STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN MICHAEL HUGHES,

Appellant

Appellate Case No. 2017-002539.

INITIAL BRIEF OF RESPONDENT

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III. Did the trial court err reversibly in allowing the admission of a 911 call recording where the statements made on the recording were hearsay that fell within no exception to the general rule against hearsay?

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VI. Did the trial court err reversibly in the manner in which it conducted the hearing on whether Appellant was immune from prosecution under the South Carolina Protection of Persons and Property Act, S.C. Code Ann. § 16–11–410, *et seq.*, and in the evidence it allowed in that hearing, entitling Appellant to a new hearing?

[1] Appellant briefed the issues raised in a different order than included in his statement of the issues on appeal. Respondent lists and briefs the issues in the order briefed by Appellant.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court properly admit evidence of a presumptive test for the presence of blood conducted by a forensics unit officer inside Appellant's home where the officer visually observed suspected blood and then conducted the presumptive test, which has been in use since at least 1993, in line with his training and experience in the field?

II. Did the trial court properly deny the motion to suppress data from Appellant's cell phone evidence where the evidence provided a substantial basis to conclude that probable cause existed to support the search warrant for Appellant's cell phone even though the warrant's affidavit in part stated it believed evidence existed on the decedent's phone?

III. Did the trial court properly admit the 911 call made by the victim's estranged wife under the excited utterance exception to the rule against hearsay where the call was made contemporaneous to and under the stress of a startling attack upon the victim?

IV. Did the trial court properly deny Appellant's motion for directed verdict as to the conspiracy charge where testimony established Appellant acted with at least one other family member in planning and carrying out an attack?

V. Did the trial court properly refuse Appellant's request to charge the jury with language from the Protection of Persons and Property Act where the jury was instructed on self-defense and where our courts have otherwise held it improper to additionally instruct juries on language from the Act?

VI. Did the trial court conduct a proper immunity hearing where the trial court heard testimony from five witnesses, recognized a disparate factual scenario, heard argument by counsel, and found Appellant did not demonstrate by a preponderance of the evidence that the immunity statute applied to the facts he alleged occurred?

STATEMENT OF THE CASE

In May 2015, the Greenville County Grand Jury indicted Appellant John Michael Hughes for the January 2015 murder of his son-in-law John Michael Ferrell and for possession of a weapon during the commission of a violent crime. (R. pp. *Indictment No. 2015-GS-23-03344). In June 2017, the Greenville County Grand Jury issued an additional indictment for conspiracy, alleging Appellant combined with one or more of Margaret, Jacob, and/or Jane Hughes in the commission of Ferrell's murder. (R. pp. *Indictment No. 2017-GS-23-04936A).

Appellant proceeded to a jury trial beginning December 4, 2017, before the Honorable Perry H. Gravely. (Tr. p. 1). Attorneys Thomas Adducci and Teal Johnson represented Appellant on the charges. (Tr. p. 13, lines 14-16). Assistant Thirteenth Circuit Solicitor Mark Moyer prosecuted the case. (Tr. p. 13, lines 7-9). Prior to the jury being sworn, Appellant sought and the court conducted an immunity hearing pursuant to the Protection of Persons and Property Act. (Tr. p. 37, lines 9-16). The court denied the motion. (Tr. p. 171, lines 10-14).

The jury was sworn and, after a four day trial, convicted Appellant of murder, conspiracy, and the weapons charge. (Tr. p. 178, line 6; Tr. p. 706, line 16 – p. 707, line 1; R. pp. *Verdict Form). Immediately following the trial, Appellant received a sentence of 45 years for murder, a consecutive five years for the possession of a weapon during the commission of a violent crime, and a consecutive five years for conspiracy. (Tr. p. 715, lines 9-14; R. pp. *Sentencing Sheets).

This appeal follows with notice being served December 8, 2017. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Appellant John Hughes arranged for his daughter's boyfriend to stay outside while his daughter's estranged husband John Ferrell came over to discuss the details of a pending child custody dispute. (Tr. p. 476, lines 1-24). His daughter Jane was going through a divorce with Ferrell. (Tr. p.600, lines 13-19). Her new boyfriend Andrew Martin had moved into the Hughes' residence. (Tr. p. 596, line 22 – p. 597, line 8). Appellant and his wife shared their family home not only with Jane, Martin, and Jane's two children from her marriage with Ferrell; but their other adult son, Jacob, also intermittently lived in the home and maintained his own bedroom there. (Tr. p. 473, line 4 – p. 474, line 10).

Jane's boyfriend Martin had lived with Appellant and his family "for a number of months" by January 24, 2015, which was the evening that Appellant expected a visit from Ferrell. (Tr. p. 472, lines 10-23; Tr. p. 475, lines 9-22). Though Martin found it unusual, Jane's estranged husband Ferrell and Jane's brother Jacob were drinking buddies, and "Jacob would occasionally work for [Ferrell]." (Tr. p. 477, lines 20-25). This led to Ferrell's coming over that Saturday night. (Tr. p. 540, lines 16-19; Tr. p. 599, line 18 – p. 600, line 5). While Ferrell visited the Hughes' residence, Martin sat in the backyard "smoking cigarettes and cigars and playing on [his] phone." (Tr. p. 477, lines 2-10). Martin recalled sitting between six and 30 feet from the house. (Tr. p. 477, line 12).

Prior to Ferrell's arrival, Appellant communicated with Jacob throughout the night, texting Jacob that they "need to discuss dessert . . . ." Jacob replied around 10:00 P.M. for Appellant to call when he was "ready for pie." (Tr. p. 548, line 24 – p. 550, line 12). From then until 11:10 P.M., Appellant continued to text Jacob updates asking for "just a few more minutes," then asking for Jacob to call him. (Tr. p. 550, line 13 – p. 551, line 11). "Green

dragons and elm trees" appeared in each of Appellant's texts.[2] (Tr. p. 550, line 13 – p. 551, line 11). Finally, Jacob and Appellant exchange brief series of phone calls between 11:10 and 11:27 P.M. (Tr. p. 551, line 16 – p. 552, line 7).

Martin, still sitting outside after an indeterminate period of time, began to get frustrated as he had not "been made aware that anybody was at the house." (Tr. p. 478, lines 16-19). Taking his headphones from his ears, he "heard a loud crash." (Tr. p. 478, lines 16-19). He decided to go open the sliding glass door at the back of the house to investigate "and walked into a nightmare." (Tr. p. 478, lines 19-23).

He "saw John Ferrell cowering under Jane and she was assaulting him with a hammer. [He] saw John Hughes in a crouched position beside her facing him with a gun. And [he] saw Jacob behind him standing there in the kitchen and the table upside down." (Tr. p. 479, lines 4-8). As Appellant held a gun to Ferrell, Ferrell said "incongruous things about bleeding from his head and later said something odd like he was prepared to die." (Tr. p. 479, lines 14-18). He witnessed this "through the archway" by the kitchen and "freaked out, froze like a deer in the headlights" wishing "immediately that someone was there to make it stop." (Tr. p. 480, line 1 – p. 481, line 18).

Martin then "eased" into the area where this was occurring, "moved Jane back" from her assault "and began convincing her to get on the phone with 9-1-1." (Tr. p. 481, lines 21-24). Martin "snatched" the hammer from Jane, tossing it on the ground to free her hands for the phone call to the police. (Tr. p. 482, lines 1-2). During this altercation, "Jacob tased or attempted to tase Ferrell in the neck or something, that general area, while he was on his knees." (Tr. p.

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[2] Presumably indicating the repetitive use of identical emojis. *See also* State's Exhibit 83 (select GZone Mobilyze_Report > evidence > communication > messages.html).

484, lines 6-8). Martin witnessed Ferrell rise from his knees and attempt "an escape through the kitchen window. Jacob and Renee [Appellant's wife Margaret Renee Hughes] attempted to stop him." (Tr. p. 482, line 12 – p. 483, line 3). Martin "didn't see much of that, but they were around that corner" in the kitchen grabbing and pulling and trying to keep Ferrell "from going out the window." (Tr. p. 483, lines 5-7). Martin saw Ferrell in the window. (Tr. p. 483, line 15).

Martin acted to make "sure that Jane was on the phone with 9-1-1." (Tr. p. 485, lines 8-9). "John Hughes ran by [Martin] and Jane out the front door," and Martin "heard yelling and gunshots." (Tr. p. 484, lines 14-15). Before the "gunshots," Martin "heard John Ferrell beg for his life." (Tr. p. 489, lines 10-11).

Jane did call 911, stating in part that someone had broken into the house and tried to kill her and further identified Ferrell as the victim. (State's Exhibit 94, file "(1) 01-24-2015 23.54.04 911-3.wav," at 2:30 to 3:05). Jane's call also included unintelligible language regarding a hammer and an instruction to "get to him." (*Id.* at 0:10 to 0:14 and 0:42 to 0:47)

As for the rest of the Hughes family, Jane's children were in the back of the house. (Tr. p. 485, lines 9-10). "Jacob went outside, came back inside and went to the back of the house" where Martin did not see him "for a long time after that." (Tr. p. 484, lines 19-23). "Margaret cleaned in the kitchen and went outside." (Tr. p. 484, line 18). "There was blood and mess everywhere" inside the home which Margaret Hughes washed with "a rag or a sponge" and a bottle of cleaning solution. (Tr. p. 485, line 24 – p. 486, line 1).

Martin seated himself in the foyer until police arrived. (Tr. p. 486, lines 4-10). Martin recognized the hammer Jane held that night because Martin himself had probably pulled it from a closet toolbox to hang pictures at one time. (Tr. p. 490, lines 11-21). Martin knew that Appellant had a pistol that he kept in a bag. (Tr. p. 490, lines 5-8). And he recognized the stun

gun Jacob had used from when Appellant showed it off "like a new toy" on a prior occasion. (Tr. p. 489, lines 19-24). Martin, however, "was lost as a ball in high weeds" to the scene he walked in on that night. (Tr. p. 491, lines 2-3).

* * *

Two neighbors had heard some of these events transpire outside of the Hughes' home. One lived about three houses down and approached the first responding officer at the scene. (Tr. p. 203, line 16 – p. 204, line 11; Tr. p. 240, lines 7-10). Though he did not know Appellant or his family, the neighbor "heard a loud bang with a momentary pause and then heard a series of more loud bangs" he believed were gunshots. (Tr. p. 240, line 12 – p. 241, line 17). Stepping outside, the neighbor saw two figures with a flashlight "walking into the house and talking with people" before "walking back outside." (Tr. p. 242, lines 1-20). One had a "big white beard" like Appellant. (Tr. p. 242, lines 3-5). The neighbor had a houseguest call 911 and walked towards Appellant's home, observing a bloodied body lying on the ground. The first responding officer approached him and asked him to return home. (Tr. p. 243, line 5 – p. 244, line 15).

