

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY S.C. SUPREME COURT  
Court of General Sessions  
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2016-001109

THE STATE, .....RESPONDENT,

v.

ROBIN RENEE HERNDON, .....APPELLANT

**FINAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. The trial judge properly denied Appellant's motion for immunity from prosecution under the Protection of Persons and Property Act where that determination had evidentiary support and was not based on an error of law.
  
- II. The trial judge properly allowed the forensic pathologist to provide her opinion on the potential location of Appellant at the time of the shooting because trial counsel conceded the pathologist's methods were reliable and South Carolina law allows an expert witness to respond to hypothetical questions concerning their realm of expertise. Moreover, any purported error in admitting the testimony is not preserved for review and also harmless because it is cumulative to other unchallenged testimony at trial.
  
- III. The trial judge's instruction on circumstantial evidence is a correct charge under South Carolina law. Moreover, any error in failing to provide the jury with the Logan charge is harmless because the jury instructions, as a whole, adequately conveyed the applicable law and the State's burden of proof.

## STATEMENT OF THE CASE

On May 12, 2014, the Aiken County Grand Jury indicted Appellant for murder. On February 29, 2017, Appellant proceeded to a jury trial before the Honorable DeAndrea G. Benjamin. Mark A. Leiendecker, Esquire, Margaret E. Hinds, Esquire, and Breen R. Stevens, Esquire, represented Appellant; assistant solicitors Glenn P. Justis, Esquire, and Donald R. Sorenson, Esquire, represented the State. The jury acquitted Appellant of murder but found her guilty of voluntary manslaughter. On May 9, 2016, the trial judge held a sentencing hearing and sentenced Appellant to nineteen years' incarceration. Judge Benjamin then granted appellant's motion for early parole eligibility as a victim of a domestic violence pursuant to S.C. Code Ann. § 16-25-90 (2015).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

## ARGUMENT

### I.

**The trial judge properly denied Appellant's motion for immunity from prosecution under the Protection of Persons and Property Act because her ruling had evidentiary support and was not based on an error of law.**

Appellant argues the trial judge erred in denying Appellant's motion for immunity from prosecution under the § 16-11-440(C) of the Protection of Persons and Property Act ("Act") because her denial of immunity contained "several purely legal errors." The State disagrees with these allegations of error. As indicated by the record, the trial judge denied Appellant's motion based on the facts presented at the hearing.<sup>1</sup> As discussed below, there was evidence presented at the hearing demonstrating Appellant failed to prove she was acting in self-defense at the time of the shooting. Evidence by both parties indicated: (1) Appellant did not intentionally shoot Victim, and because a claim of self-defense requires an intentional act she could not claim immunity under the Act; (2) Appellant was not without fault in bringing on the difficulty necessitating the shooting; and (3) Appellant was not in imminent danger of death or great bodily harm, nor did she believe such.

#### Statement of Facts

##### **Immunity Hearing – Appellant's Evidence**

Immediately prior to Appellant's trial, a hearing was held on her motion for immunity from prosecution under S.C. Code Ann. § 16-11-440 (2015), the Protection of Person and Property Act. Several witnesses testified in support of the motion. The first witness, Appellant, testified about her background and the events leading to the death of Christopher Rowley

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<sup>1</sup> In her brief, Appellant claims the trial judge's written order denying immunity "cite[d] evidence introduced during the trial by the State, but that the State failed to introduce at the immunity hearing." (Br. of Appellant p.16, n.3). However, the "evidence" of which Appellant complains was simply mentioned by trial judge during her summary of the events surrounding the shooting. (R.pp.1434-41). All of the State's evidence cited by the trial judge in support of her denial of immunity was, in fact, presented during the hearing.

(Victim). Starting in 2010, Appellant was employed by the Aiken County Department of Probation, Pardon, and Parole as a pre-parole and pardon investigator. In January 2013, they began dating. At that time, Victim was living with a friend. Soon after, Victim's roommate asked him to move out. Around March 1, Victim moved into Appellant's home. (R.p.67, line 1–R.p.82, line 6).

Appellant opined her relationship with Victim began to deteriorate once he moved in. Financial struggles were a constant stressor for the couple. Victim worked part-time for extra income, but tensions continued to escalate. Appellant claimed Victim started abusing her within weeks of moving into the home. Around mid-March, the couple got into an argument over a trip to Charleston which culminated in Victim grabbing Appellant by the arms, squeezing really hard, and throwing her against the bedroom wall. Victim eventually calmed down and apologized for the indiscretion. However, incidents similar to this continued to occur. Appellant recalled one situation where she had promised to give Victim a ride to his vehicle and later withdrew the offer. Victim started screaming, grabbed her by the arms, and slammed her into the bed. He then threw her to the floor and spit on her. He then punched the bed post, breaking a portion of it away from the frame. Another night, Victim threw a boot at Appellant which struck her in the eye, causing it to swell shut. Appellant recalled other incidents where Victim grabbed her arm or shoved, slap, or hit her. (R.p.82, line 7–R.p.88, line 10).

Appellant, believing Victim had mental instability, arranged an appointment for Victim with her personal physician, Dr. Fallaw, for April 15, 2013. At that appointment, Victim claimed he suffered from depression and anxiety. Dr. Fallaw prescribed Effexor, an antidepressant, for Victim. Over the following months, Appellant would frequently call Dr. Fallaw, complaining Victim was suffering some side effect from his medication. Dr. Fallaw

would then prescribe a new medication and request Victim come in for an appointment.

However, Victim failed to show up for the appointments or even speak with Dr. Fallaw. Dr. Fallaw's only contact with Victim was through Appellant, who made every request for new medication between the April appointment and the shooting. (R.p.188, line 22–R.p.208, line 11).

Victim, while experimenting with the various medications prescribed, showed some signs of improvement. However, incidents of abuse still occurred. The week before the shooting, Appellant had her own appointment with Dr. Fallaw. Dr. Fallaw reminded Appellant that Victim was required to attend an appointment with her before he could receive additional medication. Instead of encouraging Victim to attend the appointment, she bought him and herself tickets to a wrestling event in Greenville. As a result, Victim never made it to the appointment and did not receive a refill of his medication. (R.p.88, line 13–R.p.92, line 2).

Appellant recalled that on the day of the shooting, Victim texted her that he loved her but that he was depressed, agitated, and “really sick to his stomach.” After recalling Victim was without his medication due to skipping the doctor appointment, she made him an appointment for 2:00 p.m. She agreed to meet Victim at a cemetery approximately three miles from their home to give him checks to pay for the appointment. (R.p.92, line 3–R.p.93, line 18).

When Victim met up with Appellant at the cemetery, he again claimed he was irritated and agitated, but was unable to explain why. Depressed, he claimed he no longer felt like going to the appointment, sparking an argument between he and Appellant. Appellant, afraid Victim would intentionally wreck the car and harm himself, told Victim he should not be driving in his emotional condition and requested he call his mother to take him to the appointment. She instructed Victim to, at the very least, go home, pick up his car (he was driving one of Appellant's vehicles), and go the appointment. Victim claimed he was going to run Appellant

over with the car. The argument escalated into yelling and ended with Victim speeding out of the parking lot. Appellant followed Victim to their home. (R.p.94, line 6–R.p.97, line 2).

