (emphasis added).

This case is similar to the above cited cases, most notably Torres. In this case, the photograph served to demonstrate the character of Appellant. The character of the defendant, most notably his mental state, is a significant issue in this case where the shooting itself was admitted, the only question is whether it was done in self-defense, with malice aforethought, or in the heat of passion. The depravity and wickedness of Appellant is demonstrated through the condition of the body when it is found. As the jury was charged:

> Malice can be inferred, also, from conduct showing a total disregard for human life. Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude the legal right to do it.
>
> It's something which springs from wickedness, from depravity, from a heart devoid of social duty and

> fatally bent on mischief. In other words, malice is a mental state, and it may be inferred by facts and circumstances proven by the State beyond a reasonable doubt.

(T.1789; R. 1777). The photograph was introduced to demonstrate Appellant's character as someone showing a complete disregard for human life, a wicked person with a formed purpose to do a wrongful act. While the photograph corroborated the testimony indicating the condition of the body, it really allowed the jury to truly see what Appellant had done to the victim and to use that to determine his mental state and his character.

Further, the photograph serves to provide evidence against an accidental or self-defense shooting. If the shooting were accidental or in self-defense, why go to the trouble to put the body in the trunk of the victim's own car, drive it out to the middle of nowhere, purchase gasoline, and then burn the body and car. Appellant raised the defense of self-defense, and the State was required to disprove it. The photograph serves as material evidence from which a jury can infer the act was not done in self-defense.

Finally, the photograph corroborates the investigation and details of the investigation as discussed at trial. The officer indicated they located the car, obtained entry to the trunk of the vehicle, and the victim's body was found. This photograph depicted one of the crime scenes involved in this case and shows what was uncovered during the investigation.

Another similarity between this case and Torres is further explicated by the Supreme Court: "Moreover, the trial judge did exercise his discretion by excluding three of the State's photographs, ruling that they were duplicative and prejudicial. While the admitted photographs graphically depict the injuries of the victim, **this was a particularly horrific crime**, and the admission of the photographs did not unduly

prejudice the jury." Id. at 624, 703 S.E.2d at 229 (emphasis added). The probative value of the photograph substantially outweighs its prejudice. Further, the trial court limited the evidence to a single photograph so as to minimize the prejudice to Appellant.

The graphic nature of the photograph, while clearly present to anyone who viewed it, should not be sufficient to prevent admissibility in this case because the underlying facts and circumstances were very graphic and disturbing. See also, State v. Holder, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (finding photographs graphically displaying the beaten and abused body of a child corroborated testimony and were properly admitted: "Although the photographs were graphic, the facts in this case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis.").

The photograph provided material evidence disproving self-defense and demonstrating malice on the part of Appellant. As a result, the probative value was very high in comparison to the prejudicial nature of the single photograph. The photograph served to corroborate significant testimony regarding the investigation as well. As a result, the trial court properly admitted the photograph into evidence.

II. The trial court did not err in refusing to suppress evidence obtained as a result of the execution of a search warrant.

Appellant maintains the trial court erred in refusing to suppress the search and the fruits of the search of Appellant's home. He contends Charlotte Mecklenburg (CMPD) lacked jurisdiction to execute the search warrant of Appellant's home in Richland County, the affiant on the search warrant lacked personal knowledge and could not support issuance of the warrant, the affidavit lacks probable cause, and the good faith exception does not apply in this case. The search warrant was validly obtained and executed. The affidavit provided probable cause for the warrant. Even if the affidavit was not sufficient, the good faith exception applies. Finally, Appellant's consent allowed the search of the house.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, ..." S.C. Const. art. I. § 10.

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). "An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for

concluding probable cause existed." State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003); see also, State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) ("The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.").

Jurisdiction

Appellant contends the CMPD lacked jurisdiction to execute a warrant in Richland County. CMPD was clearly accompanied by officers from the Richland County Sheriff's Department for the search of Appellant's residence. The warrant directed its authority to the officers from Richland County to conduct the search within Richland County, and they did so with proper jurisdiction.