Another neighbor sat on his porch 450 feet around the corner from the Hughes' home around midnight that night. He was smoking and scrolling through Facebook on his phone when he heard "a loud gunshot." (Tr. p. 249, lines 4-19; Tr. p. 250, lines 6-21). He did not know anyone in the Hughes family. (Tr. p. 249, line 20 – p. 250, line 5). He thought someone shot a fox he had just seen trolling through the neighborhood, but then he "heard a man screaming for help." (Tr. p. 251, lines 4-14). "He just got louder and louder him screaming, asking God to help him, [']somebody please help me.['] And then [he] heard a bunch of shots, five or six in a row, and then [he] never heard that guy again." (Tr. p. 251, lines 14-18). The neighbor stood on his own porch, scared, waiting to see if he saw "somebody come running out" from the area until his

wife came outside to check on him. (Tr. p. 252, line 22 – p. 253, line 3). He did not share his knowledge of the shooting until a few months prior to trial because he had an outstanding warrant for his arrest at the time the shooting occurred. (Tr. p. 253, line 12 – p. 255, line 2).

* * *

Simpsonville police arrived within five minutes of Jane's call to 9-1-1. (Tr. p. 202, lines 6-10). It was 11:58 PM. (Tr. p. 202, lines 1-4). Appellant John Hughes approached the responding officer from the right side of the home. (Tr. p. 203, line 16 – p. 204, line 1). Appellant nearly immediately directed the officer towards the victim. (Tr. p. 208, lines 19-25). Using his flashlight, the officer caught a glimpse of a body lying face down "and it seemed like their hands were kind of underneath them." (Tr. p. 208, line 25 – p. 209, line 3). Taking stock of the situation, the officer noticed matting on the victim's head, indicating blood. (Tr. p. 210, lines 10-21). At that point, Appellant advised the officer he had a gun on his person and the officer ordered Appellant to drop the weapon. (Tr. p. 210, line 22 – p. 211, line 1). Appellant complied and was placed in investigative detention because the officer was the only law enforcement agent on the scene at the time. (Tr. p. 211, lines 1-25).

Margaret Hughes, Appellant's wife, came outside of the home. (Tr. p. 216, line 20 – p. 217, line 4). Appellant's daughter Jane, son Jacob, Jane's boyfriend (Martin), and Jane's two children were all inside the house and stayed there until the police ordered their exit. (Tr. p. 217, lines 4-23). Jane requested transport to the hospital for a sore wrist. Law enforcement accompanied her and emergency medical splinted and bandaged her right wrist before she left the scene. (Tr. p. 218, lines 1-10; Tr. p. 264, lines 6-23). Martin also went to the hospital with Jane and stayed with her there for about an hour. (Tr. p. 491, lines 19-23). Then he went to the police station. (Tr. p. 492, lines 3-8). Appellant was evaluated by emergency medical personnel

who initially arrived at the scene in response to the 911 calls, but they noted no distress, pain, or even blood on his person, and he waived medical transport. (Tr. p. 265, lines 5-23; Tr. p. 266, line 25 – p. 267, line 3).

More law enforcement arrived to process the scene. (Tr. p. 212, lines 1-25). They collected Appellant's handgun, a .45 caliber Glock 21, into evidence. (Tr. p. 213, lines 1-23). They found a set of keys on the ground outside near the kitchen window which were required for towing the victim's vehicle from the roadway near the Hughes' house. (Tr. p. 218, line 17 – p. 219, line 3; Tr. p. 233, lines 17-18). Officers collected Appellant's cell phone and the flashlight he had when they arrived. (Tr. p. 288, lines 3-7).

Another officer approached the victim, checked for a pulse to no avail, and observed the victim's pants pulled down near his ankles. (Tr. p. 226, lines 1-22; Tr. p. 289, lines 9-10). Emergency medical personnel pronounced the victim deceased on the scene at 12:13 A.M. (Tr. p. 261, lines 12-18; Tr. p. 264, lines 1-5). He wore a pair of brown Dockers shoes, white socks, blue jeans, plaid boxers, a black leather jacket, and a black short-sleeved shirt. (Tr. p. 277, line 16 – p. 278, line 9). The black leather jacket and shirt had bullet holes. (Tr. p. 538, lines 17-20). The shirt was "about two-thirds of the way ripped off." (Tr. p. 539, lines 3-6). The bullet holes corresponded with the gunshot wounds the victim sustained to his upper body. (Tr. p. 567, lines 6-10). But "[t]he pants were wrapped around the victim's feet" and "seemed to be intact." (Tr. p. 538, lines 20-23). Indeed, though the victim sustained a gunshot wound to the leg, there were no bullet holes in his pants. (Tr. p. 567, lines 15-17). The victim had no weapon on his person, only a cell phone, some cash, and other "personal papers." (Tr. p. 567, lines 20-21).

Examining the scene for items of possible evidentiary value, an officer observed and marked two shell casings located an estimated ten feet from the victim's head. (Tr. p. 232, lines

3-22). He additionally observed "a trail of blood from where [the victim's feet were] that led all the way back to where [an] air conditioner unit was" on the ground. (Tr. p. 233, lines 14-18). Another officer located and marked three more shell casings. (Tr. p. 282, lines 19-24). This officer also noticed "suspect blood droplets going from the window to the victim's body," as well as a small window air conditioning unit on the ground and a can opener. (Tr. p. 283, lines 11-17). He noticed suspected blood on the exterior of that kitchen window and on the exterior trash can. (Tr. p. 284, lines 19-22; Tr. p. 293, line 14). After testing by a firearms analyst, the five shell casings were confirmed to have been fired from the .45 caliber Glock Model 21 semi-automatic pistol collected from Appellant. (Tr. p. 450, line 10 – p. 454 line 1).

Measurements taken by law enforcement determined that the kitchen window was just shy of six feet from the ground. (Tr. p. 291, lines 11-20; Tr. p. 439, lines 1-8). The window itself measured 30.75 inches wide and 15.25 inches high when fully opened. (Tr. p. 439, lines 11-15). The air conditioning unit was recorded lying at a distance of about three-feet from the left of the kitchen window's location on the side of the house. (Tr. p. 439, line 23 – p. 440, line 13). The distance from the window to the large bloodstain associated with the fallen victim's head measured 19 feet. (Tr. p. 442, lines 21-25).

Inside, an officer observed suspected blood on a wooden spatula in the kitchen sink, on the cabinet area below the sink, on a hammer in the dining area adjoining the kitchen, and on a quilted blanket near the dining table. (Tr. p. 297, lines 6-22; Tr. p. 326, lines 22-25). Law enforcement observed a pouch for a handgun sitting on the sofa in the living room. (Tr. p. 298, lines 3-5). Law enforcement seized "various court documents" and computers from the home. (Tr. p. 442, lines 9-13; Tr. p. 446, lines 1-13). They also recovered another shell casing from an envelope in the kitchen. It bore a head stamp distinguishing it from the casing recovered outside

the residence. (Tr. p. 441, lines 1-17). Though also tested, the firearms analyst was unable to confirm whether this sixth shell casing had been fired from the gun collected from Appellant. (Tr. p. 453, lines 5-23).

As they worked the interior scene, the officers noticed their boots leaving prints on the sticky, damp floor. (Tr. p. 298, lines 23-25). They collected a damp rag from the interior trash can that reacted positively to an on-scene presumptive test for the presence of blood. (Tr. p. 330, line 19 – p. 331, line 4). Elsewhere throughout the home, the same presumptive test demonstrated results positively indicating the presence of blood. (Tr. p. 328, line 22 – p. 334, line 12). Officers also seized an empty Clorox bottle in the exterior trashcan placed near the dislodged air conditioning unit. (Tr. p. 441, line 19 – p. 442, line 3).

A serologist with Greenville County Department of Public Safety recorded a number of items from the Hughes residence sampled for DNA analysis due to the presence of suspected blood: kitchen window blinds; a quilt; a hammer; a blue hand towel from the kitchen trash can; pants collected from Jane Hughes; a long-sleeve shirt collected from Jane Hughes; the handle and trigger of a Glock .45 caliber gun; a pair of blue jeans collected from the victim; a pair of boxers collected from the victim; a shirt with a ripped (nearly severed) hem collected from the victim; fingernail clippings collected from the victim; a reference sampling taken from a spot of the victim's blood; and reference samplings taken from buccal swabs of Andrew Martin, Jane Hughes, Margaret Hughes, Jacob Hughes, and Appellant John Hughes. (Tr. p. 361, line 13 – p. 369, line 25). Upon each of the non-reference samples, the serologist examined reddish-brown stains and conducted a presumptive test with phenolphthalein to see if they returned positive results for the presence of blood. Most of them did. (Tr. p. 361, line 13 – p. 369, line 7).

A series of results obtained from DNA analysis conducted on the serologist's samplings

confirmed that the victim's blood appeared on the swabs sampled from the kitchen blinds, the quilt, the hammer, the blue towel from the kitchen trash can, Jane Hughes' pants and T-shirt, and the clothing and biological material collected from his person. (Tr. p. 384, line 10 – p. 390, line 16; State's Exhibit 59). Jane Hughes was a minor contributor to DNA sampled from the hammer handle. (Tr. p. 385, line 8 – p. 386, line 4; State's Exhibit 59). Though none were a definitive match, Appellant John Hughes, Jacob Hughes, and Jane Hughes could not be excluded as a possible trace contributor to the samples from Jane Hughes' pants and T-shirt. (Tr. p. 386, line 21 – p. 388, line 11; State's Exhibit 59).

A forensic pathologist recovered three bullets from the victim's body during autopsy. (Tr. p. 574, lines 18-24; Tr. p. 577, lines 13-23). Law enforcement present at the autopsy photographed, collected, and submitted the bullets and the victim's clothes as evidence. (Tr. p. 274, line 6 – p. 275, line 3). They also swabbed for gunshot residue. (Tr. p. 277, lines 1-15). The forensic pathologist noted several points regarding the victim's health prior to the shooting, including signs of emphysema, an enlarged heart, and coronary artery disease, each of which "would have limited his mobility and, certainly, his energy level and his stamina." (Tr. p. 568, line 1 – p. 569, line 23). His blood-alcohol content was .116. (Tr. p. 583, lines 16-23).

Separate and apart from these observations, the pathologist recorded that six gunshot wounds caused the victim's death. He opined that one bullet probably passed through the chest and re-entered the leg, meaning that the victim sustained five separate gunshots. (Tr. p. 570, lines 5-24). One shot struck the victim through his right eye, another straight down through the left side of his neck, another clear through the shoulder and back through the front of his right thigh, still another through the other front shoulder through to the pulmonary artery, and yet another to the back right shoulder. Each shot was fired from at least several feet away. (Tr. p. 571, line 22 –

p. 578, line 13).

The victim sustained additional blunt-force trauma to the top of his head. (Tr. p. 581, lines 9-12). The multiple contusions and lacerations existed in two distinct patterns: circular and in two small, evenly spaced rectangles. (Tr. p. 581, lines 12-20). These contusions and lacerations, which significantly overlapped atop the victim's head, were each consistent with a hammer. (Tr. p. 582, lines 1-13). Chips had been taken from the victim's skull. (Tr. p. 586, lines 1-3). The forensic pathologist also recorded a fractured jawbone associated with a similar rectilinear laceration on that part of the victim's face. (Tr. p. 582, lines 14-24).