Victim and Appellant arrived home almost simultaneously. Appellant again requested the keys to the car, stating it was her car and she did not want him driving it. Victim started screaming at her and threw his keys onto the roof. He then threatened to “beat [Appellant]” like a man and shoved her to the ground. Appellant stood up several more times and was repeatedly shoved back to the ground. Appellant started yelling at Victim, telling him she was “done” with their relationship and to get off her property. She unlocked the front door to the house and went in, looking for her other set of car keys to give Appellant. She was unable to locate the keys, so she went into the kitchen to clean up her face (she had been crying) and return to work. Victim eventually entered the house, and confronted her in front of the entertainment center in their living room. After additional comments from both parties, Victim shoved appellant to the ground and starting “wailing” on her with his fist. When he stepped back, Appellant drew her service gun and told him to get out while she called the police. Victim turned around and started to walk towards the door. Appellant followed him. Victim punched the glass front door open with enough force to cause it to slam into the wall, stepped outside, but then turned around slapping his chest and screaming, “[y]ou want some, come get some.” He then approached Appellant. She drew her gun, and Victim hit the gun with his hand. Appellant, who had turned her head, heard the gun go off. Victim grabbed his throat, exited through the front door, and fell near the front porch bannister. Appellant looked up and saw a neighbor, who offered to call an ambulance. (R.p.97, line 10–R.p.103, line 18).

However, Appellant made several admissions which contradicted her version of events. She admitted that although she believed Victim had severe mental issues including manic

depression and “severe[] bipolar” disorder, both of which required medication, she claimed she did not see any issue with taking Victim to a live wrestling event rather than ensuring he attended his scheduled appointment and received a refill on his medication. Further, she testified she knew she should not handle Victim alone when he became irritated and agitated, and should instead seek the intervention of a third party. (R.p.129, line 2–R.p.130, line 11; R.p.131, lines 7–18; R.p.133, lines 19–25).

Appellant admitted telling police she was angry, not fearful, during the confrontation. She stated she had entered the house for the specific purpose of giving Victim a set of keys to the vehicle, even though a main focus of their fight was her not wanting him to drive one of her vehicles and that she had repeatedly told Appellant she wanted him to leave the home and never return. She also claimed she wanted him to leave the property so she could lock the door to her home and go back to work, but admitted she went into her house to find a set of keys for Victim and also conceded that with his keys on the roof, she could have easily locked the door to the home and called the police. She further conceded she had not planned to lock the door behind Victim after pulling the gun on him, commanding him to leave, and him exiting the door:

Appellant also stated she believed Victim entered the home several minutes after she entered. (R.p.110, line 2–R.p.111, line 10; R.p.113, line 18–R.p.114, line 19; R.p.115, line 25–R.p.119, line 11; R.p.123, line 21–R.p.124, line 20).

Moreover, she denied ever questioning whether Victim was unfaithful to her, despite the existence of text messages implying the contrary. (R.p.130, line 12–R.p.131, line 6; R.p.131, line 25–R.p.132, line 25).

Dr. Lois Veronen, a clinical psychologist, also testified at the hearing. She was qualified as an expert in Battered Woman Syndrome (BWS). She stated she met with Appellant twice in

the two weeks prior to trial for the purpose of assessing whether she was the victim of intimate partner violence with Victim, and if so whether that violence had produced some psychological impacts that would have “altered or changed her perceptions of fear, particularly as it related to [Victim’s] death.” She admitted she had not watched the videos of Appellant’s police interview or talked to any independent witnesses about the prior allegations of abuse. Instead, she based her evaluation of Appellant on: (1) a Detailed Assessment of Post-Traumatic Stress (DAPS); and (2) the Personality Assessment Inventory, which could only tell Veronen how “[Appellant] was functioning at the time [Dr. Veronen] interviewed her” by looking at whether Appellant “consistently” presented information in their sessions. Dr. Veronen conceded the DAPS scoring relied on “taking Appellant’s word” that four traumatic conflicts occurred between her and Victim and she could not discern how much of Appellant’s trauma occurred from the shooting itself. (R.p.138, line 13–R.p.145, line 10; R.p.154, line 15–R.p.157, line 4; R.p.162, line 17–R.p.163, line 24; R.p.181, line 18–R.p.183, line 25).

Dr. Veronen recalled the description of the shooting Appellant provided during their sessions. Appellant had told her that when she met Victim at the cemetery, he appeared “more agitated and difficult” than he had ever been previously. (R.p.160, line 1–R.p.161, line 3).

She noted Appellant believed Victim’s ongoing mental issues were severe, so much so Appellant helped Victim apply for disability compensation from the government. Dr. Veronen also confirmed that Appellant never claimed she intentionally shot Victim; she repeatedly stated the gun went off when Victim swatted at her hand. (R.p.157, lines 5–14; R.p.158, lines 1–17; R.p.176, line 12–R.p.177, line 12).

Laurie Caldwell, a SLED agent who once worked with Appellant and maintained a friendship with her, later informed her of the events surrounding the shooting. Appellant

explained there had been an initial argument at the cemetery and followed Victim to the house. After Victim attacked Appellant, she pulled a gun on him while they she was on the ground, inside the house. Appellant had no recollection of pulling the trigger to the gun, noting Appellant could have made the gun go off and she was “stunned” after hearing the gunshot. (R.p.277, line 7–R.p.280, line 9; R.p.287, line 23–R.p.290, line 1).

K.N., Appellant’s daughter, testified regarding her time around Appellant and Victim at home. K.N. recalled Victim was prone to mood swings and would often raise his voice. At some point Appellant told K.N. Victim had hit her. However, K.N. never witnessed any physical abuse. In fact, K.N. recalled that on every occasion Victim became irritated or agitated, Appellant would tell him to “stop” and he would calm down or leave the room. Hours after the shooting, Appellant called her from jail and said she had not meant to shoot Victim. (R.p.292, line 4–R.p.319, line 2).

#### **Immunity Hearing – State’s Evidence**

Lacey Burton, a neighbor of Victim and Appellant at the time of the incident, witnessed a portion of the fight between the two. Burton had exited her home with the purpose of picking up her child. She heard Appellant yelling, and looked to find her pacing on walkway between her car and front porch. She noted Appellant was yelling at Victim, who was simply standing outside. Burton entered her vehicle, but remained in her driveway to continue observing the fight. Appellant eventually entered the home, but Victim remained outside and smoked a cigarette while standing in the front yard. “No more than 30 to 60 seconds” after Victim walked up the steps to the porch of the home and left Burton’s field of vision, she heard a gunshot. Burton further noted she witnessed approximately three to five minutes of a fight between

Appellant and Victim, at no point in which did either initiate physical contact with the other. (R.p.351, line 15–R.p.355, line 25).

Investigator Mary O’Grady of the Aiken County Sheriff’s Office processed the evidence at the scene of the shooting. She found a cigarette butt, lighter, and two cell phones on the porch. Moreover, the floor of the porch and the nearby railing had blood on them. Inside the home, Investigator O’Grady was unable to find any blood or other signs of a struggle inside. However, she did find a set of keys on the roof of the home. Investigator Molly Hahn, also employed with the Aiken County Sheriff’s Office, took photographs of Appellant when she was brought to the sheriff’s office that day and twenty-four later. She recalled the only injury Appellant complained of was a sore tail bone resulting from being pushed to the ground. Investigator Hahn did not observe any other fresh injuries on Appellant but did see older bruises “yellow and greenish in color” on her arms. (R.p.394, line 1–R.p.408, line 17).

Agent Phillip Turner with SLED interviewed Appellant at the Aiken County Sheriff’s Office, shortly after the shooting. He noticed Appellant was covered in Victim’s blood, but did not appear injured herself nor did Appellant report any such harm. (R.p.366, line 16–R.p.370, line 18).

