STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable J. Michael Baxley, Circuit Court Judge

THE STATE,

Respondent,

v.

WALKER MANNING HUGHES

Appellant,

Appellate Case No. 2014-000294.

FINAL BRIEF OF RESPONDENT

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II. Whether the court erred by denying appellant's motion to require the state to open fully on the law and facts and then reply only to the closing argument of appellant since granting the state the full opportunity to the last argument on the facts and law was a denial of due process because it was fundamentally unfair?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the trial court improperly admit hearsay testimony under the state of mind exception to the hearsay rule and under *State v. Weston, infra,* when it allowed the State's witnesses to testify regarding a mother victim's telling them that she feared her son, the defendant?

II. Did the trial court abuse its discretion in denying Appellant's motion to require the state to open its closing argument fully on both law and fact because Appellant's motion ignored state precedent determining the order of closing argument in a criminal trial?

STATEMENT OF THE CASE

Appellant Walker Hughes was indicted by the Greenville County Grand Jury for the charges of murder, burglary in the first degree, grand larceny and possession of a weapon during the commission of a violent crime. Karen Hughes fell victim to each charge. (R. pp. 804).

Attorneys Christopher Scalzo, John Crangle and Tim Sullivan of the Thirteenth Circuit Public Defender's Office represented Hughes at a jury trial which began February 3, 2014, before the Honorable J. Michael Baxley in Greenville County. (R. p. 1). Leigh Paoletti and Sloan Ellis of the Thirteenth Circuit Solicitor's Office prosecuted the case, which took five days to try. (R. p. 1).

Hughes was convicted of all charges, and Judge Baxley sentenced Hughes to a term of life imprisonment without the possibility of parole for murder, a concurrent life sentence for first-degree burglary, an additional five years' imprisonment for grand larceny, and another consecutive five years' imprisonment for possession of a weapon during the commission of a violent crime. (R. p. 791, lines 14-24). This appeal follows. (R. p. 792 – 793).

STATEMENT OF FACTS

David Picone of the Greenville County Sheriff's Office was dispatched to conduct a welfare check at Ms. Karen Hughes' home on April 11, 2011. (R. p. 207, line 23 – p. 208, line 19). When he arrived, Max Few, a worried neighbor stood nearby, waiting to inform the Deputy that Ms. Hughes had not shown up for work that morning. (R. p. 208, line 20 – p. 209, line 2). A co-worker of Ms. Hughes, Kim Jones, first phoned Few, and then phoned the Sheriff's Office to request the welfare check. Ms. Hughes had not returned her friends' calls of concern and her car was missing from her garage. (R. p. 533, lines 6-22).

Picone and the second Deputy to arrive, Todd Edwards, used bolt cutters to gain access behind a four-foot tall padlocked fence. (R. p. 209, line 15 – p. 210, line 19). Together, the Deputies approached the screen-in porch at the back of Ms. Hughes' home. A slit had been cut in the screen near the side of the door latch. Deputy Edwards reached his hand through the cut slit and unlocked the latch in order to gain access to the porch, where the Deputies found Jack, Ms. Hughes' rambunctious terrier. (R. p. 210, line 20 – p. 212, line 8). Few volunteered to remove Jack from the scene. (R. p. 535, line 25 – p. 536, line 3).

The door from the porch to the residence was locked. (R. p. 213, lines 4-5). Picone peeked through a gap in the blinds and observed Ms. Hughes lying on the floor with "blood all around her head." (R. p. 213, lines 3-9). She was located immediately inside the house by the door connecting the sun room and screened-in porch. (R. p. 59, line 24 – p. 60, line 4). Picone notified his sergeant and deputies forced their way into Ms. Hughes' home through the front door, conducted a protective sweep, and began an

investigation. (R. p. 213, line 10 – p. 214, line 18). Ms. Hughes' house was empty and the blood surrounding her body had dried. (R. p. 215, line 20 – p. 216, line 6). She was wearing brown sweat clothes. (R. p. 107, lines 23-24). One of her shoes laid next to her body. (R. p. 77, lines 6-7). She was positioned on her right side in the fetal position. A blue blanket had been placed under her head. (R. p. 77, lines 14-15).

Ms. Hughes lay victim to homicide, dying as a result of at least eleven separate and distinct impacts to her head. (R. p. 621, lines 7-19). Her body felt cold to the investigators' touch and remained absent of rigor mortis, indicating she was discovered one to two days following her death. (R. p. 63, lines 3-4). Law enforcement estimated the time of her death to be "sometime late Friday night," on April 8, 2011. (R. p. 65, lines 15-22). Categorized as defensive wounds, autopsy revealed six separate lacerations or abrasions across the width of Ms. Hughes' left hand culminating in a near-amputation of the tip of her fifth finger. (R. p. 608, lines 8-19; R. p. 620, lines 6-17). Such "significant" injury required "purposeful movement" and "considerable effort." (R. p. 610, lines 4-10). To her right hand, Ms. Hughes suffered blunt force trauma and a deep laceration consistent with being caused by the claw portion of a hammer. (R. p. 610, line 14 – p. 611, line 2). The head injuries Ms. Hughes sustained spread from her face and nose to all sides of her head and ear region and included bruising to her eyelid, abrasions, lacerations extending to the underlying bone, fractured nasal and facial bones, divots, rectangular perforations and depressed skull fractures. Each injury was described as consistent with a brandished hammer. (R. p. 614, line 1 – p. 620, line 5). One to two of the depressed skull fractures Ms. Hughes sustained to the right side of her head alone were fatal, as they lacerated the substance of her brain and caused it to hemorrhage. (R. p. 621, lines 12-19).

Other than the slit cut in the screen next to the porch door, the remainder of the house showed no sign of forced entry or exit from Ms. Hughes' assailant. (R. p. 56, line 9 – p. 58, line 14). No downstairs items in the home were disturbed, save for the bloody footprints leading to and from Ms. Hughes' body. (R. p. 69, line 21 – p. 70, line 22; R. p. 76, lines 4-24). A can of pepper spray was found under her refrigerator door. (R. p. 78, lines 16-19). There was a white-handled, kitchen-type knife found on the kitchen counter. (R. p. 113, lines 4-5). Inside the washing machine, investigators found a scrub brush and hammer wrapped in a hand towel. (R. p. 79, lines 19-24). Each item was clean as if run through the wash and left to air-dry. (R. p. 290, lines 206). Further investigation revealed blood smeared with brush marks on the bottom of the porch screen door, the light switch in the laundry room, and the bottle of detergent left on top of the washing machine. (R. p. 81, line 10 – p. 83, line 25).

Upstairs, Ms. Hughes' purse had been emptied out on her bed. (R. p. 105, lines 2-8). Her dresser drawers were removed and neatly stacked on her bedroom floor. (R. p. 105, lines 10-16). Her bathroom cabinet doors were left ajar, but her jewelry was sitting out in the open. (R. p. 105, lines 18-22). Her day planner lay open to the number for Greenville County Sheriff's Office dispatch. (R. p. 105, line 25 – p. 220, line 5). Her bedroom door had a deadbolt on the inside; her friends knew that Ms. Hughes was "always afraid and would lock herself in her bedroom at night with a dead bolt lock." (R. p. 104, lines 21-22; R. p. 257, lines 13-15).