* * *

After that night and early morning, Martin and Jane spent a few nights away from the Hughes' home. (Tr. p. 492, lines 12-19). Martin was called back to the police station for questioning and was ultimately arrested. (Tr. p. 492, lines 12-23). Prior to Ferrell's death, Martin had heard Appellant speak negatively about Ferrell, calling him "a threat to the children, drug user, degenerate." (Tr. p. 494, line 15 – p. 495, line 17). Appellant also spoke about the rules regarding self-defense "in relationship to every aspect of life." (Tr. p. 495, lines 18-23). Prior to arrest, Appellant called Martin and told him "the police can't know about what went on inside" the Hughes' home. (Tr. p. 493, line 1-16). Later, in person, and knowing Martin was about to go to the police station for questioning, Appellant repeated to him, "police can't know what went on inside this house. If they don't know, they can't prove anything." (Tr. p. 493, lines 17-21).

Martin ended up providing three statements to law enforcement in conjunction with this case. (Tr. p. 496, lines 12-21). Initially, Martin maintained that while he was aware of Jane and Ferrell's custody dispute, he did not hear any talk among the Hughes family indicating that they were conspiring to kill Ferrell. (Tr. p. 501, lines 15-24). Martin continually indicated to law

enforcement he believed that Ferrell came over to the house that night to discuss child custody. (Tr. p. 502, lines 3-6). Martin was charged with murder after giving his second statement. (Tr. p. 506, lines 9-14). By Martin's third statement, he had also learned that Jane had another paramour which he indicated "affected [him] on many emotional levels." (Tr. p. 505, lines 6-25). Martin testified at trial that his third statement provided "the most detailed recollection [he] could of the events of the evening." (Tr. p. 515, lines 18-21).

* * *

As to events occurring prior to January 24, 2015, the family court had appointed a guardian ad litem to the child custody case pending between the victim and Jane Hughes. (Tr. p. 430, lines 5-19). The victim had, for a time, lived in California with the two children and was granted full custody of the eldest child in that State. He sought enforcement of that order in South Carolina as well as full custody of the younger child. (Tr. p. 430, line 22 – p. 431, line 6). The children lived with Jane Hughes in South Carolina during the time frame relevant to this criminal action and the guardian ad litem recommended Ferrell have set visitation with them. (Tr. p. 431, line 12 – p. 435, line 10). Between January 20 and January 24, 2015, the guardian ad litem sent notice of an expedited hearing regarding that visitation schedule which the court set for January 27, 2015. (Tr. p. 435, lines 13-23).

Jane Hughes was proceeding pro se in the action. (Tr. p. 436, lines 1-5). The Hugheses had been seeking guidance regarding the custody dispute from a member of their church. Christine Boisher was a guardian ad litem with no involvement or attachment to the pending family court matter, and she made time to meet with the Hughes at their home about a month prior to the incident. (Tr. p. 524, lines 5-24; Tr. p. 527, likes 1-7). She talked to Appellant, his wife, Jane, and Jane's boyfriend Martin. (Tr. p. 527, lines 17-18). Boisher recalled Appellant

being "very upset with" and "questioning" the court appointed guardian's report. (Tr. p. 528, lines 20-23; Tr. p. 529, lines 10-20). Appellant expressed to Boisher that he would "do whatever he could to make sure that" the victim did not get custody of the children. (Tr. p. 530, lines 4-7). He focused on stand your ground laws for "a good bit of time." (Tr. p. 530, lines 8-13).

After that initial meeting, Appellant called Boisher "multiple times." Each time he was angry and ranting about the family court situation, "maybe for an hour to maybe an hour and a half." (Tr. p. 530, lines 15-25). Boisher just listened. (Tr. p. 530, line 14; Tr. p. 530, line 25 – p. 531, line 1).

The night before the incident, Appellant called Boisher to his home again to review family court documents and discuss the hearing coming up the following Tuesday. (Tr. p. 531, lines 2-25). Appellant "seemed to be more tense" and spoke "a lot more" about stand your ground laws. (Tr. p. 532, lines 4-10). "He kept coming back to it" despite Boisher's attempts to change the subject. (Tr. p. 532, lines 10-11). Appellant indicated he had researched the subject, reading from his computer "other incidences where people had used stand your ground as a defense." (Tr. p. 532, lines 14-19). Appellant reiterated that night that the victim "was not getting those kids no matter what." (Tr. p. 532, lines 22-25). Boisher did not depart the Hughes' home until between 1:30 and 2:00 A.M. that Friday night. (Tr. p. 531, line 10; Tr. p. 532, line 25). It was almost midnight on the next night, Saturday, January 24, when Martin walked in on the Hughes family and Ferrell. (Tr. p. 259, lines 17-23).

* * *

According to Appellant, his son Jacob called Appellant "earlier in the evening and asked" to bring Ferrell "over to the house" to talk about the upcoming family court hearing for custody dispute going on over his children with Jane. (Tr. p. 600, lines 13-19). Appellant maintained,

both at his immunity hearing and again at trial, that he acted in self-defense when he encountered Ferrell outside of the Hughes home, believing at the time that there was an unknown intruder gaining access through his kitchen window. (Tr. p. 59, line 2 – p. 61, line 25; Tr. p. 610, line 4 – p. 613, line 7).

Appellant testified that he and Jacob decided "it might not be a good idea for [Martin] to be at the house at all" when Ferrell came over, so Appellant "told him he'd have to go out in the backyard because [they] didn't want to have any kind of a problem." (Tr. p. 601, lines 5-10). Appellant, Jacob, and Ferrell sat in the kitchen to talk. (Tr. p. 601, line 17 – p. 603, line 15). Ferrell told Appellant he wanted to talk about "the children and the thing coming up on Tuesday in Family Court." (Tr. p. 602, lines 1-2). Appellant got each of them a glass of water. (Tr. p. 602, lines 3-6). Appellant characterized the custody conversation as "nothing much" other than Ferrell being "visibly upset by the fact [the family] did not have any input anymore." (Tr. p. 603, lines 18-20). Then Appellant announced he had to use the restroom and left the kitchen. (Tr. p. 603, lines 20-22).

When he got back to the kitchen, Appellant characterized Ferrell and Jacob's communication as "sort of a low-voiced, heated discussion." (Tr. p. 604, lines 2-4). They were not yelling and Appellant testified he asked them to sit down and finish the talk. (Tr. p. 604, lines 4-11). "There was not a physical fight[.]" (Tr. p. 621, line 1). Margaret Hughes came into the kitchen requesting they make less noise so as not to wake the children. (Tr. p. 604, lines 13-18). In response, Appellant witnessed Ferrell "push" Margaret's hands down, and then Ferrell left through the front door. (Tr. p. 604, line 20 – p. 605, line 9; Tr. p. 621, lines 12-18). Appellant "[l]ocked the front door, turned off the kitchen light and sort of . . . button[ed] up the house" and went to his bedroom. (Tr. p. 605, lines 18-25).

When one of his grandchildren woke up and asked for a drink, Appellant volunteered to retrieve one. (Tr. p. 606, lines 1-2). Walking to the kitchen, Appellant "heard a noise" that "sounded like something up against the [right] side of the house." (Tr. p. 606, lines 4-13). "[I]t sounded like something against that metal [gutter] on the side of the house." (Tr. p. 623, line 20 – p. 624, line 6). Still and listening, he heard another noise "further down." (Tr. p. 606, lines 15-17). "It was a noise that [he] wasn't used to hearing all the time. (Tr. p. 624, line 21). Appellant testified he "figured there was something out there that shouldn't be out there," so he grabbed his pistol from under his desk, called down the hallway for someone "to call 9-1-1," went out the front door, and locked it behind him. (Tr. p. 606, line 19 – p. 608 line 6).

Appellant did not check for, nor was he "concerned," about whether Martin had come back inside the house. (Tr. p. 626, line 18 – p. 628, line 25). Appellant had, however, effectively locked Martin outside. (Tr. p. 627, line 19 – p. 628, line 7).

When he went out to investigate, Appellant did not see anybody or anything strange in his front yard. (Tr. p. 609, lines 1-4). He did not see any one in the carport. (Tr. p. 609, lines 6-12). Then, he "went around the outside of the carport and looked down the side of the house and saw someone at the window." (Tr. p. 609, lines 22-23). He saw "someone partly in and partly out of" the kitchen window. (Tr. p. 610, lines 1-4). He yelled "probably something that's not very polite, like, [']What the bleep are you doing in my window and why are you there?[']" (Tr. p. 609, lines 18-22). Appellant did not know who the person was. (Tr. p. 634, line 23).

"That person that was in the window dropped down out of the window behind – there's a trash can there and air conditioning condenser, and they went down behind it." (Tr. p. 610, line 24 – p. 611, line 1). Appellant told the person not to move, but the person came towards him, so Appellant shot at him: "one shot at the beginning." (Tr. p. 611, lines 3-14). "There was a slight

hesitation, and then he came toward [Appellant] again," so Appellant "shot more times." (Tr. p. 611, lines 16-19). Appellant feared the person and did not want them to get to his family. (Tr. p. 611, lines 19-21). Appellant judged the distance between himself and the victim at 20 to 21 feet at the time of the first shot. (Tr. p. 612, lines 19-24). Appellant estimated the victim was about ten feet away by the time the gunfire concluded. (Tr. p. 613, lines 1-5). He maintained the victim was "always" coming toward him. (Tr. p. 613, lines 6-7).

After waiting and watching to see that the victim lie quiet and motionless, Appellant "yelled toward the house" for help and somebody brought him a phone and a flashlight. Appellant called the police who arrived within two minutes. (Tr. p. 611, line 23 – p. 612, line 15). The police station was so close to Appellant's house that, as he put it, "you can stand on my roof and throw a rock and hit it." (Tr. p. 612, lines 16-18).

When asked about a broken table leg recovered alongside the dining table located by law enforcement in Hughes' backyard, Appellant testified he removed all of the legs from the dining room table and "took it out back" due to there being "a bit of blood on" it. (Tr. p. 614, line 12 – p. 616, line 12).

STANDARD OF REVIEW FOR ISSUES I, II, AND III

"The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion," which occurs "when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *State v. McEachern*, 399 S.C. 125, 136-37, 731 S.E.2d 604, 609-10 (Ct. App. 2012). The admission of erroneous evidence must also be prejudicial to warrant reversal. *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). And, in regards specifically to Issue II, "on review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error." *State v. Bruce*, 412 S.C. 504, 509, 772 S.E.2d 753, 755 (2015).

I. The trial court admitted the results of a presumptive test for blood only after receiving proffered testimony establishing that the forensic unit officer who conducted the test had training and field experience with it and that the test itself was routinely and universally utilized.