Through Agent Turner’s testimony, the State submitted the video recording of Appellant’s interview with investigators performed hours after the shooting. Appellant’s description of the shooting differed from her hearing testimony in several ways: (1) Victim skipped work the day of the shooting primarily because of stomach issues, not depression; (2) at the cemetery, Victim told Appellant he would go home, get his mother to pick him up, at that he would move out of the house before she returned home after work that day; (3) the only physical contact between Victim and Appellant consisted of four shoves, two from Victim and one from

Appellant which occurred outside, and one from Appellant inside the home; (4) Victim immediately followed Appellant into the home; and (5) when Victim went to leave the house, Appellant purposely followed him. (State's Exhibit 34).

Additionally, Appellant's description of the history of abuse differed drastically from her hearing testimony. She claimed the first physical altercation between Appellant and Victim did not occur in March or around their trip to Charleston, but sometime in April. Additionally, she originally claimed the worst altercation between herself and Victim prior to the shooting involved a black eye she received when he threw a shoe, but that he had not intended to hit her with it. After one of the investigators asked Appellant whether Victim had ever hit her, she suddenly recalled a history of him punching her which created the black eye of which she earlier complained as well as months' worth of bruising on her arms and legs. She claimed she had photographs of those bruises on her cellular phone, but failed to produce those images during the hearing and trial. (State's Exhibit 34).

However, Appellant's statement was consistent with her hearing testimony on one issue: Appellant consistently claimed she never intended to shoot Victim; the gun discharged on accident because Victim's hand struck the gun. (State's Exhibit 34).

At the conclusion of the hearing, trial counsel argued Appellant was entitled to immunity under § 16-11-440(C) because she was acting in self-defense when she shot Victim, or at least believed she was acting in self-defense because her history of domestic abuse caused her to believe Victim was a "dangerous, dangerous individual." Citing to Dr. Veronen's testimony, he also claimed victims of domestic abuse "are not people that react like we think logical people should react," which is why Appellant failed to report the prior incidents of abuse. (R.p.413, line 15-R.p.415, line 1; R.p.424, lines 15-21).

Trial counsel admitted there were inconsistencies with Appellant's testimony and the other evidence presented, including her statements to police and the physical evidence at the scene of the crime. He also noted Burton's testimony contradicted Appellant's version of events, but argued he did not believe Burton could have seen "what she said she saw." (Trp.419, line 5-R.p.421, line 14; R.p.423, lines 11-23).

In response, the State argued Appellant did not qualify for immunity under § 16-11-440(C) because she failed to prove the elements of self-defense. The State noted Appellant failed to prove she was without fault in bringing about the conflict. For example, despite Appellant's claims of prior abuse and her observation that Victim was more unstable and dangerous than he had ever been before, she followed Victim home from the graveyard. Moreover, after the purported assault inside, Victim attempted to leave the home but Appellant followed and re-engaged him. Burton's testimony further challenged Appellant's degree of fault in the shooting because Burton testified she never saw physical contact between Appellant and Victim and witnessed Victim go into the home "seconds" before the shooting, without any time for the indoor assault to occur. The discovery of Victim's cigarettes and lighter on the porch, by the doorway, supported Burton's version of events. (R.p.426, line 7-R.p.430, line 24; R.p.436, line 17-R.p.437, line 7).

The State also argued Appellant failed to prove she was in danger or actually believed such. Burton's testimony contradicted Appellant's claims she was, or in fear of, imminent danger. During her police interview, Appellant told officers the worst thing Victim had ever done to her was throw a shoe and hit her, but believed he had not thrown the shoe "at" her. Appellant also failed to inform investigating officers Victim had hit her inside the home; in fact, she told interviewing officers she was punched but recanted the statement and clarified she was

only pushed to the ground. The interior of the home was immaculate and showed no signs of a struggle. (R.p.430, line 25–R.p.436, line 16; R.p.437, line 8–R.p.438, line 6).

The State further noted that even if Appellant actually feared an attack from Victim, she failed to prove a reasonable person with the same firmness would also have struck the fatal blow. Dr. Veronen’s expert testimony was based entirely on the information presented to her by Appellant, who was not an independent witness and met with her only two weeks before trial, years after the shooting occurred. Further, Dr. Veronen conceded she could not generate a “full report” on Appellant because Appellant was the sole source of her information. (R.p.438, line 7–R.p.440, line 2).

Finally, the State noted Appellant never alleged she intentionally shot Victim; in every version of her story, she held the gun out in front of her and Victim hitting her hand with the gun caused it to fire. (R.p.434, lines 14–21).

Ultimately, the trial judge found Appellant was not entitled to immunity under § 16-11-440(C). As a general matter, she found Appellant’s testimony was not persuasive due to its inconsistencies with her own initial statements to police and the other evidence presented at the hearing. The trial judge also found Appellant was not without fault in bringing on the shooting because Appellant followed Victim home from the cemetery, “knowing” his state of mind made him dangerous. (R.p.451, line 1–R.p.452, line 4; R.p.454, lines 4–12).

Additionally, Appellant failed to prove she was in imminent danger or reasonable fear thereof, noting Appellant claimed the pistol discharged through no action of her own. Moreover, Burton’s testimony, which was supported by the evidence found at the house, contradicted Appellant’s version of events. (R.p.452, line 5–R.p.454, line 3).

#### **Analysis**

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973)). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see generally Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is "any evidence" to support its findings.").

Whether a defendant is entitled to immunity under the Protection of Persons and Property Act ("Act") must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. S.C. Code § 16-11-440(C) states:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C)

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "Section 16-11-450 [2015] provides immunity from prosecution if a person is found to be justified in

using deadly force under the Act.” Id. “Such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court . . . .” Id. at 372, 752 S.E.2d at 267. If a defendant fails to make such a showing, then his claim of self-defense “presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution.” Id.

Thus, a defendant seeking immunity under the Act must prove he was acting in self-defense by demonstrating: (1) he was not without fault in bringing on the difficulty of the situation; (2) he was in imminent danger of death or serious bodily injury, or believed he was in such danger; (3) if the defense is based on an actual belief of imminent danger, a reasonable person of ordinary firmness and courage would have held the same belief. Id. at 374, 752 S.E.2d at 268, n.8. However, the fourth element of self-defense—the duty to retreat—is excused under the Act. Id.

Moreover, self-defense requires an intentional act by the defendant. State v. Belcher, 385 S.C. 597, 608, 685 S.E.2d 802, 808 (2009). If a court finds a defendant was not acting intentionally when shooting an individual, his actions do not constitute self-defense. See State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008) (noting the distinction between shooting intentionally in self-defense and not shooting intentionally and explaining that where a defendant is claiming self-defense and the only evidence is he intentionally shot his gun, the defendant is not entitled to a jury charge on involuntary manslaughter).

In State v. Slater, 373 S.C. 66, 69–70, 644 S.E.2d 50, 52 (2007), the Supreme Court of South Carolina found a defendant was not without fault in bringing on the difficulty of a shooting and thus was not entitled to a self-defense charge because defendant’s decision to approach an altercation underway with a loaded weapon by his side was the proximate cause of

the ensuing gunfight which led to him “accidentally” shooting the victim. Although Slater testified that his purpose for approaching the altercation was to stop what he believed to be a robbery-in-progress, the Court specifically noted the defendant’s actions “could be reasonably calculated to bring the difficulty that arose in [that] case.” Id.