"This was a personal crime" and it appeared that the perpetrator "knew the layout of the house." (R. p. 71, lines 6-11). Based upon the evidence, investigators determined that Ms. Hughes was assailed at her back doorway, went down very quickly, and that her

murderer continued to attack as Ms. Hughes lay defenselessly on her sunroom floor. (R. p. 328, lines 5-22). Nothing was missing from the home except for Ms. Hughes' Volkswagen Jetta, her garage door opener, and her car keys. (R. p. 71, lines 22-24; R. p. 95, lines 2-12). Investigators issued a BOLO for the Jetta. (R. p. 97, lines 5-10).

Interviews with friends and neighbors revealed Ms. Hughes last spoke with a neighbor between 4:30 and 5:00 PM Friday, April 8, 2011, as she took Jack for a walk. (R. p. 183, lines 15-23). Neighbor Diane Kuhl recalls the nature of their conversation, that Ms. Hughes wore a brown track suit, and that her house remained unusually dark all weekend. (R. p. 460, line 1 – p. 462, line 14). Neighbors also heard Jack whining from Ms. Hughes' screened-in porch, another uncommon occurrence. (R. p. 183, line 24 – p. 184, line 10). Prior to Friday evening, Ms. Hughes spoke with friend and neighbor Margo Green over the phone. (R. p. 255, lines 10-15). Ms. Hughes also talked to Max Few and Kim Jones that Thursday and Friday. Green, Few and Jones reported the same substance of Ms. Hughes' conversation with them: her son, Walker "Chip" Hughes, had been released from prison, she had just received notification of the release, and she expressed agitation and fear that he may "come in and kill her." (R. p. 249, line 18 – p. 250, line 14; R. p. 531, lines 6-25; R. p. 543, line 5 – p. 544, line 23).

Ten months prior to the discovery of Ms. Hughes' murder, Appellant Walker "Chip" Hughes was put on trespass notice after he showed up at his mother's house uninvited. (R. p. 192, line 7 – p. 193, line 9). On that occasion, neighbor Max Few observed Appellant arrive outside of his mother's house between 7:00 and 8:00 PM. Knowing that Appellant no longer lived there, Few walked over and introduced himself. Ms. Hughes never came outside. Appellant wandered off behind some trees at the back of

the property, and the police arrived to issue a trespass notice and gave Appellant a ride. (R. p. 529, line 8 – p. 531, line 1).

On another occasion, Ms. Hughes reported a check forgery on behalf of her ex-husband Mr. Douglas Hughes. Appellant had taken two checks from her and Mr. Hughes' joint trust fund.[1] (R. p. 195, line 7 – p. 196, line 23). In pursuing this charge against her son, Ms. Hughes expressed that she feared Appellant. (R. p. 198, lines 7-12). In fact, when Appellant received his sentence on the forgery charge, he became subject to a no contact order with Ms. Hughes as a special condition. His probation form noted Appellant would "have to move" out of his mother's home; it appeared unclear to the probation agent whether Appellant actually lived with Hughes at the time of sentencing, but he provided his mother's address as his own. (R. p. 234, line 1 – p. 236, line 23; R. p. 797).

As for the trust fund itself, it was created by Ms. Hughes' parents for her benefit. Mr. Douglas Hughes previously served as trustee, but Ms. Hughes filed suit to remove him from that position sometime fairly contemporaneously with her divorcing him. (R. p. 408, line 1 – p. 409, line 24). Mr. and Ms. Hughes' two sons, Appellant Walker "Chip" Hughes and Lawrence Hughes, constituted beneficiaries under the trust. After Ms. Hughes' death, Appellant and Lawrence[2] were to receive an equal interest in the trust. (R.

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[1] Mr. Douglas Hughes suffered significant permanent cognitive and physical impairments following a horseback riding accident in 2009 and therefore required the appointment of a conservator to handle his finances. (R. p. 520, lines 20-25). The injuries left him unable to easily perform executive functions, balance, and drive a car. (R. p. 400, line 2 – p. 403, line 24). He also lost some memory, decision-making skills, and logical reasoning. (R. p. 520, lines 11-19).

[2] Lawrence Hughes died between his mother's murder and Appellant's trial. (R. p. 477, lines 6-15). Lawrence was with his wife at their home in Charlotte from April 8, 2011 to

p. 410, line 17 – p. 411, line 25). At the time of Ms. Hughes' death, the trust's total value amounted $871, 774.19, including the value of Ms. Hughes' home. (R. p. 641, lines 3-25).

While Appellant awaited trial for his mother's murder, he sought a distribution from the trust, which was denied until a later time pending the outcome of Appellant's trial.[3] (R. p. 413, line 8 – p. 414, line 6). This judicial determination obviously agitated Appellant. (R. p. 433, lines 7-16). It turns out that Ms. Hughes previously expressed uncomfortableness when considering distributing trust proceeds to Appellant because of "his drug use and his lifestyle." (R. p. 424, lines 5-22). Additionally, the boys sided with their father following Mr. and Ms. Hughes' divorce, and were not keen on speaking with their mother. (R. p. 468, lines 19-24; R. p. 627, lines 12-17). Appellant once told his on-again-off-again love interest, Sheryl Slavensky, that he "wanted to kill her." (R. p. 627, line 20). Sheryl was Appellant's "best friend" and "confidant" at the time he learned of his parent's divorce. (R. p. 664, line 24 – p. 665 line 23). According to Sheryl, Appellant described his wish to "bash" his mother's head in by stating that he "wanted it to be slow and he wanted to be able to watch her face . . . he wanted to watch her understand." (R. p. 627, line 23 – p. 628, line 4).

April 11, 2011. (R. p. 472, line 14 – p. 473, line 12). Upon learning of his mother's murder on April 11, 2011, Lawrence "was just inconsolable." (R. p. 473, lines 13-25). Lawrence's widow, Ms. Hughes' daughter-in-law, now resides in Ms. Hughes' former home. (R. p. 464, line 21 – p. 465, line 13).

[3] Appellant's seeking that trust distribution resulted in the filing of a declaratory judgment action, in which the court did not determine whether the slayer's statute applied, but rather that the trust was discretionary and it was up to the trustee bank to decide whether Appellant could take from his share. (R. p. 419, lines 2-25).

As for the BOLO on Ms. Hughes' Jetta, a road deputy identified the car on Highway 221 South in Laurens County on the night of Monday, April 11, 2011. (R. p. 507, line 14 – p. 508, line 21). The officer, Sergeant Penland of the Laurens County Sherriff's Office, followed the Jetta into a Hot Spot gas station parking lot, where it backed up into a parking place. (R. p. 509, lines1-22). Sergeant Penland observed Appellant wave at him, exit the Jetta and walk into the Hot Spot store where he tried to buy some gas. (R. p. 511, lines 3-25). Sergeant Penland initiated a conversation with Appellant, who asked for a ride to a location three or four miles away. (R. p. 512, lines 2-8). Appellant provided personal identification. Sgt. Penland ran the license plate on the Jetta learning that it matched the BOLO, so he called in additional law enforcement and Appellant was apprehended without obfuscation. (R. p. 512, line 21 – p. 513, line 16; R. p. 514, lines 18-23).