The State presented Greenville County Forensics Officer Robert Parker to testify, in part, that he conducted a presumptive test to examine the presence of suspected blood inside the Hughes' home by spraying leuco crystal violet (LCV) on various objects and surfaces. Appellant opposed this testimony at the immunity hearing and before the jury (Tr. p. 123, line 15 – p. 135, line 20; Tr. p. 298, line 6 – p. 299, line 25). Both times, the trial court admitted Parker's testimony. (Tr. p. 135, line 20; Tr. p. 317, lines 5-6). Upon motion by the State, the court qualified Parker as "an expert in the use of LCV" before the jury and admitted the evidence about the presumptive test. (Tr. p. 307, lines 4-9; Tr. p. 317, lines 5-6). This qualification and the scope of Parker's resulting testimony finds support in the law such that no abuse of discretion occurred.

"[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . in the form of an opinion" so long as that witness' "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. The procedure for admitting scientific evidence under Rule 702, SCRE, requires a series of findings. *State v. Council*, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999). The court "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Id.*; *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

"To be clear, the reliability of a witness' testimony is not a pre-requisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012). "The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness' expert status will be determined *prior* to determining the reliability of the testimony." *Id.* To that end, "the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that 'defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility.'" *State v. White*, 382 S.C. at 273-74, 676 S.E.2d at 688 (quoting *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990)).

Parker's Qualifications

The trial court's qualification of Parker as an expert in the use of LCV was adequate under the strictures of Rule 702, SCRE, as interpreted by our appellate courts. A trial court is permitted to utilize a witness' training and experience as a basis for its admission of a witness as an expert. *State v. Mealor*, 425 S.C. 625, 825 S.E.2d 53, 68 (Ct. App. 2019) (no abuse of

discretion in qualifying expert on the theoretical yield of methamphetamine based on his training and experience and where expert utilized widely accepted calculation); *State v. Rose*, 423 S.C. 382, 393, 814 S.E.2d 529, 534 (Ct. App. 2018) (affirming admission of expert in arson origin and causes where qualification was based on breadth of "experience and training possessed at the time of trial"); *contra State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (pre-*White* case finding witness should not have been admitted as expert on barefoot sole impressions and deeming that field unreliable where there were no known standards appropriate for comparison). Our courts have found no abuse of discretion where the witness qualified as an expert "has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997); *State v. Anderson*, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014) (internal quotations omitted).

In camera, Parker exhibited that he was qualified to testify regarding the use of LCV in processing a crime scene. (Tr. p. 322, line 10 – p. 334, line 17). At the time of trial Parker was a forensics officer with the Greenville County Crime Scene Unit with eleven years' experience in law enforcement and four and a half years' experience with the forensics unit. (Tr. p. 280, lines 5-15). Parker testified he'd used LCV "on a few cases over the past three years." (Tr. p. 301, lines 23-24). He explained that LCV has been available for use in Greenville for as long as he'd been part of the forensics unit. (Tr. p. 302, lines 3-18; Tr. p. 313, lines 11-19). Parker testified that since 1993, the FBI has used LCV in the same manner as his own forensics division. (Tr. p. 302, lines 15-21). Parker explained that LCV was applied simply by misting it from a spray bottle onto the desired surface. (Tr. p. 302, line 23 – p. 303, line 3). He expounded that the LCV

"will react to the hemoglobin in the blood" suspected to exist at the site sprayed and turns violet to "enhance" the visibility of blood if present. (Tr. p. 301, lines 13-20).

As for training, Parker explained that his annual in-service forensics training included hands-on use of LCV with pig's blood. (Tr. p. 303, lines 6-10; Tr. p. 314, lines 17-19). In addition to annual training, Parker testified he had also used LCV while processing other forensic cases. (Tr. p. 304, lines 14-17; Tr. p. 312, line 5 – p. 313, line 10). He testified he was aware the possibility of a false positive exists with LCV, but that he never personally experienced one during training or in the field. He explained that a false positive may result if the area sprayed is laden with iron or other metals. (Tr. p. 303, line 18 – p. 304, line 11). Parker further testified during voir dire that he was aware that LCV had an expiration date once mixed, and that it was to be stored in a refrigerator, but that his duties within the forensics division pertained to the use of LCV and not its mixture or creation. (Tr. p. 308, line 23 – p. 309, line 24; Tr. p. 314, line 20 – p. 315, line 6).

The trial court complied with the mandates of Rule 702, SCRE, when it admitted Parker as an expert in the use of LCV. (Tr. p. 317, lines 5-6). Parker demonstrated *in camera* that he had in-service experience with the use of LCV, explained the method of application as well as the nature of potential results, acknowledged awareness that there was the possibility for false positives in the field and the reason that may occur, and further explained that he was not trained in the creation of LCV but rather on how to use it in the field. *State v. White*, *supra* at 274, 676 S.E.2d at 688 ("foundational reliability requirement does not lend itself to a one-size-fits-all approach"); *see State v. Parker*, 271 S.C. 159, 163-64, 245 S.E.2d 904, 906 (1978) (demonstration of proper use of Datamaster machine by operator, rather than intimate knowledge of the machine's inner workings, creates proper foundation for admissibility of Datamaster

results). Parker demonstrated knowledge, skill, experience, training, and education in the use of LCV such that he was properly admitted as an expert, leaving the weight of the reliability of Parker's methodology for the jury to decide.[3]

LCV's Reliability

Rule 702, SCRE, "'applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope.'" *State v. White,* 382 S.C. at 270, 676 S.E.2d at 686 (quoting *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999)). Trial courts should examine "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures" before ruling upon the admissibility of scientific or other technical matters. *State v. Council*, 335 S.C. at 19, 515 S.E.2d at 517 (applying *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). The probative value of the evidence sought for admission is also relevant to the propriety of the court's final determination.[4] *Id.* at 20, 515

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[3] "With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. . . ." *State v. White*, 382 S.C. at 273-74, 676 S.E.2d at 688. Appellant in fact amply critiqued Parker's training and methodology during voir dire and upon cross-examination, including Parker's compliance with the expiration date of the LCV utilized at the Hughes' home and his limited knowledge concerning its chemical properties. (Tr. p. 314, line 4 – p. 317, line 3; Tr. p. 349, line 23 – p. 354, line 24). Yet these deficiencies go "to weight, not admissibility." *State v. Myers*, 301 S.C. at 256, 391 S.E.2d at 554.

[4] No prejudice argument appears in the record on this issue. Thus, any allegation of an erroneous Rule 403, SCRE, analysis in unpreserved. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge"); *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (contemporaneous objection rule). Respondent further submits the LCV testimony was more probative than prejudicial. The positive results of the presumptive test for blood inside the home was probative of the Hughes family's clean-up after attacking the victim (i.e. the conspiracy charge) and further probative of the veracity of Martin's testimony, Jane's call to 911, and Appellant's eventual self-defense claim. And the photos themselves are not inherently prejudicial, as they do not show large swaths of either visible blood

S.E.2d at 518. If admissible, the jury is then free to weigh the evidence as it sees fit. *Id.* at 21, 515 S.E.2d at 518.

"LCV is considered a presumptive test for the presence of blood and turns purple when in contact with blood." *People v. Lovejoy*, 235 Ill. 2d 97, 107, 919 N.E.2d 843, 849 (Ill. Sup. Ct. 2009) (capital case remanded for new trial on other grounds). The chemical can reveal evidence of cleaned-up blood because it is designed to enhance the appearance of bloodstains. *Com. v. Barnhill*, No. 1901 MDA 2013, 2014 WL 10889906, at *3 (Pa. Super. Ct. Aug. 14, 2014) (unpublished). The court aptly admitted the LCV testimony and exhibits only after conducting a proper hearing on the reliability of the presumptive test.[5] *People v. Wright*, 2006 WL 2271264 at *6 (Mich. Ct. App. Aug. 8, 2006) (unpublished) (finding LCV results properly admitted under reliability standards test announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993)); *see People v. Lovejoy*, 2013 IL App (2d) 110289, ¶ 6 (Ill. App. 2d 2013) (unpublished) (finding it harmless error to admit LCV evidence without first conducting a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), even though the State argued "LCV was generally accepted as a presumptive test for blood") (opinion following retrial

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or violet from the LCV's application. (State's Exhibits 30-32 and 39-57). In any event, Respondent submits the harmlessness standard controls any error found by this Court.

[5] As to any argument regarding authentication of the LCV evidence, no objection was raised on the basis that the evidence as not in fact what it was purported to be, leaving any argument pursuant to Rule 901, SCRE, unpreserved. *State v. Prioleau*, *supra* at n.4; *State v. Johnson*, *supra* at n.4. The objection posed regarded crime scene processing done by the witness testifying before the court and not computer-generated data. *Contra State v. Brown*, 424 S.C. 479, 818 S.E.2d 735 (2018). Parker otherwise sufficiently testified that he was responsible for conducting this presumptive test and photographing the results, leaving no basis to question the authentication as a condition precedent to admissibility. (Tr. p. 122, line 5 – p. 123, line 12; Tr. p. 323, line 3 – p. 324, line 8). As to the alleged inaccuracy of the testing, (App. Br. at 13), Parker otherwise testified that if the LCV he used was expired, that there simply would be no reaction, therefore, no visible results. (Tr. p. 356, lines 4-10). He also testified he was aware of the possibility of false positives. (Tr. p. 350, line 20 – p. 351, line 8).

ordered in *Lovejoy, supra*). At least one court has noted that "LCV has been used in the United States and other countries since 1995, when a paper was published on its uses" and that its results can be corroborated by applying another test with phenolphthalein. *People v. Wright, supra.*

The court found the testimony concerning the use and results of LCV reliable and therefore admissible only after a proffer and consideration of the *Council* factors.[6] (Tr. p. 122, line 23 – p. 135, line 20; Tr. p. 311, lines 11-13). Prior to the submission of the LCV evidence to the jury, Parker's proffer established that law enforcement agencies across jurisdictions use LCV to look for blood while processing crime scenes, and have done so in a universal manner for over twenty years. (Tr. p. 302, lines 3-23). Parker established that LCV was uniformly used by misting it over surfaces and looking for visible results of a chemical reaction between the LCV and the properties in blood. (Tr. p. 123, line 4 – p. Tr. p. 301, lines 13-20; Tr. p. 302, line 23 – p. 303, lines 17). It was also clear from the proffer that quality control procedures exist for the creation, keeping, and use of the product, to include refrigeration once mixed and awareness of expiration. Though the witness limited his area of knowledge to LCV's application in the field, he testified that the specifics of mixing and maintaining LCV were accounted for in a law enforcement manual and carried out by his supervisors. (Tr. p. 302, line 3 – p. 304, line 17; Tr. p. 308, line 13 – p. 310, line 10). And though it was known and presented by Parker that the LCV test was capable of false positives in scenarios where the surface sprayed "was high in metals or high in iron," and though Parker admitted an inability to cite to publications or peer review concerning LCV, these weaknesses were of minimum probative value in determining reliability

[6] Parker laid a similar foundation prior to the LCV results' admission at the immunity hearing. This foundation initially delved into LCV's purpose, use, and potential for false positives. (Tr. p. 124, line 12 – p. 125, line 17). But Parker also described to the court his training and field experience with the chemical, making clear in the process that his experience was limited to use in the field and not the creation and science of LCV. (Tr. p. 130, line 15 – p. 135, line 6).

in this instance *because the test was presented at each proffer as being merely presumptive.* (Tr. p. 123, line 5; Tr. p. 124, line 13; Tr. p. 301, line 13; Tr. p. 304, lines 1-7; *see also* Tr. p. 350, line 20 – p. 351, line 8). Accordingly, the court did not abuse its discretion in admitting the results of the presumptive test.