In Curry, the defendant shot his victim at a New Years’ Eve party shortly after a series of brief physical altercations between the two men. Id. at 368–69, 752 S.E.2d at 265. Curry requested immunity under the act and testified he was carrying around his handgun to shoot up into the air at midnight, but fired on the victim after the latter lunged at him. Id. The State’s witnesses testified that after the last physical altercation between the men, Curry went and retrieved his gun from another room in the house and shot the victim in the back, without any provocation. Id. The physical evidence indicated the victim had been shot six times in the back. Both parties agreed the victim was unarmed. Id. After reviewing the evidence, the trial judge denied Curry’s motion for immunity. Id. The Supreme Court affirmed the trial court’s ruling, stating the facts presented supported the court’s finding that Curry failed to prove by a preponderance of the evidence that his actions constituted self-defense. Id. at 371–72, 752 S.E.2d at 266–67.

#### **Jones is Inapplicable to the Instant Case**

In his brief, Appellant claims the alleged error of the trial judge results in large part because she did not have the benefit of the Supreme Court of South Carolina’s opinion in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). In Jones, the court ruled § 16-11-440(C) included immunity for victims of domestic abuse forced to defend themselves against a cohabitant provided claimants prove the elements of self-defense, absent the duty to retreat, by a preponderance of the evidence. Id. at 301, 786 S.E.2d at 141. What Appellant fails to

understand is that Jones would have had no impact on the trial judge's ruling because the judge's denial of immunity was rooted in Appellant's failure to prove the elements of self-defense at the hearing.

### **Self-Defense Requires an Intentional Act**

Here, similar to Curry, the trial judge's denial of immunity under the Act was supported by evidence presented at the hearing. First and foremost, Appellant failed to present any evidence at the immunity hearing demonstrating her actions constituted an intentional act. During her testimony, Appellant made two critical assertions demonstrative of the fact: (1) she was not looking at Victim when she shot him; and (2) she did not intend to shoot Victim: the gun fired only because he hit it with his hand. Not only did Appellant assert these points during her testimony, but she also claimed as much in statements to police and K.N. the day of the shooting and in her interviews with Dr. Veronen weeks before trial. Not a single witness for Appellant at the hearing claimed Appellant had ever given a statement inconsistent with these two assertions.

Appellant's testimony at the immunity hearing indicates she was not intentionally aiming the gun at Victim and did not intentionally fire it. Thus, even if trial judge believed Appellant proved, by a preponderance of the evidence, her version of events, Appellant's evidence at best describes an accidental shooting. If Appellant's actions were an accident, and not self-defense, she was not entitled to immunity under the Act. See Belcher, 385 S.C. at 608, 685 S.E.2d at 808.

### **Appellant Was Not Without Fault in Bringing on the Difficulty**

Evidence presented by both parties indicated Appellant was not without fault in bringing on the difficulty with Victim. Moreover, the trial judge's ruling was also supported by the State's evidence. Burton testified Appellant, not Victim, was the aggressor in their dispute. Burton observed Appellant hurling verbal abuse at Victim while the latter calmly stood in the

yard. When Appellant stormed into the house, Victim remained in the yard and smoked a cigarette. Burton did not observe any physical contact between the two, contradicting Appellant's assertion of a physical altercation outside the home. Additionally, Burton heard the gunshot "no more than thirty to sixty seconds" after Victim left her field of view, which refuted Appellant's version of events inside the home, which included several minutes of Appellant looking for keys and then repeated assaults by Victim.

Appellant claims the trial judge erred in beginning her analysis with the argument between Victim and Appellant at the cemetery. (Br. of Appellant p. 19). However, the trial judge correctly began her analysis with the altercation in the cemetery because, according to Appellant and her witnesses, Appellant believed at that moment Victim was in an uncontrollable rage which she, by herself, could not handle. Additionally, she testified she was the victim of months' worth of physical abuse and knew that Victim posed a substantial threat to her. Yet, when Victim left the cemetery and removed himself from the conflict, Appellant chose to chase after Victim, reigniting the fight. Similar to the defendant in Slater, Appellant went into what she knew was an explosive situation carrying her loaded weapon. To quote the Supreme Court, "[s]uch activity could be reasonably calculated to bring the difficulty that arose in this case." Id. at 70, 644 S.E.2d at 52.

Appellant also contends the trial judge's ruling "has the perverse effect of turning a victim of domestic violence into a trespasser in her own home." As demonstrated by his brief, Appellant reaches this conclusion through a monumental misinterpretation of the Act. S.C. Code Ann. § 16-11-440(A) states:

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, or if he removes or is attempting to remove another person against his will from the 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.

Notably, section (A) creates the presumption of a reasonable fear of imminent death or peril in situations against those acting unlawfully within their home or occupied vehicle. Under this provision, a claimant is not required to prove three of the four elements of self-defense: an actual or perceived fear or imminent death or bodily harm; if the fear is perceived, that such fear is reasonable; and the duty to retreat. However, § 16-11-440(A) does not exempt a person from proving she is without fault in bringing on the difficulty of the situation. In fact, S.C. Code § 16-11-440(B)(1) and (2) provide that § 16-11-440(A) does not apply when the claimant uses deadly force against classes of people who would normally have access to a home, such as other lawful residents of the property and children of those claiming immunity: individuals for whom a trial court could not reasonably impute an unlawful purpose. Additionally, § 16-11-440(B)(3) explicitly states an individual cannot claim immunity under § 16-11-440(A) if that person was engaged in an unlawful activity when she used deadly force. The existence of section (B) proves the General Assembly does not wish for courts to give a claimant the unfettered authority to use deadly force on her property, and is particularly concerned with the use of such force on other residents. Further, no provision of § 16-11-440 exempts a defendant from proving he was not without fault in bringing on the difficulty necessitating the use of deadly force, showing the General Assembly intends to maintain the requirement that a claimant under the Act, in every situation, must prove she was not without fault in creating the situation.

Yet, Appellant's interpretation of § 16-11-440(C) would do the exact opposite. It allows a claimant to enter any situation, even if they know it will cause a deadly confrontation in which they will necessarily use deadly force, without any restrictions or repercussions. By removing the requirement that a claimant prove she is without fault in creating the difficulty, claimants would possess a legal loophole to commit murder. Consider the following hypothetical: John Smith and Tom Johnson are roommates. They get into a heated fistfight in the local park, after which Tom leaves to return home. John, still enraged, knows that if he returns home, he and Tom will continue fighting. John's gun is in his car, and he knows that when he returns home, he can use the situation to shoot Tom and claim immunity. After John arrives at the home, the conflict resumes. John raises his gun, threatening to shoot Tom. In response, Tom walks, fists clenched, towards John. At that moment, John pulls out his gun and kills Tom. Should the Court follow Appellant's logic, John would be entitled to immunity under the act: (1) he had a lawful right to be in his home; (2) Tom appeared as if he might hit John, so John reasonably believed he was in imminent danger; and (3) under South Carolina law, John was not required to retreat from the home from a conflict-in-progress. John's decision to return to the house and escalate the conflict could not be considered by the trial court because, as Appellant claims, a resident has an unfettered right to return home. Although John's actions were a calculated, premeditated murder, he cannot be prosecuted for his crime.

According to Appellant's testimony and statements to Dr. Veronen, she was in a dangerous situation at the cemetery yet chased that situation home. Even assuming Appellant's testimony true and that she pursued Victim solely out of concern for his wellbeing, the testimonies of her and several witnesses indicate she knew she was entering into a situation

which could necessitate deadly force. Similar to the defendant in Slater, she undertook a course of action which could be “reasonably calculated” to lead to the shooting.