The South Carolina Supreme Court considered a very similar argument in State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978). In Hammond, the appellant maintained the search warrant was executed by officers without jurisdiction to conduct the search because the warrant was executed by officers from the City of Greenville Police Department and the location was outside the city limits in the county. The testimony at the hearing indicated Deputy Carter of the Greenville County Sheriff's Department accompanied the officers to Hammond's house, and he participated in the arrest and subsequent search. Id. at 353, 242 S.E.2d at 414. The Court found the evidence Deputy Carter was present was sufficient to find the execution of the search warrant lawful. Id.

The Court referenced Kirby v. Beto, 426 F.2d 258 (5th Cir. 1970), *cert. den.*, 400 U.S. 919, 91 S.Ct. 181, 27 L.Ed.2d 159, in holding the search was lawful. The Court explained the facts of Kirby:

> There, a search warrant was issued to officers of the Dallas, Texas, City Police Department, authorizing a search of

> premises located in the city of Irving, Texas, outside of the Dallas city limits. The defendant argued that since the place to be searched was outside of the jurisdiction of the Dallas police officers, the execution of the search warrant constituted a denial of due process. The court held that the search warrant was executed by law enforcement officers with proper authority, since the Dallas police officers were accompanied by an Irving police officer who was present in the vicinity of the defendant's apartment at all times during the service and execution of the search warrant. See, also, State v. Wise, 90 N.M. 659, 567 P.2d 970 (App.1977).

Hammond, 270 S.C. 347, 353-354, 242 S.E.2d 411, 414.

The testimony in this case established several Richland County Deputies were on scene during the execution of the search warrant. (T.480; 489; 511; 522; R. 480; 489; 511; 522). The testimony indicated it was Investigator Robinson with the Richland County Sheriff's Department (RCSD) that made the decision to execute the search warrant in addition to the consent previously provided by Appellant to search the residence. (T.483; 490; R. 483; 490). Specifically, Investigator Hopkins from CMPD testified "Sergeant Robinson advised that his jurisdiction was going to execute the search warrant." (T.490; R. 490).

The testimony clearly establishes Richland County Sheriff's Deputies with proper jurisdiction were involved in the search of Appellant's residence. Even Appellant's own testimony indicated RCSD deputies were on site for the search warrant. (T.360; R. 360). The Search Warrant was signed by a magistrate with jurisdiction in Richland County, authorizing Richland County officers to conduct the search of a residence within Richland County. (Search Warrant Defendant's Exhibit 1; R. 16-20). Therefore, the trial court properly refused to suppress the warrant and evidence seized during its execution on this ground.

Affiant's Knowledge

Appellant contends the trial court erred in failing to suppress the search warrant and evidence obtained through the search warrant because the affiant did not have personal knowledge of what was contained in the affidavit and did not establish the credibility of the source of his information. The affiant was briefed on the case and the details of the investigation to the time of obtaining the search warrant. Further, all information came from law enforcement agencies, including CMPD and RCSD, so establishing separate credibility was not an issue as it is with an informant.

It is well established in this state that magistrates may issue a search warrant based upon hearsay information that is not a result of direct personal observations of the affiant. See State v. Dunbar, 361 S.C. 240, 249, 603 S.E.2d 615, 620 (Ct. App. 2004). This is especially true when the hearsay is obtained from other law enforcement officers. The United States Supreme Court has sanctioned hearsay as a basis for a search warrant when the information is obtained from other law enforcement officers. In U.S. v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), the Court found: "Observations of fellow officers . . . engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." As the Fourth Circuit has stated: "It is well settled that an affiant, seeking a search warrant, can base his information on information in turn supplied him, as this information, by fellow officers." U.S. v. Welebir, 498 F.2d 346, 350 n.2 (4th Cir. 1974).