Harmless Error

Even if erroneously admitted, expert testimony may constitute harmless error. *State v. Tapp*, 398 S.C. at 389-90, 728 S.E.2d at 475 (harmless error applied to admission of expert testimony "before vetting it for its reliability"). "Whether an error is harmless depends on the circumstances of the particular case." *Id.* (quoting *State v. Mitchell,* 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008)). The relevant inquiry does not focus on whether the State proved its case beyond a reasonable doubt, "but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *Id.* "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Mitchell*, *supra* (internal quotation omitted). Factors for consideration include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case." *Delaware v. Van Ardsall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986).

Most crucially, there existed other material evidence of a clean-up aside from the smattering of violet depicted in the challenged exhibits. The suspected blood on the rag recovered from the kitchen trashcan was analyzed for DNA and came back matching the

victim. (Tr. p. 386, lines 5-13). The officers' boots were leaving prints on a damp and sticky interior floor. (Tr. p. 298, lines 23-25). An empty Clorox bottle was retrieved from the outside trashcan. (Tr. p. 441, line 19 – p. 442, line 3). More samples of suspected blood sampled from the kitchen and dining areas (the hammer, the window blinds, and the quilt) came back matching the victim's DNA. (Tr. p. 384, line 16 – p. 385, line 23). Appellant testified that the kitchen table was taken outside because it had some blood on it. (Tr. p. 614, line 12 – p. 616, line 12). And Jane's boyfriend Martin testified that he in fact witnessed Margaret Hughes using a rag and a bottle of cleaning solution to wipe up between the attack and the police's arrival. (Tr. p. 485, line 24 – p. 486, line 1). Martin also testified as an eyewitness to the cause of the victim's bleeding. (Tr. p. 479, lines 13-15). He walked in on Jane repeatedly assaulting the victim on the head with a hammer in the dining area adjacent to the kitchen. (Tr. p. 479, lines 4-5; Tr. p. 480, line 6 – p. 481, line 13).

The LCV testimony was also corroborative, if not cumulative, to Parker's testimony that he visually observed suspected blood on items and surfaces in the Hughes' kitchen and dining area. (Tr. p. 297, line 9 – p. 298, line 24; Tr. p. 326, line 15 – p. 329, line 19). He testified that he sprayed the floor in those rooms and got positive results. (Tr. p. 323, lines 18-20). And an additional and similar presumptive test, the reliability of which Appellant did not question, corroborated the presence of blood on items in the kitchen and dining area which Parker swabbed due to the visual presence of suspected blood. (*See* Tr. p. 337, line 14 – p. 339, line 8). Later, with the addition of phenolphthalein, Parker's swabs presumptively tested positive for blood (except for the one from the rag, which a DNA test later confirmed as matching the victim). (Tr. p. 360, line 19 – p. 366, line 21).

Additionally, Appellant undercut the weight to be afforded the LCV testimony during

Parker's cross-examination. Parker agreed during cross-examination that the use of LCV was merely a *presumptive* test for the presence of blood which may then be corroborated after a confirmatory test from a DNA lab. (Tr. p. 350, line 23 – p. 351, line 8). Parker acknowledged the test was capable of false positives and false negatives—that if the chemical was expired or improperly mixed then there would simply be no reaction, meaning no visible results. (Tr. p. 353, lines 16-23; Tr. p. 356, lines 4-10). Parker also gave cross-examination testimony indicating the quality control procedures in place for LCV may not have been followed—he was unaware of the expiration date of the particular spray bottle and that he did not verify whether it had expired prior to using it to conduct the presumptive test at the Hughes' home. (Tr. p. 351, line 17 – p. 353, line 11).

When considering the remainder of the blood-related evidence, the LCV testimony merely corroborated compelling confirmatory DNA evidence, eyewitness testimony, and other circumstantial evidence supporting the occurrence of an attack upon the victim inside the Hughes residence. Appellant also impeached the veracity of the LCV test in front of the jury. Therefore, any error in the scope of Parker's testimony on his presumptive LCV test cannot be determined to have reasonably affected the result of the trial.

II. The record supports the trial court's admission of text messages between Appellant and son Jacob because the evidentiary scenario faced by the officer presented articulable facts sufficient to sustain the affidavit for probable cause.

On the third day of trial, Appellant moved to suppress the introduction of text messages and phone call history obtained from his cell phone. (Tr. p. 400, line 1 – p. 402, line 4; Tr. p. 425, line 20). "On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is

clear error." *State v. Bruce*, 412 S.C. at 509, 772 S.E.2d at 755.

Appellant challenged the sufficiency of the search warrant on the basis that the affidavit in support of probable cause cited a belief that the victim's phone, rather than his own, would contain evidence "which would help clarify inconsistencies and information provided and collected, and also provide the department with a clear picture of the decedent's activities leading up to his death." (Tr. p. 401, line 4 – p. 402, line 4). The warrant Appellant cited was shown to the court but not made an exhibit. (Tr. p. 420, lines 11-12). The court characterized the affidavit as requesting "information on the decedent's phone." (Tr. p. 403, line 2).

The State argued that the affidavit cited sufficient probable cause because it made clear (1) that the officers sought "information about the victim and the activities leading up to" the victim's death; (2) that the victim was a family member of the defendant; (3) and that it was reasonable to believe from the wording of the affidavit that the defendant and the victim may have communicated in a manner helpful to discovering what occurred prior to the victim's death. (Tr. p. 402, lines 6-24; Tr. p. 403, lines 7-18; Tr. p. 404, lines 1-6). Ultimately, the State postured that they sought "to introduce the defendant's cell phone dump under the theory that even if the search warrant [was not] valid, these officers would have had these records anyway. And there were several different ways they could have done it" such as obtaining a warrant to get the data from the cell phone provider as was done with Jacob Hughes' records.[7] (Tr. p. 407, lines 2-22).

The trial court admitted Appellant's cell phone data. (Tr. p. 425, lines 18-23; *see* State's

[7] The State further represented that data from Jacob's phone had otherwise been validly obtained pursuant to a "search warrant for his phone records." (Tr. p. 404, lines 7-17; Tr. p. 418, lines 20-25). The State also presented argument that Appellant consented to law enforcement's search of the contents of his phone during at least one portion of about five hours of recorded interviews in which Appellant on January 26, 2015, stated, "You can pull up any phone record I've ever had. You can have anything you want. I'll give you permission to go and look at it. You won't have to get warrants or anything." (Tr. p. 416, lines 2-25).

Exhibit 83[8]). The court opined the warrant should have been clarified by stating "that based on all this, there's evidence on the decedent's phone and the defendant's phone." (Tr. p. 403, lines 19-23). However, citing the inevitable discovery doctrine, the court admitted only "the information [on the phone] they could have [also] gotten from Jacob's phone"—meaning the text messages between Appellant and Jacob. (Tr. p. 418, lines 9-20; Tr. p. 419, lines 8-21). Thereafter, Greenville County Sergeant Mike Rainey testified that he recovered the cell phone data as part of his duties with the computer crimes unit. (Tr. p. 422, line 19 – p. 424, line 23). Then Captain Cheryl Manley of the Simpsonville Police Department published the text messages and phone calls between Appellant and Jacob made in the hours prior to the shooting. (Tr. p. 547, line 13 – p. 552, line 6; State's Exhibit 83[9]).

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 2042 (2001). Generally, a warrant is required prior to examining a cell phone's stored contents. *State v. Moore*, 421 S.C. 167, 177, 805 S.E.2d 585, 590 (2017). However, "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, . . . then the deterrence rationale has so little basis that the evidence should be received." *State v. Simpson*, 425 S.C. 522, 540, 823 S.E.2d 229, 239 (Ct. App. 2019), *reh'g denied* (Feb. 21, 2019) (citing *Nix v. Williams*, 467 U.S. 431, 432, 104 S.Ct. 2501, 2503 (1984)). This is the inevitable discovery doctrine. *State v. Cardwell*, 425 S.C. 595, 601, 824 S.E.2d 451, 454 (2019), *reh'g denied* (Mar. 27, 2019) (citing *Nix v. Williams*, *supra* at 444, 104 S.Ct. at 2509).

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[8] Select GZone Mobilyze_Report>evidence>device>device.html.

[9] Select GZone Mobilyze_Report>evidence>communication>messages.html.

The warrant requirement may also be excused under the good faith exception to the exclusionary rule, which occurs "when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope" so long as the affidavit provides the magistrate with a substantial basis for determining the existence of probable cause. *United States v. Leon*, 468 U.S. 897, 914-15, 104 S.Ct. 3405, 3416 (1984); *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). The magistrate's task in finding probable cause "is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Spears*, 393 S.C. 466, 483, 713 S.E.2d 324, 333 (Ct. App. 2011). The magistrate's finding of probable cause finds deference within reviewing courts. *State v. Weston*, *supra.* "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* at 293, 494 S.E.2d at 804.

The rational for these exceptions to the warrant requirement lies in the judiciary's determination that "the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis v. United States*, 564 U.S. 229, 246, 131 S.Ct. 2419, 2432 (2011). "Where there is no misconduct, and thus no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction." *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014).

The record supports a finding that the trial court properly received the evidence of texts and calls between Appellant and Jacob based upon evidence presented to the court at the time of admission. Rule 220(c), SCACR. The warrant and affidavit clearly established (1) Appellant's cell phone as the thing to be searched, (2) that the victim was shot and killed at the residence of his estranged wife Jane Hughes, (3) that the shooting allegedly occurred during an attempted

burglary of the Hughes' home, and (4) that the statements taken and evidence received by law enforcement indicated there may have been an assault inside the home which was covered up. (R. pp. *Warrant Printed 01/29/2015 at 09:16:21 AM). The affidavit did also state a belief that evidence existed on the decedent's phone which would assist (1) in the clarification of the inconsistent information present at the scene, and (2) in painting a clearer picture of the decedent's activities prior to the shooting. (*Id.*).