The requirement that a person not act in such a way as to create the difficulty which necessitates deadly force is not a duty to retreat but a duty to avoid unnecessary violence, a central tenet of general criminal law. When the General Assembly crafted the Act, it intended to give citizens immunity from prosecution for situations outside of their control; it did not intend to give them a legal loophole equivalent to a license-to-kill.

In conclusion, the trial judge’s ruling that Appellant was not without fault in bringing on her difficulty because she followed Victim home and created the dangerous situation was supported by the evidence. Additionally, the trial judge’s ruling was also supported by the State’s evidence, particularly Burton’s testimony which identified Appellant as the aggressor and demonstrated the physical assault reported by Appellant could not have occurred.

**Appellant Was Not In, Nor Did She Believe She Was In, Imminent Danger**

Appellant claims the trial judge erred in finding she failed to prove she was in imminent danger or reasonably believed such and supports his argument by referencing the size difference between Appellant and Victim and by citing to Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) in which the Supreme Court of South Carolina noted a victim of domestic abuse may experience a reasonable fear of imminent danger “even when the batterer is absent or asleep.” Id. at 79, 417 S.E.2d at 91. However, Robinson is inapplicable to the instant case. In Robinson, the Supreme Court noted a person suffering from BWS may kill an abuser in self-defense even though the battered person acts at a time when the patter is not physically abusing her. The theory behind this broader interpretation of self-defense is that a victim of such abuse may be considered the victim of a continuous assault which also creates “a heightened sense of imminent

danger arising from perpetual physical and mental abuse” which “does not wane, even when the batterer is absent or asleep.” Id. at 79, 417 S.E.2d at 91. According to such theory, the battered person acts to avoid a future assault.

Here, Appellant did not claim she acted out of some perceived fear of a future attack; rather, she claimed she shot Victim in the midst of an active physical assault, during which he pushed her on the ground and repeatedly punched her. Appellant’s testimony described a situation which, regardless of any prior history of domestic abuse, required immediate action to protect her from harm in that moment. If Appellant’s allegations were true, her claim of self-defense would be proper independent of any history of abuse. Moreover, the trial judge was not required to accept as true Appellant’s claims that she was the victim of ongoing abuse.

Appellant was the only direct witness to such events, and given the glaring inconsistencies among her testimony and statements to friends, family, and the police, the trial judge was well within her discretion to reject such claims at the immunity hearing.

Regardless, there was substantial evidence Appellant was not in imminent danger of serious bodily injury or reasonably believed such. Again, Burton’s testimony indicated Victim was not the aggressor in the confrontation and was shot almost immediately upon entering the home. Investigators O’Grady and Hahn were unable to find any sign of a struggle at the crime scene or injuries on Appellant. Investigator Hahn also recalled the only injury of which Appellant complained was a sore tail bone from falling on her buttocks. In her recorded statement to police, Appellant claimed the severity of Victim’s assault was limited to pushing which caused her to lose her balance and fall to the ground.

Based on the evidence presented by both parties, the trial judge did not abuse her discretion in finding Appellant was not in imminent danger or reasonably believed as much.



## II.

**The trial judge properly allowed the forensic pathologist to provide her opinion on the potential location of Appellant at the time of the shooting because trial counsel conceded the pathologist's methods were reliable and South Carolina law allows an expert witness to respond to hypothetical questions concerning their realm of expertise. Moreover, any purported error in admitting the testimony is not preserved for review and also harmless because it is cumulative to other unchallenged testimony at trial.**

Appellant argues the trial judge erred in allowing the forensic pathologist, Dr. Janice Ross, "offer an unreliable opinion on crime scene reconstruction . . . outside the scope of her expertise." (Br. of Appellant p.24). The State disagrees with Appellant's allegation of error on several grounds. Initially, the State notes Appellant's objection to the reliability of Dr. Ross's testimony is not preserved for appellate review because trial counsel objected to the statements based on her belief the testimony involved a subject area outside of Dr. Ross's realm of expertise, not the reliability of the information from which she developed her opinion. Notably, trial counsel admitted she did not dispute Dr. Ross's ability to determine the path the bullet traveled from Appellant's gun through Victim's body. Because the parties agreed on the reliability of Dr. Ross's testimony, the trial judge did not rule on the issue.

Moreover, Dr. Ross's testimony was reliable testimony involving her field of expertise, forensic pathology, and was based on the evidence in the case. It did not involve any crime scene reconstruction. Dr. Ross's statements were an appropriate response to the State's hypothetical question, and South Carolina law allows experts to respond to hypothetical questions based on the evidence in the case and any theory which reasonably can be deduced from that evidence.

Finally, any purported error in admitting the challenged testimony is harmless. While Appellant complains the State relied on Dr. Ross's response to the hypothetical in its closing

argument to argue Appellant's actions were not an accident or self-defense, the information in dispute, Appellant's heightened position over Victim at the time of the shooting, was also supported through Dr. Ross's unchallenged testimony and other evidence at trial. Moreover, Dr. Ross's response to the hypothetical was just one of the numerous arrows in the State's quiver: the State referenced various evidence of Appellant's guilt during its closing, highlighting the eyewitness testimony which contradicted Appellant's testimony and proved she, not Victim, was the aggressor at the time of the shooting and supporting her conviction.

### **Facts**

#### **Dr. Ross's Expert Testimony**

Dr. Ross, a forensic pathologist, the individual who performed Victim's autopsy, also testified at trial. She testified she received her medical degree from Upstate Medical Center in Syracuse, New York, after which she obtained further training in pathology and forensic pathology with the school, learning how to perform autopsies related to homicides, suicides, rapes, and other crimes. Such training taught her how to find and document injuries and collect physical evidence for use in criminal investigations. She claimed to have performed "close to 10,000" autopsies in her career and to have testified approximately 200 times as an expert in forensic pathology. When the State offered Dr. Ross as an expert in forensic pathology, trial counsel failed to object. (R.p.562, line 12-R.p.565, line 19).

Following her admission as an expert witness by the trial judge, testified regarding the evidence she discovered during the course of Victim's autopsy. Consistent with the eyewitness testimony, she discovered the bullet that killed Victim entered around the midline of his lower neck area. Stippling, soot and pieces of gunpowder which exited the gun along with the bullet, were also found on his neck, indicating the gun was within a couple feet of his neck when it was

fired. X-rays taken determined the bullet came to rest underneath the skin of his right back, towards his shoulder area. Based on the locations of the entrance wound and bullet, Dr. Ross concluded the gun would have had to have been positioned to Victim's left and above his neck, or that Victim was bent over. Notably, Dr. Ross dismissed the possibility that anything in Victim's body caused the bullet to change direction from that of which it was fired. (R.p.565, line 22–R.p.573, line 21).

Based on these statements, the State asked whether the path of the bullet would be “consistent or inconsistent [with Victim] coming up a flight of steps and the shooter [standing] at the top of the steps?” Trial counsel objected. Citing State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001),<sup>2</sup> counsel and arguing such testimony was beyond the scope of a forensic pathologist's expertise because it involves crime scene reconstruction. She claimed the State's query sought specific evidence about the crime scene, which was inappropriate because the State and trial counsel had “different theories” about how the shooting occurred. However, trial counsel reiterated that Dr. Ross was “imminently qualified as a forensic pathologist.” (R.p.573, line 22–R.p.575, line 7; R.p.577, line 14–R.p.578, line 14).