Finally, the use of information from other officers was sanctioned by the South Carolina Supreme Court in State v. Sullivan, 267 S.C. 610, 614-15, 230 S.E.2d 621, 623

(1976). The Court specifically held: "The propriety of an affiant attesting to information supplied him by a fellow officer has been judicially endorsed." Id. at 615, 230 S.E.2d at 623.

In the instant case, Investigator Robinson testified he participated in numerous meetings and discussions with officers from CMPD. In the meetings he learned the facts found in the investigation and was involved in determining the direction of the investigation in Richland County. (T.520-523; R. 520-523). Investigator Robinson then detailed the information including the details of CMPD's investigation to Investigator Croxton who was the affiant for the search warrant. (T.522; R. 522).

Investigator Croxton testified he received a call from Investigator Robinson asking him to obtain a search warrant. Investigator Croxton testified Investigator Robinson advised him of the investigation and of what was found to date by CMPD and RCSD. (T.509-510; R. 509-510). Investigator Croxton testified the affidavit and information provided to the magistrate was consistent with what he was told by Investigator Robinson. (T.510; R. 510).

The information contained in the affidavit indicates much of the information contained in the affidavit was developed through investigation by CMPD. The information was provided to Investigators Robinson and Croxton. The affidavit, by virtue of specifically indicating the information was coming from CMPD to RCSD, provided sufficient indicia of reliability and satisfied the requirement for the magistrate to find probable cause based on the hearsay contained therein. Accordingly, the fact CMPD provided information upon which the affidavit was based is insufficient to justify suppressing the search warrant and the evidence found as a result of its execution.

Probable Cause

Appellant contends the affidavit fails to provide sufficient evidence for the magistrate to have determined probable cause existed. The magistrate had a substantial basis for finding probable cause existed to issue the warrant and as a result the trial court properly refused to suppress the warrant or evidence obtained during the execution of the warrant.

The United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (emphasis added); see also, State v. Keith, 356 S.C. 219, 223-224, 588 S.E.2d 145, 147 (Ct. App. 2003).

A reviewing court should give great deference to a magistrate's determination of probable cause. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007) (citing State v. Davis, 354 S.C. 348, 355, 580 S.E.2d 778, 782 (Ct. App. 2003)). The United States Supreme Court has expressly recognized "affidavits in support of search warrants should not be subject to '[t]echnical requirements of elaborate specificity,' and that a magistrate has the 'authority . . . to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant.'"

U.S. v. Bynum, 293 F.3d 192, 197 (4th Cir. 2002) (quoting Gates, 462 U.S. at 235, 240). "The term 'probable cause' does not import absolute certainty." Dupree, 354 S.C. at 683, 583 S.E.2d at 441(internal citations omitted). "Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties." Id.

The affidavit in the current case contains sufficient evidence from which the magistrate could determine probable cause existed to justify the search of Appellant's home. First, the affidavit issued on May 22 established the victim had been missing and not heard from since May 5, a period of 17 day. It stated she had not reported to work which was "uncharacteristic" for her. (Affidavit of Search Warrant part of Defendant's Exhibit 1; R. 18-19).

Next, the affidavit indicated the victim was last known to be "enroute [sic] to South Carolina to end a relationship with a boyfriend known only as, 'Teddy.'" It was determined through telephone records she called Theodore Roosevelt Manning IV. Manning was interviewed by CMPD detectives and confirmed he and the victim had sex on the day of her disappearance and that she had been to his house. Finally, the last indication of her cell phone being used was near Eastover on May 6. This evidence, taken as a whole, indicates the victim visited Appellant, and Appellant was likely the last person to see the victim. Further, the affidavit establishes the victim's bank cards were used multiple times to access her account. Black males were observed completing the transactions. (Affidavit to Search Warrant; R. 18-19).