The warrant does not present in a manner rendering it unreasonable that the officer believed in its validity. *United States v. Leon*, 468 U.S. at 919-20, 104 S.Ct. at 3419; *see State v. Franklin*, Op. No. 27886 (S.C. Sup. Ct. filed May 15, 2019) (Shearouse Adv. Sh. No. 20 at 24). The warrant and affidavit contain sufficient probable cause despite the reference in the affidavit to "the decedent's phone."[10] In short, the warrant sought data from Appellant's phone on the basis that the data would assist in deciphering conflicting evidence about what occurred with the victim, who was an estranged relative, prior to his being shot at the Hughes' home. (R. pp. *Warrant Printed 01/29/2015 at 09:16:21 AM). Tying Appellant's phone to the desire to investigate the cause of the shooting is the undisputed fact that law enforcement collected the cell phone from the Hughes' home where the shooting occurred—where it was also undisputed (and known to the court from the time of the immunity hearing) that Appellant did shoot the victim because he believed the person was breaking into his home. (Tr. p. 59, line 14 – p. 61, line 19; Tr. p. 288, lines 3-5; Tr. p. 336, lines 5-25). Yet it was also undisputed that the victim was an invited visitor to the Hughes home earlier that night, during which time Appellant maintained nothing violent occurred—but during which time another witness testified an attack upon the

[10] Of some bearing on the potential for a good faith mix-up, Appellant and the victim share the first and middle names John Michael. (Tr. p. 12, lines 1-4).

victim did occur inside the house. (Tr. p. 44, line 14 – p. 54, line 13; Tr. p. 478, line 16 – p. 481, line 18). It was known that the purpose for this visit was the family's embroilment in a child custody dispute. (Tr. p. 68, line 21 – p. 73, line 2). And, it was discovered as law enforcement processed the scene that visually observable blood and other evidence inside the home corroborated the eyewitness rather than Appellant's version of what occurred. (*E.g.*, Tr. p. 297, lines 6-22; Tr. p. 298, lines 23-25; Tr. p. 326, lines 22-25; Tr. p. 384, line 10 – p. 390, line 16; State's Exhibit 59). Inconsistencies with the totality of the evidence were sufficient to cause an officer to believe or want to investigate whether there had been an attack in the home.

This evidence supports the trial court's finding that the data from Appellant's phone was available and ultimately would have been obtained through other means. *See State v. Spears*, 393 S.C. at 484, 713 S.E.2d at 333-34 (applying inevitable discovery doctrine where there was a substantial basis for concluding that probable cause existed, regardless of whether suspect voluntarily consented to search). This evidence also provides a substantial basis for concluding probable cause existed to search the communications stored on Appellant's phone. *United States v. Leon*, *supra*; *see State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (affirming magistrate's issuance of a search warrant). Given the foregoing, *any* inter-familial communication (including with estranged relatives) would assist in establishing a relevant timeline of events leading up to the shooting. Inter-familial communications were relevant to investigating whether the shooting occurred as a result of an attempted burglary or as the culmination of an attack which started inside the home and which the family was covering up. Inter-familial communications could be gleaned from Appellant's cell phone as well as from the victim's phone and from other phones belonging to the residents of Appellant's house where the shooting occurred. *See State v. Moore*, 421 S.C. at 178, 805 S.E.2d at 591 (affirming search of

cell phone contents under inevitable discovery doctrine as an additional sustaining ground). This includes Jacob, as it was known and undisputed that Jacob was the one who brought the victim to the Hughes' home to visit that night. (Tr. p. 45, lines 16-22). Accordingly, suppression would have been inappropriate.[11] *State v. Weston*, *supra* at 293, 494 S.E.2d at 804; *State v. Adams*, *supra* (noting suppression as a harsh remedy).

III. The trial court properly admitted Jane Hughes' 911 call under the excited utterance exception to the rule against hearsay because the call was made contemporaneous to and under the stress of the attack upon the victim.

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *In re Care & Treatment of Harvey,* 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE). "Hearsay is not admissible unless there is an applicable exception." *Id.* at 61-62, 584 S.E.2d at 897 (citing Rule 803, SCRE). The trial court overruled Appellant's hearsay objection to Jane Hughes' 911 call, finding the call fit within the exited utterance exception to the rule against hearsay. (Tr. p. 417, line 21 – p. 418, line 8; *see* Tr. p. 412, line 2 – p. 415, line 23; *see also* Tr. p. 559, lines 20-25).

Excited Utterance

Excited utterances are exempt from the rule against hearsay and the availability of the declarant is immaterial to the exception. Rule 803(2), SCRE. "The rules of evidence define excited utterance as a 'statement relating to a startling event or condition made while the

[11] In the alternative to the inevitable discovery doctrine and good faith exception, Respondent herein reincorporates the harmless error standard included in Issue I above and asks this Court affirm as harmless error for the facts establishing guilt as described therein, *supra* at 24-26, and for the reasons argued within Ground VI in support of the trial court's denying immunity, *infra* at 45-49, as those facts from the immunity hearing were later presented at trial. *State v. Jenkins*, 412 S.C. 643, 652-54, 773 S.E.2d 906, 910-11 (2015) (erroneous ruling on suppression motion affirmed by harmless error rather than by inevitable discovery).

declarant was under the stress of excitement caused by the event or condition.'" *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (quoting Rule 803(2), SCRE). An excited utterance (1) "must relate to a startling event or condition; (2) . . . must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *Id.* Temporally, our courts have recognized that the excited utterance exception may apply even after the startling event occurs so long as the statements were made "under continuing stress." *State v. Sims*, 348 S.C. 16, 21-22, 558 S.E.2d 518, 521 (2002).

"The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication." *State v. Blackburn,* 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978). "An excited utterance expresses the real belief of the speaker because the utterance is made under the immediate and uncontrolled domination of the senses, rather than under reason and reflection." *State v. McHoney*, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001). While the totality of the circumstances surrounding the declarant's speech are relevant, "factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event. *Id.*; *State v. Sims*, 348 S.C. at 22, 558 S.E.2d at 521.

Regardless of whether the attack occurred on purpose or as a matter of happenstance, Jane Hughes was wrapped up in a startling event at the time Martin entered the Hughes' residence during the murderous acts and coached Jane to call 911. (Tr. p. 478, line 19 – p. 479, line 18). At the time of the call, Jane was either startled by and under the stress of Martin's unannounced entrance in the middle of the attack, or Jane was startled by and under the stress of

a violent encounter with a home intruder who happened to be her estranged husband. (*Id.*; State's Exhibit 94). The statements made during the 911 call were therefore contemporaneous to and made as a result of a startling event. Officers responded to the 911 call within minutes from the time the six-minute-long call was placed. (State's Exhibit 94, file "(1) 01-25-2015 00.00.49 911-3.wav").

Nothing about the recording suggests Jane was capable of reasoning or reflection. Prior to the operator picking up, Jane can be heard gasping and stating, "I can't breathe." (State's Exhibit 94, file "(1) 01-24-2015 23.54.04 911-3.wav," at 0:00 to 0:10). She can be heard between rings stating, panicked, "Where is he? . . . We've got to get him." (*Id.* at 0:42 to 0:47). She continues to sound panicked and in fear for her life. (*Id.* at 1:00 to 1:38). She thereafter responds to the dispatcher's questions in a shaken tone and at one point answers she feels as though she's having a panic attack. (*E.g. id.* at 5:00 to 5:05).

Jane's statements were not made during any formal interview or other organized setting. *Cf. State v. Washington*, 379 S.C. 120, 665 S.E.2d 602 (2008). Instead, the recording evidences a real-time, off-the-cuff feed of statements by Jane Hughes, and the trial court accurately admitted the call pursuant to Rule 803(2), SCRE.

Co-Conspirator Statement

As an additional sustaining ground, the call was made by a co-conspirator within the Hughes family and was admissible pursuant to Rule 801(d)(2)(E), SCRE. This rule categorizes statements made by a co-conspirator "during the course of and in furtherance of the conspiracy" as non-hearsay. Rule 801(d)(2)(E), SCRE. Co-conspirator are admissible as non-hearsay so long as the statement advances the conspiracy and so long as there exists additional independent evidence of the conspiracy. *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000).

Jane's call advanced the conspiracy because she was the first member of the Hughes family with an occasion to interact with any type of responding agent. Thus, Jane's call presented a crucial opportunity to set the scene for the agreed-upon castle doctrine, immunity, or self-defense claim. *State v. Sims*, 387 S.C. 557, 566, 694 S.E.2d 9, 14 (2010) (narrative statement which may "spill the beans" is not enough to be considered a statement in furtherance of a conspiracy). Jane did that by blindly executing the agreed-upon plan within the family: telling law enforcement that her husband broke into the home and violently threatened her life.[12] (State's Exhibit 94).

There also existed independent evidence of a Hughes family conspiracy prior to the time the 911 call was published. (Tr. p. 561, lines 17-18). The State provided eyewitness testimony from Martin that Jane acted in concert with Jacob and Appellant in a violent assault upon the victim and that the matriarch of the Hughes family cleaned up evidence of the attack inside the home. (Tr. p. 384, line 10 – p. 390, line 16; Tr. p. 479, lines 4-18; Tr. p. 484, lines 6-8; Tr. p. 485, line 24 – p. 486, line 1). Earlier text messages between Appellant and Jacob indicate that the family coordinated the victim's arrival at the home. (Tr. p. 548, line 24 – p. 551, line 11). Prior to the attack, Appellant's communications with Martin and a member of their church serve as circumstantial evidence that the Hughes family—including Jane, who was present at the meetings with the church member and who was the named party to the child custody case—

[12] This does not detract from or alter the argument that Jane spoke without reflection under the stress of the startling event. As previously stated, Jane was either startled by and under the stress of Martin's unannounced entrance in the middle of the planned attack, or Jane was startled by and under the stress of a violent encounter with her husband who broke into her home. The applicability of the excited utterance exception and the categorization of the statement as non-hearsay are not mutually exclusive. *E.g. State v. Griffin*, 399 S.C. 74, 528 S.E.2d 668 (2000) (considering whether multiple exceptions or provisions of the hearsay rules apply to one declarant).

agreed to take measures to do away with the victim, masquerade it as a home invasion from which they would be immune from prosecution, and win Jane's ongoing custody battle.[13] (Tr. p. 495, lines 18-23; Tr. p. 527, lines 17-18; Tr. p. 528, lines 20-23; Tr. p. 529, lines 10-20; Tr. p. 530, lines 4-25; Tr. p. 532, lines 4-25). Martin also testified that after the attack, Appellant twice told him not to divulge to the police what went on in the house, emphasizing that "[i]f they don't know, they can't prove anything." (Tr. p. 493, line 1-21). Accordingly, the 911 call was additionally admissible as a non-hearsay statement by a co-conspirator.

[13] *See infra* at Issue IV (further detailing evidence of conspiracy in relation to the directed verdict issue).

STANDARD OF REVIEW FOR ISSUE IV

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler,* 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The trial court should deny a motion for directed verdict as to any charge when "there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" *State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016) (quoting *State v. Littlejohn,* 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)). "In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight." *Id.* at 192, 785 S.E.2d at 452. While "the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *State v. Bennett,* 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) (emphasis in original).

IV. The trial court correctly denied Appellant's directed verdict motion as to the conspiracy charge because testimony established Appellant acted with at least one other family member in planning and carrying out an attack upon the victim.

Appellant moved for a directed verdict on the basis that the State failed to present evidence that Appellant engaged in a conspiracy with family members prior to the shooting. (Tr. p. 587, lines 18-25). Considering the evidence in the light most favorable to the State, the trial court found the prosecution "established that there was a joint effort possibly to do away with Mr. Ferrell in light of the custody issue." (Tr. p. 588, lines 1-5). This ruling finds support in the record laid by the State.