The trial judge, in an effort to understand the substance of trial counsel's objection, asked her whether she believed Dr. Ross, as a forensic pathologist, could testify to: (1) where the bullet entered Victim's body; (2) the distance between Victim and the gun when it was fired; and (3) the angle the bullet traveled. Trial counsel agreed Dr. Ross was able to testify to all three of those issues, the X-ray evidence, and “everything [she] did not object to” up until that point.

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<sup>2</sup> In Ellis, the Supreme Court of South Carolina found the trial court erred in permitting a police officer to testify that, in his opinion, the victim was astride his bicycle when shot. In that case, the expert in question was qualified in the areas of crime scene processing and fingerprint identification. The court took no issue with his testimony in those two subjects, but found the expert “exceeded the scope of his expertise” when he was permitted to “impart to the jury his conclusion, drawn from [his measurements] and observations, regarding the location of the victim and position of his body vis-a-vis the bicycle at the time of the shooting.” The court found this testimony was, in effect, the expert giving his opinion on an ultimate issue: whether the defendant was acting in self-defense when he shot the victim. Id. at 177–78; 547 S.E.2d at 491.

Still, counsel believed Dr. Ross's response to the State's question required the consideration of "evidence found at the crime scene," and was thus prohibited "opinion" testimony because the State and the defense had "different theories of what happened." (R.p.575, line 12–R.p.576, line 1; R.p.579, lines 2–19; R.p.580, lines 2–5).

In response, the State argued the answer to his question was not any different than asking a forensic pathologist whether a person's cause of death was suicide, as such a determination necessarily involves testimony regarding the origination point and path of a bullet. The State explained the question, which posited whether Victim's injury was "consistent or inconsistent" with being shot while walking up steps was an "allowable hypothetical question." It further argued that Dr. Ross, as an expert, was able to give opinion testimony and trial counsel had the ability to cross-examine the doctor on her response. (R.p.576, line 2–R.p.577, line 3; R.p.578, line 17–R.p.579, line 6; R.p.580, lines 6–8).

Relying on State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988),<sup>3</sup> the trial judge found Dr. Ross was qualified to "testify as to the trajectory of the bullet" because such a determination is within the ambit of a forensic pathologist's skills, it was probative of the circumstances of Appellant's crime, and experts are permitted to give their opinions on matters within their qualified fields. (R.p.577, lines 4–13; R.p.578, lines 1–8; R.p.580, line 9–R.p.581, line 10).

### **Eyewitness Testimony**

On the day of the shooting, witnesses Wendy Kiz̄er and Darryl Prather were employees of the cemetery who witnessed the argument between Appellant and Victim. They recalled a

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<sup>3</sup> In Matthews, the Supreme Court of South Carolina found the trial court did not err in admitting the testimony of Dr. Perot, a neurosurgeon, and Dr. Sens, a forensic pathologist, whose combined testimony described the path a bullet took through the victim's body, including the placement of her hands at the time she was shot. The Court found such testimony was relevant because it was probative of the circumstances of the crime and helped explain "the type and extent of injuries [the victim] sustained." Id. at 391, 373 S.E.2d at 594.

heated exchange from both parties during which both appeared incensed. When Victim attempted to leave, Appellant used her vehicle to block him into his spot. Eventually, Appellant was able to pull through his parking space and speed out of the lot. Appellant jumped in her vehicle and “peeled out” in her effort to hastily chase Victim. Approximately ten minutes later, Kizer and Prather heard emergency vehicle speed past the cemetery and head in the same direction Appellant and Victim went minutes earlier. Prather and his boss jumped into a vehicle to find out what caused the commotion. They were stopped on the road outside Appellant’s and Victim’s home, where officers were attempting to revive Victim. (R.p.491, line 6–R.p.510, line 17).

Sarah Wiggins and Lacey Burton, Appellant and Victim’s neighbors, witnessed the argument after they arrived home. Wiggins was performing yard work when she saw Victim park in the driveway, followed immediately by Appellant. She heard Appellant scream at Victim for several minutes, repeatedly demanding he get out of her house and off her property. Wiggins saw them argue for several minutes in the driveway before they walked to the front of the house and out of her view. She did not observe any physical contact between the two. Approximately one or two minutes after they left her field of sight, Wiggins heard a gunshot and Appellant yelling for help. Appellant ran to the front of the porch and observed Victim on the ground, bleeding from his neck. Appellant tried to stand up, but was “pouring blood” out of his neck and fell into a chair. (R.p.512, line 16–R.p.522, line 3).

Burton was leaving her house to pick up her daughter when she observed approximately five minutes of the argument between Appellant and Victim. She could not hear Victim, but could here Appellant yelling at Victim as she paced back and forth. Victim appeared relatively calm, and remained outside to smoke a cigarette after Appellant entered the home. Burton never

observed any physical contact between Appellant and Victim. After Victim smoked his cigarette, he went up the stairs to the home. Somewhere between thirty to sixty seconds after Victim went up the stairs and out of her field of sight, she heard the gunshot. (R.p.523, line 9–R.p.539, line 15).

### **State's Closing Argument**

During its closing, the State highlighted various evidence contradicting Appellant's claims of self-defense and demonstrating she, not the Victim, was the physical aggressor throughout their confrontations, including: (1) Appellant's statements to her coworker, Leeann, Bost, in which she expressed concern Victim was cheating on her and, if her suspicions were confirmed she would shoot him dead and "no jury would convict [her]"; (2) with the exception of Appellant, none of the witnesses ever observed any physical abuse between Appellant and Victim; (3) Appellant's police interview in which she claimed Victim never hit her that day, only pushed her, and provided officers with an account of the shooting which contradicted much of her trial testimony; (4) eyewitnesses from the cemetery testified Victim attempted to flee the cemetery but Appellant blocked his escape, and when he was able to leave Appellant sped after him in her own vehicle; (5) Neither Wiggins or Burton ever observed any physical contact between Appellant and Victim and saw Appellant, not Victim, was the aggressive party during the argument; (6) Both Wiggins and Burton testified Victim was shot almost immediately after leaving their field of vision; (7) Appellant's daughter testified she never witnessed Victim hit her mother, instead he would leave the room to deescalate intense fights; and (8) the physical evidence, including the height differential between Victim and Appellant, the path of the bullet through Victim's body, and the lack of blood or other signs of struggle within the house,

contradicted Appellant's testimony that she shot Victim because he charged at her. (R.p.1304, line 23–R.p.1336, line 22).

The State also discussed Dr. Ross's testimony, stating:

The pathologist. Downward and to the right. Right here in the throat, downward and to the right. Ends up right here. Stippling on his face. You can see it on the left side of his face. That's what that is. All those little black marks right here, I submit to you, you know, probably what it is. Gunshot. That's why it's on that face. She's pointing at him. And the doctor said that would mean that the muzzle of the gun was within two feet of the wound when he was shot. That's as far as stippling will show, two feet.

Nothing - - and she testified nothing [] indicate[d] [the bullet] ricocheted. She testified to that. He wants you to believe it hit his spine and then it ricocheted off and went down. . . .

But she did say it would be consistent if he was walking up the steps and she's about - - remember, she's about 5' 4" and he's about 5' 10," 5' 11."

(R.p.1337, line 15–R.p.1338, line 12).

Following its summary of Dr. Ross's testimony, the State did a physical demonstration of the difference in height between Appellant and Victim, demonstrating that Appellant could not have shot Appellant at the angle she did from the position she described, pointing out the "pure physics" of the shot undermine her testimony. (R.p.1339, line 2–R.p.1341, line 2).