The call notifying Greenville law enforcement of Appellant's apprehension in Laurens County was dispatched simultaneously with Greenville's beginning to clear from processing the scene of Ms. Hughes' murder. (R. p. 114, lines 17-20). The Jetta was identified as belonging to Ms. Hughes, and there existed no evidence throughout the course of investigation that Ms. Hughes allowed her son, Appellant, to borrow her car. (R. p. 118, line 22 – p. 119, line 3). Appellant was arrested at that time for possession of a stolen vehicle. (R. p. 125, lines 14-18).

When Greenville County law enforcement processed the Jetta, agents located Ms. Hughes' car key and garage door opener in the driver's side door pocket. (R. p. 116, lines 10-14). Atop the rear driver's side seat lay Appellant's copy of his probation, parole, and pardon services acknowledgement of sentence and notice to report dated April 6, 2011,

and stating that Appellant was to have no contact with his mother. (R. p. 351, line 20 – p. 352, line 7; R. p. 338, lines 20-23; R. p. 798). Spots of blood sampled from the right edge of the driver's seat, the substance between the driver's seat and emergency brake, the driver's sun visor, the center console, and the driver's seat adjuster lever were identified as having originated from Ms. Hughes. (R. p. 175, line 17 – p. 176, line 3; R. p. 335, line 5- p. 336, line 25). Inside the car, Sgt. Miller also found a cigarette pack, a couple of receipts dated April 11, 2012, a Masters Inn membership card, a credit card, toiletries in the back seat, a pillowcase housing a Samsung flip phone and other miscellaneous items, binoculars, clothes in the trunk, books, kids' toys, an atlas, tools, a BB gun, and a composition book once-belonging to a fifth grader,[4] *inter alia*. (R. p. 117, line 9 – p. 121, line 25; R. p. 337, line 18 – p. 341, line 11). A blood-spotted Conair electric shaver and its packaging were also recovered from the car. (R. p. 339, lines 19-25). Appellant's head was half shaven across the back at the time of his arrest. (R. p. 127, lines 13-24).

Also during the course of investigation, Sgt. Miller received from a witness an email between Ms. Hughes and a friend in which Ms. Hughes states that it was "a little un-nerving" knowing that Appellant had been released from the detention center on probation. (R. p. 162, line 1 – p. 164, line 25; R. p. 803). Sergeant Miller also recovered a journal kept by Ms. Hughes which documented Appellant's cursing at her on at least one occasion. (R. p. 167, lines 9-24). DNA samples from the Jetta all returned as matching

[4] A name in the composition book led Sgt. Miller to a third party, Ali Mell, who once lived at a now-abandoned trailer in Lugoff. (R. p. 121, line 13 – p. 123, line 25). Items from Ali Mell's abandoned residence were identified as being found in the Jetta. (R. p. 124, line 1 – p. 125, line 13).

Appellant. (R. p. 572, lines 1-11). Appellant[5] could also not be excluded as a minor DNA contributor to swabs of suspected blood found in Ms. Hughes' upstairs bedroom closet and her living room door/curtain. (R. p. 573, lines 4-17; R. p. 576, line 10 – p. 577, line 3). Brother Larry Hughes and father Douglas Hughes were excluded as donors. (R. p. 580, lines 7-23; R. p. 600, lines 8-19).

At trial, another inmate testified on behalf of the State that he and Appellant discussed their disdain for the manner in which they perceived their respective parents to treat their own little brothers. (R. p. 485, lines 1-20). According to this inmate, Michael Isakson, Appellant expressed a desire to be in control of his family inheritance. (R. p. 485, line 21 – p. 486, line 5). Isakson also testified that Appellant was angry because his mother had a restraining order against him, and that Appellant would pay Isakson $70,000 if Isakson would beat his mother to death. (R. p. 486, lines 6-23). Appellant detailed to Isakson where his mother lived, what kind of car and dog she had, and advised that he should keep the dog in the house and "make it look like it was a burglary gone wrong." (R. p. 487, lines 2-22). When Isakson replied that he was facing a lot of time and would not be getting out, Appellant replied "that when he got out he guess he'd have to do it." (R. p. 486, lines 24-25). Isakson asked Appellant what he was going to do after he got out of jail, to which Appellant replied "he was going to his mom's house to collect some money and stuff" and that he did not care that she had a restraining order against him because "[s]he owed him." (R. p. 487, line 23 – p. 488, line 4).

[5] A partial DNA profile was established for Appellant from a swab taken between the Appellant's toes. (R. p. 578, lines 20-25).

Also at trial, Appellant denied involvement in his mother's murder. According to Appellant, he was released from jail and intended on walking to Laurens, but was picked up by a road deputy who took him to the Salvation Army. (R. p. 674, line 16 – p. 676, line 12). Over the next couple of days, Appellant walked to various locations and ended up at his mother's house at dusk on April 8, 2011, where Appellant testified that he spoke with his mother for the first time about his daughter Kaley. (R. p. 684, line 2 – p. 687, line 25). According to Appellant, his mother then gave him a package of new t-shirts and underwear, some candy, and a set of Conair electric clippers. (R. p. 688, lines 2-18). Next, Appellant testified, he talked with his mother for an additional time as they formulated a plan to recover his daughter Kaley from the girl's mother. (R. p. 690, line 4 – p. 692, line 17). Then, according to Appellant, his mother told him to take her Jetta and go get his daughter. She gave him some money and her car keys and he left. (R. p. 692, line 18 – p. 693, line 25).

ARGUMENT

I. Hearsay evidence regarding a mother victim's fear of her son was properly admitted because *Weston* specifically provides that the state of mind exception to the hearsay rule allows others to testify regarding a victim's statements that she feared her son, the defendant.

Pre-trial, the State notified the trial court of its intention "to introduce and present to the jury evidence that the victim was fearful of the Defendant." (R. p. 12, lines 2-6). Due to the factual nature of the case, the State intended to call multiple witnesses personally familiar with the victim, Ms. Hughes, and therefore would likely testify as to Ms. Hughes' expressing to them a fear for her son, Appellant. (R. p. 13, line 15 – p. 14, line 25). The State posited that under the state of mind exception to the hearsay rule, "those statements, in general, on their face that she told these witnesses that she was afraid of the Defendant would be admissible. Not the reasons why[,] if she told them why." (R. p. 45, lines 3-9).

Appellant objected pre-trial on the basis of hearsay, citing the remoteness, as well as under Rule 403, SCRE, alleging that the prejudice accompanying such testimony outweighed its probative value so as to render it otherwise inadmissible. (R. p. 14, lines 3-11; R. p. 16, line 1 – p. 17, line 3). The court, acknowledging the similarity between the objection raised and the *Weston* holding, preliminarily ruled that testimony regarding the victim's fear would be admissible under *Weston* and Rule 803, SCRE, but reserved its final ruling until the presentation of each witness who would testify in relation to the objection. (R. p. 17, lines 4 - p. 18, line 6). None of the overruled objections elicited testimony contravening the hearsay rules and exceptions.[6]

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[6] In addition to the particular rulings discussed herein, Appellant cites that Sgt.