The evidence links Appellant to the victim and it establishes murder as the probable crime. The victim was uncharacteristically missing for 17 days, and her cell

phone had not been active for 16 days. This indicated she was more than a missing person, and instead was deceased. Appellant's statements to the CMPD officers established the victim was at his house around the time of her disappearance. This fact likely establishes him as the last person to see her alive. Finally, at least one black male is seen on a bank camera attempting to access the victim's bank accounts after the day she traveled to see Teddy to break off a relationship with him. (Affidavit of Search Warrant in Defendant's Exhibit 1; R. 18-19).

These facts, when considered in the totality of the circumstances, establish probable cause to believe Appellant, as the rejected boyfriend, murdered the victim and evidence would be found in her last known location. Accordingly, given the totality of the circumstances, there is evidence in the record to support the magistrate's conclusion probable cause existed to issue the warrant.

Good Faith Exception

Appellant contends the good faith exception found in U.S. v. Leon, 468 U.S. 897 (1984), does not apply in this case. Even assuming for the sake of argument the affidavit was insufficient to establish probable cause, the circuit court would have properly admitted the evidence under the Leon good faith exception.

The United States Supreme Court in Leon articulates that a court should not suppress the fruits of a search conducted under the authority of a warrant, even a "subsequently invalidated" warrant, unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n. 23. The Supreme Court explained the limited circumstances in which an officer

could not be found to have acted with "objective reasonableness," thereby excluding application of this good faith exception:

> (1) "the magistrate ... was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";
> (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral "judicial role";
> (3) "an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
> (4) "a warrant [is] so facially deficient- i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid."

U.S. v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) (citing Leon, 468 U.S. at 923) (internal quotation marks omitted).

The Fourth Circuit Court of Appeals explained:

> "Substantial basis" provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." This is a less demanding showing than the "substantial basis" threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (internal citations omitted) (emphasis added).

The South Carolina Supreme Court explained the application of the Leon good faith exception: "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801,

804 (1997) (emphasis added) (quoting Leon, 468 U.S. at 923). "[W]hen an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." Id. at 292, 494 S.E.2d at 803-804.

In this case, even if the affidavit does not provide a substantial basis for determining the existence of probable cause, it is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The affidavit cannot be described as so bare-boned that the magistrate's issuance of the warrant could be viewed as a mere rubber-stamping of the warrant application, nor is the affidavit so lacking in indicia of probable cause that it was unreasonable for the officers or the magistrate to conclude that probable cause existed. Accordingly, even if the affidavit is insufficient in some manner, this Court should affirm the admission of the evidence under the additional sustaining ground of the Leon good faith exception.

Consent

Finally, as an additional sustaining ground, the trial court could have correctly determined the evidence was admissible because Appellant consented to the search of his residence. Appellant contends he could not have consented to the search because the officers had a warrant. However, the evidence indicated provided his consent prior to learning of the warrant so his consent would still be valid, knowing, and voluntary.

> The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises.

Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (internal citations omitted). South Carolina also recognizes consent as an exception to the requirement of a warrant to conduct a search. See State v. Dupree, 319 S.C. 454, 456–57, 462 S.E.2d 279, 281 (1995).

The United States Supreme Court has also explained the requirement for consent:

> We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973). The Court has also explained consent cannot be given when an individual is merely following an official directive or submitting to known authority. The Court stated:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

Bumper v. North Carolina, 391 U.S. 543, 548-550 (1968) (footnotes omitted).

This case is clearly distinguishable from Bumper. All the officers present at the search indicated consent was obtained from Appellant prior to his being informed of the existence of the warrant. Detective Hopkins from CMPD testified she explained they had a warrant after Appellant already consented to the search of his residence. (T.478; 486; R. 478; 486). She explained Appellant came to the door and she and Detective Martin from CMPD talked with him about wishing to search the residence to rule him out as a suspect. She indicated they talked about how the search would be conducted and he had a lot of questions but consented to them searching. (T.480-481; R. 480-481). She testified that as part of his statement given that day, Appellant admitted he was voluntarily talking with the officers and that he had previously consented to the search of his residence. (T.482-483; R. 482-483).