#### **Issue Preservation and Reliability Analysis**

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to

properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (“A contemporaneous objection is required to properly preserve an error for appellate review.”). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (“A defendant must object at his first opportunity to preserve an issue for appellate review.”); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) (“[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King’s belated objection to subsequent testimony came too late.”). A party may not argue one issue at trial and a different issue on appeal. State v. Dickman, 341 S.C. 293, 295 534 S.E.2d 268, 269 (2000). Additionally, an issue conceded at trial cannot be later argued on appeal. See State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal); also State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (where defendant conceded below that the court’s ruling was not prejudicial, he may not later assert on appeal that the same ruling was prejudicial);

The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212,

212 (1982)). Thus, the admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). Indeed, the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of that discretion. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support. Morris, 376 S.C. at 206, 656 S.E.2d at 368; Gooding, 326 S.C. at 252, 487 S.E.2d at 598; Lee v. Sues, 318 S.C. 283, 457 S.E.2d 344 (1995).

The South Carolina Rules of Evidence provide:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Thus, there are several criteria that must be considered by the court in deciding whether to admit expert testimony. First, the court must determine if the scientific, technical, or specialized knowledge purportedly held by the witness would assist the jury to understand the evidence or determine a fact in issue. Second, the court must determine if the proffered witness in fact possesses scientific, technical, or specialized knowledge to qualify as an expert. Finally, in its general gatekeeping function, the court must determine if the type of expert testimony offered meets a "reliability threshold" for the jury's ultimate consideration. White, 382 S.C. at 269-70, 676 S.E.2d at 686; State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011). The reliability of a witness's testimony is a separate question than whether the witness is

an expert; however, the expertise, reliability, and ability of the testimony of assist the trier of fact must all be determined prior to the admission of expert testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474–75 (2012).

As an initial matter, the State notes Appellant's objection to the trial judge's purported error in failing to rule on the reliability of Dr. Ross's testimony is not preserved for review. The record shows Appellant's objection to Dr. Ross's testimony did not concern the reliability of her analysis regarding the path of the bullet, but centered on her expert qualifications. These are two separate and distinct questions under South Carolina law. See id. Trial counsel's reliance on Ellis further illustrates this point. The issue in Ellis was whether a police officer exceeded his scope of expertise, crime scene processing and fingerprint identification, when testifying about the position of a victim at the time of the shooting because such testimony was an opinion on the ultimate issue of the case: whether the defendant had acted in self-defense. Id. at 177–78, 547 S.E.2d at 491. Notably, the court focused solely on his expert qualifications and omitted any analysis as to whether the expert's methods or results were reliable. Accordingly, any issues with the reliability of Dr. Ross's testimony are unpreserved. See, e.g., Dickman, 341 S.C. at 295 534 S.E.2d at 269 (stating a party may not argue one issue at trial and a different issue on appeal).

Further, the trial judge did not need to perform an on the record analysis of the reliability of the testimony because trial counsel conceded the issue. The trial judge asked trial counsel whether Dr. Ross could testify as to: (1) where the bullet entered Victim's body; (2) the distance of the gun from Victim when it was fired; and (3) the path of the bullet through the body. Trial counsel readily admitted he did not have any objection to those analyses, and added he also did not object to her use of X-rays and the remainder of her testimony, excluding the answer to the State's hypothetical question. Thus, trial counsel's statements were an acceptance of the

autopsy, laboratory work, and other tests and analyses described by Dr. Ross and a concession to the reliability of Dr. Ross's testimony. The trial judge did not make an on-the-record reliability ruling because both parties agreed on the issue. Accordingly, Appellant may not raise this issue on appeal. See Benton, 338 S.C. at 157, 526 S.E.2d at 231.

### **Opinion Testimony on Hypothetical Scenarios**

A qualified expert may base his opinion testimony on facts or data "perceived by or made known to the expert at or before the hearing." Rule 703, SCRE. Even if the expert's opinion or inference embraces an ultimate issue to be decided by the trier of fact, such testimony is not objectionable if otherwise admissible under the rules of evidence. Rule 704, SCRE. Notably, experts may provide opinion testimony in response to hypothetical situations presented by a party. See State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 367 (2008) (stating the trial court did not err in allowing the State to present a series of hypothetical situations to an expert about whether certain actions would be illegal because the jury was required to analyze facts and circumstances in a complex business environment and the testimony, although arguably involving the ultimate issue of fact in the case, assisted the jury in making its determinations). Although these hypothetical questions must be based on facts supported by evidence, a party may pose the hypothetical "on any theory which can reasonably be deduced from the evidence and select as a predicate for it such facts as the evidence proves or reasonably tends to prove." Gazes v. Dillard's Dept. Store, Inc., 341 S.C. 507, 514-15; 534 S.E.2d 306, 310 (Ct. App. 2000).

Appellant conflates the challenged testimony as an impermissible comment on crime scene reconstruction, which he claims is a field outside of Dr. Ross's area of expertise; just the opposite, Dr. Ross's response was admissible hypothetical testimony long accepted under South Carolina law. As noted above, the State did not ask Dr. Ross any questions about the actual

layout in the crime scene and whether the angle of the bullet resulted from Appellant shooting Victim on the actual stairs in the home; rather, the State asked Dr. Ross whether the angle of the bullet was “consistent or inconsistent” with Appellant standing at the top of a flight of steps and Victim walking up the same flight at the time Appellant shot him. In Morris, the Supreme Court found the trial court did not err in allowing Gregory Adams, an expert qualified in corporate and securities laws, to respond to hypothetical situations posed by the State in which it asked whether certain actions posed in those hypotheticals would be illegal. The court found the testimony, which arguably involved the ultimate issue of defendant’s guilt, was permissible because (1) the hypotheticals involved Adams’s area of expertise; and (2) Adams’s statements helped the jury “analyze facts and circumstances as they existed in a complex business environment” and the trial court determined Adams’s testimony would assist the jury in determining guilt. Id. at 203–05, 656 S.E.2d at 366–68.

Here, similar to Morris, the State’s expert was qualified in a complex field, forensic pathology. Dr. Ross’s response to the hypothetical question was based on her area of expertise and her analysis of Victim’s corpse. Trial counsel did not dispute, and in fact conceded, Dr. Ross’s skill as a forensic pathologist and her ability to determine the path the bullet traveled through Victim. Her response to the State’s hypothetical merely acknowledged that Appellant shooting Victim from the top of an unspecified flight of steps was consistent with the information she obtained from the autopsy. Moreover, Appellant’s expertise in pathology aided the jury in understanding how and why the bullet killed victim and caused Victim’s injuries, which in turn greatly aided the jury in determining whether Appellant shot him in self-defense.

**Harmless Error**

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Heller at 171, 731 S.E.2d at 320.

Appellant complains admitting Dr. Ross's response to the State's hypothetical "allowed the [State] to use her testimony in place of arguing the inferences from the path of the bullet through the body." (Br. of Appellant, p.27). However, Appellant fails to consider the State made only a passing reference to the hypothetical in a single sentence of its closing. When discussing Dr. Ross's testimony, the State instead focused on her unchallenged testimony on the path of the bullet and other forensic evidence, including the stippling on his face. The State combined this information with the height differential between Appellant and Victim referenced throughout the entire trial and demonstrated the inconsistency between Appellant's testimony and the physical evidence presented at trial through a physical demonstration. The demonstration did not rely upon Dr. Ross's response to the hypothetical.