Margo Green

Green, a childhood friend of Ms. Hughes, worked as a paralegal at the law firm retained by Ms. Hughes to handle her divorce. (R. p. 243, line 11 – p. 244, line 23). The State elicited testimony from Green regarding what Ms. Hughes had said about fearing the Appellant. (R. p. 246, line 22 – p. 247, line 21). Appellant objected, and the court required the State to lay a foundation of "some sort of contemporaneous event or proof that has something to do with the time relation to the events that [they were] talking about here" in order to rule on the hearsay objection. (R. p. 247, lines 2-20).

The State developed that Green last talked to Ms. Hughes on Friday, April 8, 2011, the last day she was seen alive, and that during Green's telephone conversation with Ms. Hughes, she sounded "agitated," "her voice was just a little shaky," and "[s]he was talking a little fast[er] than she normally did." (R. p. 247, line 23 – p. 249, line 7). The State asked Green if Ms. Hughes told her why she was agitated, to which Green answered in the affirmative. (R. p. 249, lines 8-9). At that time, the court overruled defense counsel's hearsay objection "based on the date and the fact that that's contemporaneous" with Ms. Hughes' murder. (R. p. 249, lines 11-16).

Green was therefore able to testify that Ms. Hughes "was upset because she had found out that her son, Chip, had been released by the court, that the solicitor's office had failed to notify her, that she was now going to have to . . . be especially careful now that

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Christopher Miller's testimony naming Appellant as "the primary focus" of a statement taken from an interview with Appellant's brother's wife, Teri Hughes, was elicited over the defense counsel's hearsay objection. (Br. of Appellant, pp. 7-8 (citing R. p. 149, line 11 – p. 150, line 15)). That objection was actually posed by the State during defense counsel's cross-examination of Sgt. Miller. Respondent does not believe that particular objection was raised by the state in line with Rule 803(3), SCRE, and therefore posits that the particular objection cited in Appellant's brief is not the subject of his issue on appeal.

he was back out on the street." (R. p. 249, lines 19-24). Green testified that Ms. Hughes did not tell her that she was "afraid" on April 8, 2011. (R. p. 249, line 25 – p. 250, line 1).

Ben Leaphart

The attorney handling Ms. Hughes' trust, Ben Leaphart, testified regarding the specifics of potential distributions from Ms. Hughes' trust to her two sons. (R. p. 411, lines 3-25). After Ms. Hughes' murder, Leaphart filed a declaratory judgment action on behalf of Ms. Hughes' estate to determine if Appellant could take from the trust. (R. p. 413, line 3 – p. 414, line 4). The State asked Leaphart if Ms. Hughes ever expressed how she felt about her son throughout the course of Leaphart's representing her. (R. p. 420, lines 9-20). Defense counsel objected to hearsay, and the State again made a record of the proximity between Ms. Hughes' statements to Leaphart and her murder. (R. p. 420, line 21 – p. 423, line 10). Leaphart's representation of Ms. Hughes carried on into 2010. (R. p. 422, line 1 – p. 423, line 4).

The court ruled that the State should limit its questioning "to toward the end of his relationship with the deceased, which would make this more proximate in time" and reminded the parties "that while the state of mind may be admissible, the reason for that is not under the case law." (R. p. 423, lines 19-25). Leaphart ultimately testified that Ms. Hughes' expressed to him that "she was not comfortable around [Appellant]. She had some concerns about his . . . drug use and his lifestyle" and "she talked about getting into some verbal altercations with him." (R. p. 424, lines 3-12). According to Leaphart, Ms. Hughes was also concerned that if her ex-husband remained on as trustee, that he could enable Appellant by providing him with distributions from that trust. (R. p. 424, lines 13-

22).

Max Few

Max Few was Ms. Hughes' neighbor across the street corner. (R. p. 525, lines 16-25). Few witnessed Appellant loiter in Ms. Hughes' yard on one occasion when the police arrived to escort Appellant off of his mother's property. (R. p. 529, line 1 – p. 531, line 1). Few testified that he recalled last speaking with Ms. Hughes on April 8 and 9, 2011, and that she came to him in person and told Few "to watch out for [her]. She said, ['']I found out that Chip is out of jail.'" According to Few, Ms. Hughes "was frustrated, very scared" and "[s]he was afraid that Chip was going to come in and kill her." (R. p. 531, lines 6-25).

Marion Beachum

Marion Beachum worked at Palmetto Bank and dealt with Ms. Hughes and the administration of her trust from Palmetto Bank's appointment as trustee on July 1, 2009, until her murder on April 8, 2011. (R. p. 638, lines 18-24). During meetings with Ms. Hughes, Beachum recalled asking her questions about her family, including Appellant. (R. p. 639, lines 3-11). The court found the temporal nexus between Beachum's speaking with Ms. Hughes and her murder sufficient to overrule defense counsel's hearsay objection and allowed Beachum to testify that Ms. Hughes told him that "she was deathly afraid of Walker." (R. p. 639, line 14 – p. 640, line 3). Beachum said further "[t]hat if he ever got her alone, he would kill her." (R. p. 640, lines 3-4).

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings,* 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011). "The improper admission of hearsay is reversible error only when the admission causes prejudice." *State v. Weston,* 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006); *State v. Mitchell,* 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). An insubstantial error not affecting the result of the trial is harmless where a review of the entire record demonstrates that guilt was conclusively proven by competent evidence such that no other rational conclusion could be reached at trial. *State v. Price,* 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). Therefore, in order to obtain a new trial based upon the erroneous admission of hearsay evidence, Appellant must demonstrate both error and prejudice. *State v. Mizzell,* 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998).

A. The challenged testimony falls within the boundaries prescribed by *Weston.*

Under an oft-recognized exception to the hearsay rule,[7] a "declarant's then-existing state of mind, emotion, sensation, or physical condition" is admissible so long as testimony regarding that declarant's state of mind does not cross into "a statement of memory or belief to prove the fact remembered . . . ." Rule 803(3), SCRE; *State v. Garcia,* 334 S.C. 71, 75, 512 S.E.2d 507, 509 (1999) (hearsay testimony admissible as

[7] Hearsay is a statement made by someone other than the declarant which is offered at trial to prove the truth of the matter asserted. Rule 801, SCRE.

"circumstantial evidence of the decedent's fear of appellant and concern for her safety," but improper insofar as each declarant's testimony revealed "the reason for [the decedent's] state of mind."). "These statements are considered trustworthy because 'they are based on unique perception; that is, the declarant has a unique perspective into his own feelings and emotions.'" *Garcia, supra*; *see* Fed. R. Evid. 803(3) (identical to Rule 803(3), SCRE). The "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Fed. R. Evid. 803(1) advisory committee's notes (noting that 803(3) "is essentially a specialized application of [803(1)] presented separately to enhance its usefulness and accessibility").