"A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that is neither criminal nor unlawful." *State v. Sims*, 377 S.C. 598, 606, 661

S.E.2d 122, 126 (Ct. App. 2008), *aff'd*, 387 S.C. 557, 694 S.E.2d 9 (2010) (internal quotations and citations omitted). "The essence of a conspiracy is the agreement." *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). It must be shown that the defendant is connected to the conspiracy and "intended to act together [with at least one other] for their shared mutual benefit within the scope of the conspiracy charged." *State v. Sims*, 377 S.C. at 607, 661 S.E.2d at 126 (internal quotations and citations omitted). An overt act is not required. *Id.* at 606, 661 S.E.2d at 126. Neither is proof of an express agreement, "and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *State v. Buckmon, supra.* "It may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement." *Id.*

Here, the scope of the conspiracy was an agreement among one or more members of the Hughes family to do away with the victim and thus unlawfully procure custody of Jane's children.[14] Martin referenced that "they," the Hughes family, hoped the victim would come to resolve the child custody case "out of court." (Tr. p. 476, lines 5-7). The family reached "a consensus" that Martin would be instructed to sit outside in an outbuilding so as not to be involved in the victim's visit. (Tr. p. 476, line 20 – p. 477, line 5). Jacob and Appellant exchanged text messages to coordinate the victim's arrival at the Hughes' home. The messages included repetitive usage of "green dragons and elm trees" which may be interpreted as code for

[14] Appellant makes an erroneous argument that the State "agreed that no such evidence had been adduced." (App. Br. at 22). The record demonstrates that the State referred to witness Andrew Martin when the prosecutor stated, "no, not him," and immediately thereafter presented that "the other four were charged with conspiracy. . . . The conspiracy is between John Hughes, Margaret Hughes, Jane Hughes, and Jacob Hughes." (Tr. p. 486, line 11 – p. 488, line 8).

the plan against the victim. (Tr. p. 550, line 13 – p. 551, line 11; *see* State's Exhibit 83[15]). In what may be circumstantially discerned as more coded communication, Jacob referenced "dessert," asking for Appellant to signal when he was "ready for pie." (Tr. p. 548, line 24 – p. 550, line 12).

Then Martin witnessed Jacob, Jane, and Appellant each engage in a role in the attack upon the victim. Appellant held a gun to the victim inside the home. (Tr. p. 479, lines 14-18). Jane repeatedly and violently assaulted the victim over the head with a hammer, which was corroborated by the forensic pathologist's autopsy examination. (Tr. p. 479, lines 4-12; Tr. p. 582, lines 1-13). Jacob aimed a taser at the victim. (Tr. p. 479, line 7; Tr. p. 484, lines 6-8). According to Martin, the attack caused the victim to attempt escape out the kitchen window and Appellant ran outside with his handgun and fired into Appellant several times, ending his life. (Tr. p. 484, lines 14-15; Tr. p. 570, lines 5-24). Yet Jane's contemporaneous call to 911 stated that someone had broken into the house and tried to kill her. (State's Exhibit 94, file "(1) 01-24-2015 23.54.04 911-3.wav," at 2:30 to 3:05).

Similar to Jane's 911 call, Appellant maintained that he acted in self-defense because he believed someone was trying to break into his kitchen window after he had gone to bed for the night—but according to Appellant, the person never made it inside the home. (Tr. p. 59, line 2 – p. 61, line 25; Tr. p. 610, line 1 – p. 613, line 7). And after the shooting, the matriarch of the family cleaned "blood and mess" from inside the home. (Tr. p. 485, line 24 – p. 486, line 1). The DNA evidence corroborates that the scene was wiped. (Tr. p. 384, line 10 – p. 390, line 16).

As for additional circumstantial proof of an agreed-to plan, Appellant expressed on multiple prior occasions that he would "do whatever he could to make sure that" the victim did

[15] Select GZone Mobilyze_Report > evidence > communication > messages.html.

not get custody of the children. (Tr. p. 530, lines 4-25; Tr. p. 532, lines 22-25). Before the attack, the Hughes family met with another member of their church to discuss outrage at and implications of ongoing child custody proceedings. (Tr. p. 527, lines 17-18; Tr. p. 528, lines 20-23; Tr. p. 529, lines 10-20). During those meetings Appellant also discussed his understanding of the workings of stand your ground laws. (Tr. p. 530, lines 8-13; Tr. p. 532, lines 4-19). By Martin's account, Appellant at other times discussed the concept of self-defense "in relationship to every aspect of life." (Tr. p. 495, lines 18-23). Appellant also twice told Martin prior to arrest that "the police can't know about what went on inside" and that "[i]f they don't know, they can't prove anything." (Tr. p. 493, line 1-21).

The record contains substantial circumstantial evidence that the family members agreed to and did in fact carry out a physical attack resulting in the victim's death. It can be adduced from the totality of this evidence that one or more members of the Hughes family agreed to act together to get rid of the victim in order to ensure he could not win the child custody battle. Evidenced by text messages and Martin's eyewitness account, Jacob lured Ferrell to the Hughes' home to discuss the upcoming custody hearing. It can additionally be adduced from the totality of this evidence that one or more members of the Hughes family then agreed to misrepresent what occurred in the home that night in an effort to claim immunity from prosecution. Accordingly, the trial court correctly denied Appellant's directed verdict motion on the conspiracy charge.

STANDARD OF REVIEW FOR ISSUE V

"The law to be charged must be determined from the evidence presented at trial." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). This Court reviews a jury charge "as a whole in light of the evidence and issues presented at trial." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "'Generally, an alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial.'" *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (quoting *Priest v. Scott*, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976)).

V. The trial court appropriately rejected the request to charge the jury with the statutory presumption from the Protection of Persons and Property Act because the trial court denied immunity, making self-defense the appropriate jury instruction, and because it has earlier been held that language from the Act is not appropriate as a concurrent jury charge.

At the close of evidence, Appellant requested a jury instruction informed by language included in S.C. Code Ann. § 16–11–440(A) of the Protection of Persons and Property Act (the Act). (Tr. p. 637, line 14 – p. 638, line 15; Tr. p. 704, lines 12-13 (preserving issue)). The trial court refused this charge request and instructed the jury on the affirmative defense of self-defense, including that the defendant was on his own premises and had no duty to retreat. (Tr. p. 696, line 8 – p. 699, line 12).

The trial court accurately refused the request to charge the Act's statutory presumption on the basis that it was not supported as a jury instruction by the relevant South Carolina case law. (Tr. p. 638, lines 16-23). "Section 16–11–440(A), the main thrust of the Act, provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle." *State v. Curry*, 406 S.C. at 370, 752 S.E.2d at 266. But this

presumption only applies for purposes of the pre-trial immunity hearing. Once immunity is denied, the presumption no longer applies and the affirmative defense of self-defense is the appropriate instruction upon which the jury must inform their verdict.[16] *Id.* at 373, 752 S.E.2d at 267 (holding that instructing the jury with language from S.C. Code Ann. § 16–11–440(C) in addition to the elements of self-defense "was indeed error, but one that inured to Appellant's benefit. Specifically, the trial court had denied Appellant immunity, and section 16–11–440(C) should not have been charged to the jury.").

Given the denial of immunity, it would have been inappropriate to charge the statutory presumption pertaining to the immunity determination because there then existed a question of fact before the jury as to whether Appellant was in a position of reasonable fear of imminent peril of death or great bodily injury. *Compare* S.C. Code Ann. § 16–11–440 *and Curry*, *supra* at 371 n.4, 752 S.E.2d at 266 n.4. Self-defense includes, as the third element, that when a defense "is based upon his belief of imminent danger, [that] a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." *Curry*, *supra* (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)). The requested instruction runs contrary to this elemental question of fact that applied to the affirmative defense and was therefore appropriately denied by the trial court. *See*, *e.g.*, *State v. Bennett*, 415 S.C. at 237, 781 S.E.2d at 354 ("the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt").

[16] Irrespective of the location of the shooting. (*See* Br. of App. at 23 (citing *State v. Scott*, 424 S.C. 463, 808 S.E.2d 116 (2018), *reh'g denied* (Oct. 17, 2018)).

STANDARD OF REVIEW FOR ISSUE VI

As with the trial court's admission of evidence, this Court applies the abuse of discretion standard to a trial court's immunity determination. *State v. Andrews*, 424 S.C. 304, 313, 818 S.E.2d 227, 232 (Ct. App. 2018), *reh'g denied* (Sept. 20, 2018) (quoting *State v. Curry*, 406 S.C. at 370, 752 S.E.2d at 266). "[T]he abuse of discretion standard of review does not allow [the appellate] court to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014).

VI. The trial court conducted a full immunity hearing in accord with S.C. Code Ann. § 16–11–440 and thereafter validly denied immunity due to the inconsistent evidence presented.

Appellant moved pre-trial for dismissal pursuant to the Protection of Persons and Property Act (the Act), S.C. Code Ann. § 16–11–440(A) and (C). (Mot. for Immunity and Dismissal filed Nov. 29, 2017). After a full hearing and arguments by counsel, (Tr. p. 37, line 9 – p. 171, line 9), the trial court found Appellant had not demonstrated by a preponderance of the evidence that he was entitled to immunity. (Tr. p. 171, lines 10-14). The trial court premised its denial upon "all this physical evidence that just absolutely shows that [Appellant's] story could not be possible," and disagreed with Appellant's contention that the victim was inside the kitchen window when Jane Hughes bludgeoned him with a hammer. (Tr. p. 167, lines 4-19). Appellant's immunity hearing comported with the pre-trial procedure and burden of proof required by the Act such that no error, structural or otherwise, can be found to have invalidated the submission of the case to a jury.

Other than a requirement that the trial court make an immunity determination prior to trial, neither the Act nor our case law establish any specific form of hearing or procedure to be followed when a criminal defendant claims immunity pursuant to S.C. Code Ann. § 16–11–440.

State v. Manning, 418 S.C. 38, 44, 791 S.E.2d 148, 150 (2016); *State v. Curry*, 406 S.C at 375 n.3, 752 S.E.2d at 268 n.3 (2013) (noting "the Act is silent on the procedure to follow when an accused seeks immunity and *Duncan* interprets the Act to require a pretrial determination by the trial court") (citing *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011)). The trial court may even deny a full testimonial hearing where the essential facts are undisputed and counsel for each side is offered an opportunity to present legal argument on the applicability of the Act. *State v. Manning*, 418 S.C. at 45, 791 S.E.2d at 151.