Detective Martin testified he and Detective Hopkins went to Appellant's home to speak with him. He testified one of the reasons for going was to obtain Appellant's consent to search his residence. Detective Martin testified Appellant gave his consent to search. (T.223-224; R. 223-224). Detective Martin explained Appellant gave consent and was later informed the officers had the search warrant. (T.232-233; 239-240; R. 232-233; 239-240).

The testimony in this case establishes Appellant gave his consent prior to being informed of the search warrant. As a result, the situation in this case is not "instinct with coercion" and is not mere "acquiescence to a claim of lawful authority." Appellant's consent, unlike that in Bumper, was voluntary and was given without coercion, or any other basis for invalidating the consent. Under the facts of this case, the search of

Appellant's home and, therefore, the admission of all evidence resulting from the search were admissible based on Appellant's voluntary consent to allow the search.

III. The trial court did not err in its application of the Protection of Persons and Property Act. Appellant received a hearing on his motion to apply the immunity provision and the court ruled he was not entitled to immunity. Appellant, therefore, received the relief he is arguing he was denied. Further, Appellant failed to immediately appeal this decision and, thus, it was waived for review on appeal.

Appellant contends the trial court erred in refusing to hold an evidentiary hearing on whether Appellant was entitled to immunity under the Protection of Persons and Property Act, Sections 16-11-410 through -450 of the South Carolina Code (the Act). The trial court allowed argument by both counsel including allowing Appellant's counsel to argue what evidence indicated he was entitled to immunity under the Act. As a result, Appellant received consideration pre-trial as is required under State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (2011). Finally, Appellant received a ruling from the trial court that he was not entitled to immunity and failed to immediately appeal the ruling so that issue has been waived.

The Act provides, "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle...." S.C. Code Ann. § 16–11–420(A) (Supp. 2010). The Act also states, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16–11–420(B) (Supp. 2010).

The Act further provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle ...; and
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
> ....

S.C. Code Ann. § 16–11–440 (Supp. 2010).

The immunity provision at issue provides:

> (A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer....

S.C. Code Ann. § 16–11–450 (Supp. 2010).

The South Carolina Supreme Court recently considered the immunity provision in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The Court concluded: "We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial." Id. at 410, 709 S.E.2d at 665 (emphasis added). Nothing in the Act, or in Duncan, requires a specific type of hearing or a specific procedure for the hearing. It only requires the trial court make the determination upon motion of either party prior to trial.

In this case, the issue was decided pre-trial as is required by Duncan. While witnesses were not called, Appellant never asked to call any witnesses in support of his position, and never objected to the trial court's hearing the motion without witnesses being called. (T.462-471; R. 462-471). He makes no assertion in his brief of what

additional evidence he would have offered at an "evidentiary hearing" that he did not offer the trial court prior to the trial court making his determination Appellant was not entitled to immunity. The trial court in this case heard the evidence provided and argument provided by counsel and made a ruling prior to trial as required by Duncan. As a result, Appellant received a determination prior to trial as he was entitled to under Duncan.

Finally, Appellant failed to appeal the determination made by the trial court in this case. First, he does not contend the trial court incorrectly ruled he was not entitled to immunity. (T.470-471; R. 470-471). Appellant only appeals the method of considering the issue by the court. As a result, the issue of his entitlement to immunity is not before this court. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case). Further, the Supreme Court in Duncan found the determination of immunity was immediately appealable under section 14-3-330(4) of the South Carolina Code because it is in the nature of an injunction. See Duncan, 392 S.C. at 407, 709 S.E.2d at 663. Appellant did not immediately appeal this determination and, therefore, has waived the issue for review after his conviction and sentence.