Also, "at least when relevant to the motive to kill, evidence of the victim's state of mind is admissible" under Rule 803(3). *United States v. Tokars,* 95 F.3d 1520 (11th Cir. 1996), *cited by Garcia, supra* at 74, 512 S.E.2d at 508 (citing *Tokars* for the proposition that the victim's state of mind, her fear, was relevant because it suggested that the defendant may have intended to shoot her). "Under 803(3) a statement of the declarant's then-existing state of mind including his intent, plan, or motive, is not excluded by the hearsay rule." *Phoenix Mutual Life Ins. Co. v. Adams,* 30 F.3d 554, 566 (4th Cir. 1994) (declarant's testimony that decedent expressed intent to make declarant the beneficiary of his insurance policy admissible). The state of mind exception is so available because it is relevant evidence tending to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rules 403 and 803(3), SCRE; *see United States v. DiNome,* 954 F.2d 839, 846 (2d Cir. 1992) (statements about victims' existing and ongoing suspicions concerning defendant's exportation business relevant to show motive to kill), *cert. denied,* 506 U.S.

830, 113 S.Ct. 94 (1992); *United States v. Donley,* 878 F.2d 735, 738 (3d Cir. 1989) (statements showing that victim intended to move out of military apartment and separate from defendant), *cert. denied,* 494 U.S. 1058, 110 S.Ct. 1528 (1990). But, "[s]tatements that contain direct observations of the physical appearance and actions of another person are not hearsay at all, but rather direct evidence of the facts in question." *Ross v. St. Augustine's College,* 103 F.3d 338, 342 (4th Cir. 1996).

Compare the present testimony to that held admissible in *State v. Weston,* 367 S.C. 279, 625 S.E.2d 641 (2006), a factually similar case wherein a son murdered his mother, Mrs. Franchey. Weston asserted that his sister's testimony and Mrs. Franchey's friend's testimony were inadmissible pursuant to Rule 803(3), SCRE, and *State v. Garcia, supra. Weston* at 285, 625 S.E.2d at 644. In that case, Suzanne Allen, the friend, testified that Mrs. Franchey was "very unhappy" upon Weston moving in with her. Allen also testified that she "encouraged" Mrs. Franchey "to ask him to leave . . . ." *Id.* at 285, 625 S.E.2d at 644-45. Allen further testified that she spoke with Mrs. Franchey on the Tuesday prior to the murder, at which time Mrs. Franchey shared that she "finally" intended to "ask him to leave" because she wanted her home back; she did not explicitly say she was afraid of her son. *Id.* at 286, 625 S.E.2d at 645. Weston's estranged sister testified that the summer prior to her mother's murder, she was in town for a family reunion and "discussed with the family the fact that [she] became aware that [Weston] was planning to move in with [her] mother . . . ." *Id.* The sister further testified that during the two-week period prior to her mother's murder, she "seemed more nervous and anxious than normal." *Id.* During that time, Mrs. Franchey and her daughter were working on the house and her mother said "please don't touch anything in [Weston's]

room . . . because she was afraid." *Id.* Weston put forward no evidence in furtherance of his defense; the State's evidence connecting Weston to his mother's murder was largely circumstantial. *See id.* at 282-84, 625 S.E.2d at 643-44. The *Weston* court reasoned:

> The testimony in this case did not give a **reason** for Mrs. Franchey's fear. Rather, Toni Franchey and Suzanne Allen testified only that Mrs. Franchey was afraid of Weston. To read *Garcia* as Weston suggests would require us to hold that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid **of the defendant.** This is simply too constrained a reading of *Garcia.* We specifically held that 'the victim's state of mind—that she was scared of appellant—was relevant . . . .'

Id. at 287-88, 625 S.E.2d at 646 (emphasis in original) (citing *Garcia, supra* at 74, 512 S.E.2d at 508).

Indeed, in the present case, to limit the challenged testimony would only allow the witness' testimony to relate that Ms. Hughes was merely afraid, not that she was afraid of her son. To do so obfuscates the witness testimony otherwise directly relevant to the issue of guilt, namely that Ms. Hughes' fearing Appellant tended to show that Appellant's intent, motive and opportunity to kill her was not just a mere possibility.

1. Margo Green

Green testified on the day of her murder Ms. Hughes sounded "agitated," "her voice was just a little shaky," and "[s]he was talking a little fast[er] than she normally did" during a phone call. (R. p. 247, line 23 – p. 249, line 7). These impressions were properly admitted. *Garcia, supra*; *Weston, supra*; *see* Rule 803(1), SCRE (present sense impression exception to hearsay rule applicable where declarant is describing her perceptions of the event spoken of).

As to Green testifying that Ms. Hughes "was upset because she had found out that

her son, Chip, had been released by the court, that the solicitor's office had failed to notify her, that she was now going to have to . . . be especially careful now that he was back out on the street," (R. p. 249, lines 19-24), that testimony falls squarely in the line of testimony contemplated by the *Weston* court. For Green to otherwise only be able to testify that Ms. Hughes seemed agitated is "too constrained." *Weston* at *Id.* at 287-88, 625 S.E.2d at 646. In order for that testimony to be relevant to the issue of guilt, Green had to intimate that Ms. Hughes somehow feared a specific person—Appellant, and Green did so. Ms. Hughes' expression also specifically intimates that she planned to take precautions upon learning of her son's release from the detention center, thus permissibly indicating that she embodied some fear or apprehension toward Appellant.

The testimony gains additional trustworthiness deserving of the Rule 803(3) exception because the phone call occurred on the day of the murder. From Green, we learn of Appellant's opportunity to commit the murder.

2. *Ben Leaphart*

On the topic of Ms. Hughes' fear of Appellant, Leaphart's testimony relayed:

> We had discussions about her son, Walker. The most I can tell you about it was that she was not comfortable around him. She had some concerns about his—what I understand was some—his drug use and his lifestyle. And they do—I do know for a fact that she talked about getting into some verbal altercations with him.

(R. p. 424, lines 5-10). According to Leaphart, Ms. Hughes was also concerned that if her ex-husband remained on as trustee, that he could enable Appellant by providing him with distributions from that trust. (R. p. 424, lines 13-22).

These statements are patently admissible pursuant to Rule 803(3), SCRE.

Leaphart was Ms. Hughes' trust attorney. Ms. Hughes was expressing her intent in garnering Leaphart's assistance with the distributions and terms of her trust fund. In relaying the above information to him regarding her son, Ms. Hughes was telling Leaphart that she planned to exclude Appellant's ability to receive distributions from her trust, which is again indicative of her apprehension of Appellant. Appellant's exclusion from trust distributions is directly relevant to the motive implicit in his murdering his mother.