Moreover, Appellant's argument ignores the fact that Dr. Ross's testimony was only one of many compelling pieces of evidence discussed during the State's closing. In addition to Dr. Ross's testimony, the State referenced: (1) the testimony of the eyewitnesses from the cemetery

and Appellant's neighborhood; (2) absence of eyewitnesses to the alleged prior abuse; (3) Appellant's police interview, which contradicted her trial testimony; (4) other physical evidence, including the lack of blood or any signs of struggle within the home. All of this evidence contradicted Appellant's testimony and undermined her credibility.

Accordingly because the great weight of evidence presented at trial and referenced by the State in its closing was independent of Dr. Ross's response to the hypothetical, any purported error in admitting her statement must be harmless.

### III.

**The trial judge's instruction on circumstantial evidence is a correct charge under South Carolina law. Moreover, any error in failing to provide the jury with the Logan charge is harmless because the jury instructions, as a whole, adequately conveyed the applicable law and the State's burden of proof.**

Appellant argues the trial judge erred in refusing to provide the jury with the Logan circumstantial evidence charge. The State disagrees with this allegation of error: the trial judge provided the jury with the Grippon<sup>4</sup> charge, which the Supreme Court of South Carolina has found to be a current and accurate explanation on the evidentiary value of circumstantial evidence. Moreover, even if the trial judge erred in refusing to provide the Logan charge, any such error was harmless because the trial judge's instructions, as a whole, accurately conveyed the applicable law to the case and the State's burden of proof.

#### Facts

At the conclusion of Appellant's case-in-chief, trial counsel requested five specific jury charges, including one regarding the interpretation and weight of both direct and circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Mirroring the language of the Logan charge, the requested charge read:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proved by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray [Appellant's] behavior as suspicious, the proof has failed.

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<sup>4</sup> State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

The State has the burden of proving [Appellant] guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relied on direct evidence, circumstantial evidence, or some combination of the two.

Trial counsel conceded his charge and the trial judge's charge were similar, but argued his requested charge was a "more direct and complete statement of the law since 2013)." (R.p.1224, line 24-R.p.1226, line 8; R.pp.1432-33).

The judge denied trial counsel's request for the charge, believing the charge in her bench book was "very similar" to the requested language. (R.p.1226, lines 12-15).

During her instructions to the jury, the trial judge charged direct evidence, circumstantial evidence, and reasonable doubt as follows:

Ladies and gentlemen of the jury, I submit to you that there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You should weigh all of the evidence in the case. After weighing all of the evidence in the case, if you are not convinced of the guilt of [Appellant] beyond a reasonable doubt, you must find [Appellant] not guilty.

....

What is reasonable doubt? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving [Appellant] guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a

fact is more likely true than not true, such as by the greater weight or preponderance of the evidence.

In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of [Appellant's] guilt. There are very few things in this world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt.

If, based on your consideration of the evidence, you are firmly convinced that [Appellant] is guilty of the crime charged, you must find [Appellant] guilty. If, on the other hand, you think there is a real possibility that [Appellant] is not guilty, you must give [Appellant] the benefit of the doubt and find her not guilty.

(R.p.1345, line 16–R.p.1346, line 15; R.p.1350, line 21–R.p.1351, line 20).

At the conclusion of the trial judge's instructions, trial counsel renewed his objections to the failure to include the Logan charge. (R.p.1365, line 4–R.p.1366, line 18).

#### Analysis

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). When reviewing the trial judge's jury instructions, the appropriate test involves determining

what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996).

In State v. Logan, our Supreme Court considered whether the circumstantial evidence jury instruction from Grippon remained an appropriate statement of the law. 405 S.C. at 90, 747 S.E.2d at 448. Logan asserted that the charge from Grippon was invalidated by the Court's more recent decisions in cases involving challenges to the denials of directed verdict motions. Logan, 405 S.C. at 91, 747 S.E.2d at 448. However, the Court disagreed and found that the trial judge committed no error in instructing the jury on the law of circumstantial evidence in a manner consistent with the charge articulated in Grippon. Logan, 405 S.C. at 94, 747 S.E.2d at 449. The Court then went on to propose a new circumstantial evidence jury charge containing the following language:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452. Regarding the newly-articulated charge, the Court instructed that the charge should be provided “when so requested by a defendant[.]” Id. Thus, the Court modified its earlier holdings in Grippon and Cherry to allow trial judges to instruct juries on circumstantial evidence using its proposed language if that language was requested by a defendant. Logan, 405 S.C. at 100, 747 S.E.2d at 453.

The facts of this case are indistinguishable from Logan. In both cases, the trial judges instructed the jury in a manner consistent with the approved jury charge from Grippon. See Logan, 405 S.C. at 90, 747 S.E.2d at 447 (identifying the circumstantial jury instruction given in Logan’s case, which contained virtually identical language to the circumstantial evidence jury instruction given in Appellant’s case). As a result, the trial judge properly instructed the jury on the law of circumstantial evidence. See id. at 94, 747 S.E.2d at 449 (“[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon.”). Notably, the Supreme Court in Logan did not find that the circumstantial evidence charge from Grippon reduced the State’s burden of proof or constituted an incorrect statement of the law. See Logan, 405 S.C. at 100, 747 S.E.2d at 452-453 (“This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in Grippon and Cherry.”). Instead, the Supreme Court simply proposed a new circumstantial evidence charge that could appropriately be given upon request. See Logan, 405 S.C. at 99, 747 S.E.2d at 452 (providing a new circumstantial evidence jury instruction that should be given when requested that did not include any “reasonable hypothesis” language). Because the charge given was a complete and accurate statement of the law, it could not have been error.

Finally, even assuming the trial judge somehow erred in failing to give the Logan instruction on circumstantial evidence, any error was entirely harmless because the trial judge fully and correctly instructed the jury on the State's burden of proof. In Logan, the Supreme Court of South Carolina found the trial court's proper instruction on the reasonable doubt burden of proof rendered "any conceivable error . . . harmless beyond a reasonable doubt" because the Grippon charge, combined with the clear instruction on reasonable doubt, properly conveyed the applicable law to the jury. Logan, 405 S.C. at 94, n.8, 747 S.E.2d at 449 n.8. Notably, the reasonable doubt instruction in Logan included the following language:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find the defendant guilty. If, on the other hand, you think there is a real possibility the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty . . . . You should weigh all the evidence in this case, and, after weighing the testimony, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty . . . . The burden of proof remains on the [S]tate to prove guilt beyond a reasonable doubt.

Id. Since Logan, this Court has repeatedly found harmless error in the failure to provide the Logan charge where the jury was given the Grippon charge and a correct instruction on reasonable doubt. See State v. Drayton, 411 S.C. 533, 545–46, 769 S.E.2d 254, 260–61 (Ct. App. 2015) (vacated in part on other grounds, aff'd in result); State v. Jenkins, 408 S.C. 560, 573–74, 759 S.E.2d 759, 766 (Ct. App. 2014). In the instant case, the trial judge gave the Grippon charge and used an instruction on reasonable doubt identical to that of the trial court's in Logan. Thus, the jury charges, as a whole, properly instructed Appellant's jury on the applicable law. See Wharton, 381 S.C. at 213, 672 S.E.2d at 788.

Accordingly, the trial judge's refusal to give the Logan circumstantial evidence charge did not constitute a prejudicial abuse of discretion.

**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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December 20, 2017

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of General Sessions  
DeAndrea G. Benjamin, Circuit Court Judge

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DEC 20 2017

SC Court of Appeals

Appellate Case No. 2016-001109

THE STATE, .....RESPONDENT,

v.

ROBIN RENEE HERNDON, .....APPELLANT,

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**CERTIFICATE OF COUNSEL**


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

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