The standard of review for the pre-trial determination is by a preponderance of the evidence. *State v. Andrews*, 424 S.C. at 313, 818 S.E.2d at 232. "Of course, at the conclusion of any given hearing, if the circuit court determines the movant has not met his burden of proof as to immunity, the case will go to trial, and the issue of self-defense may—depending upon the evidence presented at trial—be presented to the trial jury." *State v. Cervantes-Pavon*, Op. No. 27872, 2019 WL 1372351, at *4 (S.C. Ct. App. filed Mar. 27, 2019) (Shearouse Adv. Sh. No. 13 at 29), *pet. for reh'g pending* (filed Apr. 11, 2019). Denial of immunity is appropriate where testimony from the accused "varied 'substantially'" from that given by the State's witnesses. *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (Ct. App. 2014) (quoting *Curry* at 369, 752 S.E.2d at 265). "The accused is not entitled to immunity under the Act, when the accused's testimony is in direct conflict with eyewitness testimony as to whether the victim attacked the accused. 'When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.'" *State v. Andrews*, *supra* at 316, 818 S.E.2d at 234 (quoting *State v. Butler*, 407 S.C. 376, 382, 755 S.E.2d 457 460 (2014) (citing *Curry*, 406 S.C. at 372, 752 S.E.2d at 267).

Here, Appellant's case for self-defense was properly submitted to the jury due to substantial variances between Appellant's testimony and the State's witnesses' account of facets of the crime scene.

Appellant's immunity hearing testimony, like that given before the jury, maintained that the victim was at the house that night to talk about the custody dispute with he and Jacob, but departed after the discussion got heated and Appellant asked him to leave. (Tr. p. 44, line 14 – p. 54, line 13). To the best of his recollection, Jane was somewhere towards the back of the house in a bedroom. (Tr. p. 77, line 24 – p. 80, line 3). Thereafter, Appellant "buttoned up the house" and went to bed in the back of the home with the rest of his family until he heard an unfamiliar "thump on the side of the house" near the kitchen. (Tr. p. 54, line 19 – p. 55, line 9). Grabbing his pistol and calling down the hallway for someone to call the police, Appellant went outside to investigate, locking the front door behind him. (Tr. p. 55, lines 11-25). He did not see anything odd until he made it to the right side of his home where he saw "what looked like a body part in and part out of the window." (Tr. p. 58, line 3 – p. 59, line 11). That window was almost six feet off the ground. (Tr. p. 85, lines 18-25). Appellant verbally addressed the figure, which then dropped down from the window and started to come at him "not at a run, but not at a slow walk either." (Tr. p. 59, line 14 – p. 60, line 19). The figure continued at Appellant at an increasing speed. (Tr. p. 91, line 18 – p. 92, line 24). In response, Appellant shot the figure until he stopped moving, continuing to shoot even after the figure hesitated between movements. (Tr. p. 60, line 20 – p. 61, line 19). Appellant stated that it was only after law enforcement arrived that he realized the victim was his son-in-law. (Tr. p. 66, line 22 – p. 67, line 4; Tr. p. 94, lines 1-4). Appellant described the child custody dispute with the victim as "quite a controversy" which was ramping up for a hearing few days following this incident. (Tr. p. 68, line 21 – p. 73, line 2).

The State presented testimony from a neighbor of the Hughes family who heard the victim begging for his life between gunshots. (Tr. p. 98, lines 1-16). The State also presented the first responding officer to the scene, who testified that the victim had visible blunt force trauma to the head. (Tr. p. 105, lines 19-20). Another officer who processed the crime scene testified that "the victim's pants and his underwear were pulled down to his ankles. They were down around his ankles. And [there was noticeable] injury to his right buttocks." (Tr. p. 116, lines 12-18). This officer observed "suspected blood on the window blinds, particularly on the bottom of the window blinds." (Tr. p. 117, lines 18-20). And though victim purportedly did not make it inside the house, this officer also observed suspected blood "on the interior of the window and at the sink" in the kitchen, on a wooden spatula in the sink, and "on the kitchen counter underneath the sink." (Tr. p. 119, line 23 – p. 120, line 4). The suspected blood continued into the dining room, where the officer found a hammer on the floor with suspected blood on both ends of the head and on a quilted blanket sitting on a table. (Tr. p. 120, lines 8-14).

A presumptive test conducted on the interior of the home returned results indicating the presence of blood on the dining room table, a wall stretching from the foyer to the living room, the bathroom sink in the hallway bathroom, and on a rag found in the kitchen trash can.[17] (Tr. p. 136, line 21 – p. 138, line 2). A DNA analysis conducted on that blue rag positively matched the victim. (Tr. p. 138, lines 6-8; State's Exhibit 59, p. 3). The remainder of the DNA report introduced by the State during the immunity hearing demonstrated that the victim's DNA was present on the quilted blanket, the kitchen window blinds, and the hammer. (State's Exhibit 59,

[17] As argued in Issue I, the LCV testing of the interior of the house was not admitted in error and corroborated this same officer's observations of suspected blood inside the house. But even assuming error in the admission of the LCV testing at the time of the immunity hearing, those test results do not render inadmissible the officer's naked-eye observations of suspected blood. Nor do they render inadmissible the results of the DNA analysis.

pp. 2-3; Tr. p. 112, lines 4-9). Jane Hughes' DNA was located on the hammer handle. (State's Exhibit 59, p. 3). The victim's DNA and trace alleles matching those of Jane and Jacob Hughes were located on samples taken from Jane's clothing. (State's Exhibit 59, pp. 3-4).

The State last presented the forensic pathologist who conducted the autopsy on the victim. (Tr. p. 150, lines 14-19). He reported the victim wore "a jacket, jeans, boxer shorts, socks, [and] shoes." (Tr. p. 150, lines 24-25). "There were multiples defects in the jacket" which corresponded to a bullet hole in the victim's body. (Tr. p. 151, lines 4-9). There were no bullet holes or other defects in the pants. (Tr. p. 151, lines 15-17). The victim was a large man 5'7" tall, 286 pounds, and "carried a lot of weight in his neck and chest." (Tr. p. 152, lines 6-13). The victim suffered from "some blockage of the right coronary artery of his heart which would have compromised his cardiac capacity." (Tr. p. 152, lines 22-24). He also suffered from emphysema and an enlarged liver and heart which, when combined with his weight and heart disease, led the doctor to conclude the victim "could not be described as healthy." (Tr. p. 152, line 25 – p. 153, line 12).

The victim's cause of death, however, was due to gunshot wounds: "four wounds in total to the neck and torso, one to the head, and then another in the thigh." (Tr. p. 153, lines 21-25). Though Appellant stated the victim was coming at him at a walk/run, one gunshot wound to the posterior neck penetrated "very strongly downward" from the neck down to the center of the body. (Tr. p. 155, lines 1-9). Another gunshot wound initiated in the shoulder but then the bullet exited the body—again from a downward direction—and re-entered the victim in his leg. (Tr. p. 155, line 22 – p. 156, line 15). Yet another gunshot entered near the clavicle traveling downward through the second and third ribs and puncturing the aorta and pulmonary artery. (Tr. p. 156, line 17 – p. 157, line 8). A sixth gunshot wound entered through the back right shoulder and

proceeded at "a very hard downward angle." (Tr. p. 157, lines 10-16). Finally, the victim sustained "multiple injuries" to the back of the head, face, and jaw which the pathologist attributed to blunt force trauma caused by the distinct shape of a hammer head. (Tr. p. 60, line 14 – p. 161, line 25).

The trial court was correct to find Appellant failed to meet his burden by a preponderance of the evidence. (*See* Tr. p. 168, lines 7-10). "A preponderance of the evidence stated simply is that evidence which convinces as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). Appellant's version of events was simply not convincing of its truth when compared to the contradictory physical evidence recorded at the Hughes' residence. Appellant argued Jane could have bludgeoned the victim with a hammer as he made access through the kitchen window, (Tr. p. 167, line 7 – p. 168, line 20), but the remainder of the evidence does not support this contention.

First, there was evidence that the victim's blood had been cleaned from more than one room inside of the house. The blue rag from the kitchen trash contained his DNA, and there was blood detected not only in the area near the kitchen window, but in the dining and living areas on the home. The victim's DNA was located on Jane's clothing, including her pants, as well as on several other surfaces in the home. The forensic pathologist noted several blunt force wounds to the back of the victim's head in addition to wounds on his face. Appellant testified that he was the only person up and about in the home at the time he heard the noise on the side of the house and went outside to investigate. Nothing about Appellant's version indicated that the victim ever made access to the interior of the home, but rather voluntarily dropped down from the window upon Appellant's verbal address from the exterior side yard. Appellant's testimony simply did not account for the extent of the break-in and attack which was necessary to establish the blood

and DNA found inside the residence, nor did it account for the extent of the blunt-force injury to the victim's head and face. The extent of this evidence is not convincing of an attack upon the victim by someone inside the home while the victim was suspended through the kitchen window.

Second, the victim was not in good health and stood at 5'7" tall, while the kitchen window was nearly six feet from the ground. The forensic pathologist noted the victim suffered from a series of ailments including a heavy upper body and emphysema, which circumstantially indicate that the victim neither physically climbed from the ground into the kitchen window as alleged, nor came at the defendant in any type of athletic manner. Crucially, the victim's pants and boxers were around his ankles. He sustained a bullet wound to one leg, but there were no bullet holes in the pants. Not only is there a question as to how the victim's pants and boxers would have voluntarily ended up around his ankles given Appellant's testimony, but their positioning would stifle the ability of an individual of his size and stature to bum-rush Appellant. (Tr. p. 92, lines 12-14). And, the shooting demonstrably occurred after the pants and boxers fell into that position because there were no corresponding bullet holes in the pants. Again, the extent of the evidence is not convincing of an attempted home intrusion by the victim as Appellant alleged.

Third, Appellant maintained he fired as the victim came toward him at a "not at a run, but not at a slow walk either." (Tr. p. 59, line 14 – p. 60, line 19). Yet the majority of the gunshots sustained by the victim were angled downward. The downward angles do not corroborate Appellant's testimony and neither do the location of the wounds, which pooled around the victim's head, neck, and shoulders rather than at the center-mass of a person moving at a walk/run. Instead, it indicates that Appellant stood over the victim and fired even though the

victim was already confined to the ground, and corroborates the neighbor who heard the victim begging for his life between gunshots.

With the physical evidence presented by the State at the immunity hearing undermining Appellant's testimony, it was appropriate to deny immunity and submit the case to the jury. "Appellant's claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." *State v. Curry*, 406 S.C. at 372, 752 S.E.2d at 267.

CONCLUSION

For all of the foregoing reasons, Respondent submits that this Court affirm Appellant's convictions and sentence for murder, conspiracy, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 24, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN MICHAEL HUGHES,

Appellant

Appellate Case No. 2017-002539

PROOF OF SERVICE

I, Caroline Scrantom, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, postage pre-paid, and addressed to his attorneys of record: Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201, and to Andrew S. Radeker, Esq., Harrison, Radeker & Smith, P.A., P.O. Box 50143, Columbia, South Carolina 29250.

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

This 24th day of May, 2019.

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May 24, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. John Michael Hughes
Appeal from Greenville County
Appellate Case No. 2017-002539

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Caroline Scrantom
Assistant Attorney General

CS:dmd
Enclosures
cc: Robert M. Dudek, Esq. (w/two copies of encls.)
Andrew S. Radeker, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor 13th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encl.)