3. Max Few

Few testified that Ms. Hughes approached him on both April 8 and 9, 2011, during which time she stated that she "found out that Chip is out of jail" and for Few "to be watching out for [her]." She "was frustrated, very scared" and "[s]he was afraid that Chip was going to come in and kill her." (R. p. 531, lines 6-25). Here, we have a declarant permissibly testifying to Ms. Hughes' frustration and fear of Appellant. Ms. Hughes plainly states **what** she was afraid of: Appellant's ability to come and kill her. Under *Weston,* this testimony was proper because it described what and not why she feared him. It also shows Ms. Hughes' intent to take additional care and her plan to request that those close to her, her neighbors and friends, watch out for her safety. From Few, we again learn of Appellant's opportunity to commit the murder.

4. Marion Beachum

Appellant's motive is a relevant derivative from Beachum's testimony. Beachum learned of Ms. Hughes's state of mind concerning Appellant during her course of her trust administration. (R. p. 638, line 18 – p. 639, line 11). Beachum testified that Ms.

Hughes "was deathly afraid of Walker and "[t]hat if he ever got her alone, he would kill her." (R. p. 640, lines 3-4). Again, this reflects what Ms. Hughes feared, not the reason for her fearing Appellant.

The testimony outlined herein is highly distinguishable from the erroneous testimony found in *Garcia* and is not a basis for reversal in the instant case. In *Garcia* it was reversible error for the declarant to relay the victim feared the defendant specifically because the defendant "had kicked and threatened to kill" the declarant. *Garcia, supra* at 76-77, 512 S.E.2d at 509-10. In the present case, we have no threat of death, only fear of death at the hands of Appellant. The *Garcia* court implicitly acknowledged the admissibility of fear absent threat within its reasoning. *Id.* (citing *United States v. Joe,* 8 F.3d 1488 (10th Cir. 1993) (under Rule 803(3), Fed. R. Evid., witness could testify declarant stated she was "afraid sometimes," but not because she thought her husband was going to kill her); *State v. Bell,* 950 S.W.2d 482 (Mo. 1997) (testimony that decedent had stated defendant had assaulted her on prior occasions was inadmissible hearsay); *State v. Reynolds,* 80 Ohio St.3d 670, 687 N.E.2d 1358 (Oh. 1998) (declarant's statements that she was fearful or concerned are admissible but reasons for emotions are not admissible)).

In fact, the *Garcia* court contemplated the admissibility of such statements. *Id.* at 74-75, 512 S.E.2d at 508-09 (citing *State v. Wood,* 180 Ariz. 53, 881 P.2d 1158 (Ariz. 1994) (victim's statements about her fear of defendant and her desire to end their relationship were relevant to trial issues of defendant's motive and mental state, but not witness' testimony "[declarant] told me that she did not want to stay at the apartment

because [defendant] had threatened her life"); *United States v. Tokars, supra* (when relevant to the motive to kill, evidence of the victim's state of mind is admissible under Rule 803(3), Fed. R. Evid.); *State v. Richards,* 552 N.W.2d 197 (Minn. 1996) (where defendant raised accident and/or suicide as a defense to homicide charge, victim's state of mind was relevant); *State v. Crawford,* 344 N.C. 65, 472 S.E.2d 920 (N.C. 1996) (in homicide trial, victim's state of mind was relevant to refute defendant's claim of self-defense and accident); *State v. Shurn,* 866 S.W.2d 447 (Mo. 1993) (victim's statements of fear are relevant where defendant argues self-defense)).

Here, Appellant maintained that he was not his mother's assailant when he took the stand at trial. Any statements made close in proximity to Ms. Hughes' murder regarding her fearing Appellant are plainly relevant to Appellant's motive and opportunity in committing the crimes charged.

B. Any error in the extent of the testimony admitted proves harmless where Appellant opened the door to the challenged evidence by first suggesting the reason the victim feared her son, where the challenged testimony was cumulative, and where there exists other overwhelming evidence of Appellant's guilt.

Even where Appellant posits that these excerpts of witness testimony exceeded the bounds set by *Weston,* any error in the admission of the challenged statements proves harmless.

1. Appellant opened the door to Ms. Hughes' fearing Appellant

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page,* 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). Defense counsel's cross of Sgt.

Miller interposed an email exchange between Ms. Hughes and a friend, Patsy McBride, which occurred within two days of Ms. Hughes' murder. (R. p. 161, line 7 – p. 162, line 24). During the course of Sgt. Miller's investigation, McBride provided him with this email exchange, to which Sgt. Miller ascribed fear at trial. (R. p. 163, line 1 – p. 164, line 19). The emails from Ms. Hughes read:

> Chip was released yesterday. . . . no contact w/mother & dad . . . will have probation . . . . It was a strong sentence. I am glad for that, but it is a little un-nerving to know he is out there. . . . Either he rang my doorbell at 7 pm last night or God did so he would let me know something was up.

(R. p. 803). This email exchange was introduced immediately prior to defense counsel's eliciting testimony that Ms. Hughes kept a personal journal recounting Appellant "cursing her" on at least one occasion. (R. p. 167, lines 9-24).

Thus, defense counsel injected Ms. Hughes' fearing Appellant into the trial on its own accord, making the subject fair game for the State to address in its own case-in-chief. Furthermore, the email adds to the cumulative nature of the complained-of testimony. It was admitted prior to Green, Leaphart, Few or Beachum's testifying at trial.

2. *Testimony was cumulative to that of prior witnesses*

A determination of harmless error requires a consideration of the case's particular facts and other various factors including, *inter alia*, whether testimony was cumulative and the presence or absence of corroborating testimony. *State v. Clark,* 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994). Erroneously admitted testimony does not constitute reversible error where it is merely cumulative and therefore not prejudicial to the defendant. *Weston, supra* at 289, 625 S.E.2d at 646-47.

Prior to Green, Leaphart, Few or Beachum's testimony, the jury learned through

Sgt. Miller that Appellant had just been released from the Greenville County Detention Center and was out on probation. Appellant had pled guilty to forgery "in reference to the trust account . . . that was in his mother's name. Even more, testimony revealed that at the time of his release, Appellant was subject to a no contact order concerning his mother. (R. p. 90, line 19 – p. 93, line 10). Prior testimony also revealed that a copy of that no contact order was recovered from the victim's car at the time of Appellant's apprehension. (R. p. 131, line 6 – p. 132, line 2; R. p. 798 – 802).

Moreover, Greenville County Sherriff's Deputy Daniel Acord testified that he received a call ten months prior to the murder which resulted in him putting Appellant on trespass notice at the victim's home. (R. p. 190, line 20 – p. 192, line 18). Detective Drew Palmer next testified that he investigated Ms. Hughes' report that Appellant forged two checks from her trust account and that she wished to prosecute the forgery. Over defense counsel's withdrawn objection, Detective Palmer testified that Ms. Hughes feared the forgery defendant, her son. Palmer even recommended she purchase a weapon. (R. p. 195, line 2 – p. 198, line 25). Then, the jury again heard that Appellant was subject to a no contact order requiring him to stay away from his mother and relocate from her residence. (R. p. 234, line 1 – p. 236, line 5).

Only then did the jury hear from the challenged witnesses. Therefore, the testimony complained of was harmless in light of any potentially impermissible reasons for Ms. Hughes' fear being cumulative to the State's case up to that point.