IV. The trial court properly refused to charge the jury related to the Castle Doctrine.

Appellant contends the trial court erred in failing to charge portions of the Protection of Persons and Property Act (the Act). The trial court properly charged the jury the applicable law of the State of South Carolina. Further, a charge pursuant to the Act would not be appropriate where the trial court found the Act did not apply and Appellant has not challenged that finding. Additionally, the Act establishes pre-trial immunity from prosecution; it does not provide for a charge separate and distinct from the traditional self-defense charge, which was correctly given in this case.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible

error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

First, Appellant was not entitled to the charge because the trial court found the Act did not apply to the facts of this case. During the pre-trial motions, the trial court specifically found the facts of this case did not support application of the Act. (T.470-471; R. 470-471). Appellant even asked for clarification: "So, I'm sorry, Your Honor. Are you ruling that this is not - - that the act - - the defense of Property and Persons Act is not applicable to this case?" The trial court simply responded: "Yes." (T.471; R. 471). As stated above, Appellant did not immediately appeal this ruling as required under State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), and has not challenged the ruling on appeal in this case. As a result, he has waived application of the Act and would not be entitled to a jury charge applying the Act to the facts of this case.

Additionally, the Act creates pre-trial immunity from prosecution. The immunity provision at issue provides:

> (A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer....

S.C. Code Ann. § 16–11–450 (Supp. 2010). In examining the provision, the South Carolina Supreme Court explained:

> [W]e find that, by using the words "immune from criminal prosecution," the legislature intended to create a true

> immunity, and not simply an affirmative defense. We also look to the language of the statute that provides, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial.

Duncan, 392 S.C. at 410, 709 S.E.2d at 665. The legislature clearly intended, as the Supreme Court found, to create immunity from prosecution and not an affirmative defense or new law which must be charged to the jury for consideration. As a result, a charge based on the Act would be inappropriate and the trial court properly declined to give the requested charge.

Appellant specifically contends on appeal the trial court failed to charge the jury regarding section 16-11-440(A) of the South Carolina Code, which provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle ...; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

The Act continues:

> (B) The presumption provided in subsection (A) does not apply if the person:

> (1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder.

S.C. Code Ann. § 16-11-440 (Supp. 2010).

In the instant case, the victim was invited into the home and was a guest in the home when the difficulty started. She was not "in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered" the residence. Further, the presumption should not apply when Appellant has removed the gun from the victim's possession and is standing with the gun pointed at the victim. The situation found in the current case is not covered by the section of the Act Appellant sought the court to charge the jury and so, therefore, the trial court properly refused to charge the incorrect and inapplicable law.

The charge given, when viewed as a while, provided the jury with the appropriate law. The trial court fully charged the jury on the law of self-defense. The court explained the four requirements of self-defense: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the

defendant had no other probable means of avoiding the danger. State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007). The trial court then charged the jury on the castle doctrine as it has historically applied, stating: "However, there is no duty to retreat where an act - - attack occurs in one's own dwelling, his yard, or elsewhere on the property owned and lawfully occupied by him." (T.1792-1793; R. 1780-1781). Accordingly, the trial court charge the correct and appropriate law and this Court should affirm the charge.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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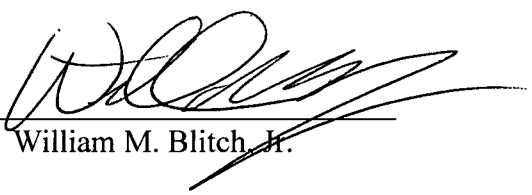
BY: 
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June 18, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

The State, Respondent,

vs.

Theodore Manning, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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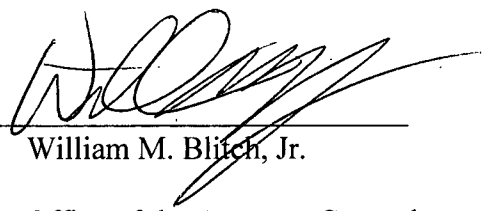
BY: 
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Fielding Pringle, Chief Public Defender
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I further certify that all parties required by Rule to be served have been served. This 18th day of June, 2013.

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