3. *There exists overwhelming evidence of Appellant's guilt*

Harmless error also results where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Appellant himself testified that he had just been released from the detention center and that he did indeed go visit his mother on April 8, 2011, arriving "right at dusk." (R p. 679, line 20 – p. 680, line 7). Appellant's testimony in this regard immediately follows Ms. Hughes' neighbors last seeing her walking her dog the evening of April 8, 2011, and immediately precedes the discovery of her murder. (R. p. 183, lines 15-23; R. p. 207, line 23 – p. 208, line 19). Therefore, Appellant placed himself at the scene of the crime at the estimated time of Ms. Hughes' death. (R. p. 65, lines 15-22).

Direct evidence placed Appellant at the murder scene, with DNA sample results showing that Appellant could not be excluded as a minor contributor to the victim's suspected blood found upstairs in her home. (R. p. 573, lines 4-17; R. p. 576, line 10 – p. 577, line 3). Appellant's brother and father were excluded as potential donors to all DNA samples. (R. p. 580, lines 7-23; R. p. 600, lines 8-19). Her home showed no sign of forced entry other than a slit in the porch screening near where Ms. Hughes' body was found. (R. p. 210, line 20 – p. 212, line 8). Not much was disturbed in Ms. Hughes' home, nor was her exposed jewelry stolen. (R. p. 56, line 9 – p. 58, line 14; R. p. 105, lines 18-22). Investigators testified that based upon the crime scene, "[t]his was a personal crime" and it appeared that the perpetrator "knew the layout of the house." (R. p. 71, lines 6-11). Nothing otherwise accounted for was missing from the home except for Ms. Hughes' Volkswagen Jetta, her garage door opener, and her car keys. (R. p. 71, lines

22-24; R. p. 95, lines 2-12). The apparent murder weapon, a hammer, was found washed in the washing machine alongside a scrub brush and a hand towel. (R. p. 79, lines 19-24; R. p. 290, lines 206; R. p. 614, line 1 – p. 620, line 5). A kitchen knife, also consistent with left-hand lacerations and a near-amputation sustained by Ms. Hughes, was found on the kitchen counter. (R. p. 113, lines 4-5; R. p. 608, lines 8-19; R. p. 620, lines 6-17).

Of course, Appellant was found driving Ms. Hughes' Jetta absent permission. (R. p. 118, line 22 – p. 119, line 3). Blood samples recovered from the right edge of the driver's seat, the substance between the driver's seat and emergency brake, the driver's sun visor, the center console, and the driver's seat adjuster lever were identified as having originated from Ms. Hughes. (R. p. 175, line 17 – p. 176, line 3; R. p. 335, line 5 - p. 336, line 25). Her car key and garage door opener were recovered from the Jetta, along with a set of Conair clippers Appellant testified to receiving from the victim. (R. p. 116, lines 10-14; R. p. 339, lines 19-25; R. p. 688, lines 2-18). The car also contained a collection of receipts dated April 9 and 11, 2011. (R. p. 337, line 23 – p. 338, line 6).

Additionally, Appellant was put on trespass notice after he showed up at his mother's house around dusk, uninvited, about ten months prior to her murder. (R. p. 529, line 8 – p. 531, line 1). In the way of motive, there was also the issue of Ms. Hughes pursuing Appellant's prosecution after he forged two checks from her trust account. (R. p. 195, line 7 – p. 196, line 23). Appellant sought a distribution from that same trust fund immediately following his mother's murder. (R. p. 413, line 8 – p. 414, line 6). Also establishing motive, testimony revealed that Appellant sided with his father following Mr. and Ms. Hughes' divorce. (R. p. 627, lines 12-17). Moreover as to intent, Appellant once told his one-time "best friend" and "confidant", Sheryl Slavensky, that he "wanted

to kill her." (R. p. 627, line 20; R. p. 664, line 24 – p. 665, line 23). According to Slavensky, Appellant described his wish to "bash" his mother's head in by stating that he "wanted it to be slow and he wanted to be able to watch her face . . . he wanted to watch her understand." (R. p. 627, line 23 – p. 628, line 4). Surely the challenged testimony was also no more prejudicial than that of the fellow inmate, Michael Isakson, who testified to Appellant's intent and particular method of murdering his mother down to almost the final detail. (R. p. 487, lines 2-22). Isakson testified that Appellant wanted to control his family inheritance and offered Isakson $70,000 to beat his mother to death. (R. p. 485, line 21 – p. 618, line 23). Appellant last told Isakson he was headed to "his mom's house to collect some money and stuff," and that "[s]he owed him." (R. p. 487, line 23 – p. 488, line 4).

A survey of the direct and circumstantial evidence demonstrates that the State presented a case-in-chief demanding a jury to return a verdict of Appellant's guilt beyond a reasonable doubt even absent testimony that Ms. Hughes' told those close to her that she feared Appellant.

II. At the time of trial, there existed no requirement that the State open fully on both law and fact prior to its reply to Appellant's closing argument.

Appellant moved *in limine* for the trial court to require the State to open its closing argument fully on both law and fact. (R. p. 647, line 3 – p. 649, line 6; R. p. 794 – 796). Appellant based his argument upon the theory that allowing the State to reserve its closing argument on the facts until the final argument of the trial infringes upon a defendant's due process rights because it allows for "sandbagging."[8] *Id.* Following discussion with the court, the State announced its intention to open on the law, Appellant preserved his objection, and the court ruled that there exists "no precedent" which would allow "the Defense force the State to structure its arguments in a particular way. The State has the burden of proof and it's a difficult burden of proof and the reason closing arguments are set up the way they are by rule and by precedent. And because [Appellant] put evidence in, the State gets the final argument." (R. p. 654, line 4 – p. 655, line 5).

Standard of Review

The conduct of a trial is left largely to the discretion of the presiding judge and will not be interfered with by the appellate court "unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." *State v. Lee,* 255 S.C. 309, 313-14, 178 S.E.2d 652, 654 (1971), *overruled on other grounds by State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009). Absent an abuse of discretion, "matters of detail as to the order in which a number of arguments on behalf of the state and of the defendant shall be made is ordinarily to be left to the sound discretion of the presiding judge." *State*

[8] "The act or practice of a trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem." Black's Law Dictionary (10th ed. 2014).

v. Garlington, 90 S.C. 138, 138, 72 S.E. 564, 565 (1911).

Our Circuit Court no Longer Follows the Rule Relied Upon by Appellant

Appellant's argument on this issue contradicts criminal trial procedure as generally exercised in our State and as reflected by the current state of our law. "In South Carolina, it is well established that where the defendant calls no witnesses and offers no evidence in his behalf, his counsel is entitled to have the concluding argument to the jury." *State v. Mouzon,* 321 S.C. 27, 31, 467 S.E.2d 122, 125 (Ct. App. 1995), *aff'd,* 326 S.C. 199, 485 S.E.2d 918 (1997) (citing *State v. Crowe,* 258 S.C. 258, 188 S.E.2d 379 (1972). Otherwise "[t]he solicitor is entitled to open the closing arguments to the jury." *State v. Rodgers,* 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) (citing *State v. Gellis,* 158 S.C. 471, 155 S.E. 849 (1930)). A criminal defendant waives the right to make the concluding argument when he introduces any evidence. *State v. Battle*, 304 S.C. 191, 403 S.E.2d 331 (Ct. App. 1991). Once waived, this right cannot be reclaimed, even if the State's position remains unchanged. *Battle, supra; Mouzon, supra.*

"The solicitor in this case skillfully used the last argument to which [A]ppellant could not reply to urge [A]ppellant's convictions." (Br. of Appellant, p. 16). This is because **the State holds the burden of proof**. The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error. It follows that such right cannot be limited solely by custom or practice. *Rodgers*, 269 S.C. at 24-25, 235 S.E.2d at 809. In a criminal trial, "which in the end is basically a fact finding process, no aspect of advocacy could be more important than the opportunity to finally marshal the evidence for each side before submission of the case to judgment." *Mouzon, supra* at

31, 467 S.E.2d at 125; *contra State v. Atterberry,* 129 S.C. 464, 124 S.E.2d 649 (1924) ("the failure to require the state to open fully on the law and the facts was reversible error"). Where, as here, a defendant elects to put forward evidence, the State is allowed to open and conclude the order of closing arguments in its own chosen manner out of fairness: the burden-bearing party, or movant, retains that right by taking upon himself the burden of proof. *Cf.* Rule 43(j), SCRCP. Conversely, a defendant retains "the right to reply in argument by reason of not introducing evidence" so that he may argue the otherwise-unrebutted State's case against him. *See Garlington,* 90 S.C. at 90, 72 S.E. at 566.

The State's oft-exercised choice to open only on the law finds support in still-good law. In *State v. Lee*, *supra* at 317, 178 S.E.2d at 656, "[t]he trial judge refused to require the State to open on the facts but did require an opening argument on the law and such was made." The *Lee* court expounded upon the relevant change in Circuit Court rules applicable at the time, noting that Rule 59 and the *Atterberry* opinion upon which Appellant now relies were changed to an adoption of Circuit Court Rule 58 reading as follows: "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." *Lee* at 317-18, 178 S.E.2d at 656. Otherwise, "[t]he solicitor is not required to make an opening argument to the jury on issues of fact, *State v. Lee, [supra],* but may do so in his discretion." *See Rodgers* at 25, 235 S.E.2d at 809.

The Circuit Court Rules were later replaced by the separate sets of Rules of Civil and Criminal Procedure, and those governing criminal procedure failed to adopt Circuit Court Rule 58. *See* Rules 13-24, SCRCrimP; *contra* Rule 43(j), SCRCP (providing, *inter*

alia, the party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter). "All other existing Criminal Practice Rules heretofore adopted [were] repealed as of the effective date of [the] South Carolina Rules of Criminal Procedure." Rule 39, SCRCrimP. Thus, the previous rule 58 and 59 relied upon by Appellant were expressly rejected upon adoption of the current set of rules governing criminal practice. That set of rules does not require the State to open its closing argument fully on both law and fact, even where requested by motion of the defendant. *See Lee* at 318, 178 S.E.2d at 656 ("It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact."). The common law interpretation of Circuit Court Rule 58 as described in *Rodgers,* however, lives on in practice.

Our State's precedent on this issue reflects more than mere custom or practice; our retention of the common law provides an orderly mechanism by which the movant embodies the first and last opportunity at closing argument to embrace the factfinder with the hopes of garnering a favorable result. It cannot offend the notions of fundamental fairness and due process for a prosecutor to initially address the jury at the close of the defendant's case with only the elements of the crimes charged. It makes sense that the State would choose to initiate its final opportunity to meet its burden by reminding the jury of the simplistic elements that they will soon be called upon to deliberate in favor of guilt or innocence. As is true of every party in every trial, criminal or civil, the State, as the movant, has every availability to come out of the gate at closing argument pointing its proverbial finger at the defendant and intimating to the jury that the State has to prove X, Y and Z in order to meet their burden of proving guilt beyond a reasonable doubt. That

alone cannot constitute "sandbagging," because due process does require the State to duly notice the defendant of the charges against him at the time of indictment. *See State v. Gentry,* 363 S.C. 93, 102, 610 S.E.2d 494, 499-500 (2005) ("The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation."); *see also State v. Baker,* Opinion No. 27497 (S.C. Sup. Ct. Filed February 11, 2015) ("we focus our attention on *Gentry* as it is the seminal case in analyzing the sufficiency of an indictment"); *State v. Wade,* 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991) ("one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise [by an indictment] and hence unable to combat the charges against him").

Moreover, the State cannot be said to "sandbag" its opponent by reserving its argument on the facts for the close of its case. Closing arguments are not evidence. *See Simmons v. State,* 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). At the point where closing arguments are reached, defense counsel has heard the entirety of the State's evidence against his client. The State cannot introduce anything new in its closing so as to leave a defendant without an opportunity to challenge the evidence against him. Thus, when a solicitor reserves its argument on the facts for its final word at trial, the State is not remaining "cagily silent . . . with the hope of preserving an issue for appeal." Black's Law Dictionary (10th ed. 2014). Rather, the solicitor is merely taking up its "opportunity to finally marshal the evidence for [its] side before submission of the case to judgment" on behalf of the burden-bearing party and in line with the common law rule on the order of closing arguments. *Mouzon, supra* at 31, 467 S.E.2d at 125.

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Simply put, the manner of closing argument in this case did not offend any limitation placed upon a solicitor's closing argument as otherwise defined in our State and, by extension, due process. *See e.g. State v. Copeland,* 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (a solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors); *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (same); *see also Simmons v. State, supra* (the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences therein); *State v. Lunsford,* 318 S.C. 241, 246-47, 456 S.E.2d 918, 922 (Ct.App.1995) (improper for the solicitor to express before the jury his or her personal judgment about opposing counsel). *State v. Thomas,* 287 S.C. 411, 339 S.E.2d 129 (1986) (condemning closing arguments wherein the prosecutor's comments lessen the jury's sense of responsibility by referencing preliminary determinations of the facts); *Thompson v. Aiken,* 281 S.C. 239, 315 S.E.2d 110 (1984) (same); *State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982) (same); *State v. Woomer,* 277 S.C. 170, 284 S.E.2d 357 (1981) (same).

South Carolina maintains the common law rule governing the order of closing arguments during a non-capital criminal trial. Therefore, no such rule existed at the time of Appellant's trial which would require the prosecution to open its closing argument fully on both law and fact. Our courts denied the adoption of any such rule when it omitted Circuit Court Rules 58 and 59 from the Rules of Criminal Procedure. Absent the existence of any such a rule cited by Appellant, there can be no abuse of discretion in the

trial court's denying Appellant's motion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant's convictions for murder, burglary in the first degree, grand larceny and possession of a weapon during the commission of a violent crime.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable J. Michael Baxley, Circuit Court Judge

THE STATE,

Respondent,

v.

WALKER M. HUGHES,

Appellant,

Appellate Case No. 2014-000294.

CERTIFICATE OF COMPLIANCE

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

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