STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



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Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2018-000851

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THE STATE,

Respondent,

vs.

TERRELL FREEMAN,

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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The trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable South Carolina law to the jury, properly declined to present the requested jury instruction on evidence of flight because that instruction would have constituted an improper, confusing, misleading, and unconstitutional comment on the facts in direct violation of the mandates of the South Carolina Constitution.

## STATEMENT OF THE CASE

In July of 2016, Appellant Terrell Freeman was arrested in Charlotte, North Carolina, along with his confederate, Nicholas Jacob McIver, in connection to the execution-style killing of a woman a few days earlier in North Myrtle Beach, South Carolina. In May of 2017, the Horry County Grand Jury indicted Appellant for murder, kidnapping, possession of a weapon during the commission of a violent crime, and grand larceny.[1] On April 23, 2018, a jury trial was commenced in the Horry County Court of General Sessions with the Honorable Steven H. John, circuit court judge, presiding.[2] During the course of trial, the trial judge directed a verdict of acquittal on the kidnapping charge. Thereafter, at the conclusion of the five-day trial, the jury convicted Appellant of grand larceny while acquitting him of the remaining charges.[3] Following the verdict, the trial judge sentenced Appellant to a five-year term of imprisonment.[4] Appellant then filed a timely notice of appeal.

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[1] Just like Appellant, McIver was indicted by the Horry County Grand Jury for murder, kidnapping, possession of a weapon during the commission of a violent crime, and grand larceny. (Tr. p. 14).

[2] McIver was tried jointly with Appellant. (Tr. p. 14).

[3] The jury convicted McIver of murder, possession of a weapon during the commission of a violent crime, and grand larceny. (Tr. p. 650).

[4] The trial judge sentenced McIver to an aggregate term of imprisonment of forty-five years for his convictions. (Tr. p. 661).

## STATEMENT OF FACTS

Around midnight on the night of July 8, 2016, Amanda Fisher ("Victim") left her home in Shallotte, North Carolina, and headed to Myrtle Beach, South Carolina, along with her cousin, Tabetha Oxendine, to celebrate Oxendine's birthday. (Tr. pp. 167-169; pp. 172-173; p. 180; p. 411; p. 486; pp. 488-489). At approximately 1:00 a.m. in the early morning hours of July 9, 2016, the two checked into a room at the Holiday Sands North Hotel and ventured out onto the room's balcony. (Tr. pp. 201-202; pp. 395-396; pp. 490-491). As they relaxed together on the balcony, two men—Appellant and McIver—walked by on the street below and made contact with them. (Tr. pp. 490-492). After that, Victim, Oxendine, Appellant, and McIver partied together for the next few hours in both Victim and Oxendine's room and Appellant and McIver's room at the nearby Lancer Motel.[5] (Tr. pp. 190-192; p. 196; pp. 198-199; pp. 203-204; p. 209; p. 411; pp. 415-416; pp. 491-494).

Later on that morning, Victim started to drive Oxendine back to her aunt's home in North Carolina, and McIver suggested he and Appellant accompany them on the trip. (Tr. p. 425; pp. 495-496; p. 500). The four then rode back to Oxendine's aunt's home, and Oxendine was dropped off there around 9:45 a.m. (Tr. p. 425; p. 500). After that, Victim headed back to Myrtle Beach in her vehicle along with McIver, who was in the car's front passenger's seat, and Appellant, who was seated in the back behind the driver's seat. (Tr. pp. 498-500; p. 505).

On the way back to Myrtle Beach, Victim stopped her vehicle in the parking lot of a K&W Cafeteria restaurant located in North Myrtle Beach around 11:00 a.m. (Tr. pp. 86-87; p. 91). Shortly after that, a gun was pressed to Victim's head just above her right ear, and she was fatally shot. (Tr. p. 89; pp. 238-239; pp. 241-242; p. 244).

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[5] While partying together, the four consumed alcohol and ingested drugs. (Tr. pp. 241-242; pp. 458-459; p. 491).

In the immediate aftermath of the seemingly-random killing, Appellant and McIver worked together to drag and push Victim from her vehicle's driver's seat onto the pavement outside.[6] (Tr. pp. 89-92; pp. 98-99; pp. 103-104; pp. 107-108; p. 126; p. 161). The two then quickly drove out of the parking lot in Victim's vehicle and headed back to their motel room. (Tr. p. 89; p. 426; p. 431; State's Ex. # 17 (Recording of Surveillance Footage from Motel)). Once there, McIver—after appearing to scan his surroundings to make sure no one was watching—removed a metallic-looking object from his waistband and hid it in the bed of his truck while Appellant went into the motel room. (Tr. p. 429; State's Ex. # 17). Then, the two causally loaded their belongings into the truck before parting ways within minutes of arriving back at the motel with McIver driving off in Victim's car and Appellant driving off in McIver's truck.[7] (Tr. p. 431; State's Ex. # 17).

Meanwhile, officers from the North Myrtle Beach Department of Public Safety swiftly travelled to the restaurant parking lot in response to the shooting. (Tr. p. 109; pp. 115-116; pp. 124-126; p. 147; p. 337; pp. 385-386). When they arrived, they found Victim's body on the ground outside the restaurant and were able to ascertain Victim's identity through her cell phone, which was left at the crime scene along with her jewelry. (Tr. pp. 126-128; pp. 141-142; pp. 150-151; p. 160; p. 162; pp. 337-338; p. 386; p. 388). Beyond that, officers further located a bullet fragment on the ground between Victim's legs. (Tr. pp. 149-150).

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[6] The killing appeared to be random because there was no evidence Victim and Oxendine had any prior contact with Appellant and McIver. (Tr. pp. 453-454; p. 503). Notably though, at the outset of trial, Appellant's defense counsel indicated to the trial judge there was evidence Victim was a witness in a Charlotte murder case at the time she was killed. (Tr. pp. 47-48). However, that evidence was not subsequently introduced during trial. (Tr. pp. 47-48).

[7] Before leaving in Victim's car, McIver retrieved something from the bed of his truck and concealed it in his waistband. (State's Ex. # 17).

As the investigation progressed, Detective Owen Lynam met with Victim's family and obtained information from Oxendine that led to Appellant and McIver being identified as the prime suspects in Victim's death. (Tr. pp. 389-391; p. 501). Additionally, the detective attempted to locate Victim's vehicle and discovered it had been burned and completely destroyed by McIver around 4:00 p.m. on the date of the shooting in Charlotte, which was the city in which Appellant and McIver reportedly lived.[8] [9] (Tr. p. 298; pp. 305-307; p. 325; pp. 391-394; p. 440). Furthermore, Detective Lyman discovered McIver used Victim's credit cards several times after the killing as he made his way back to North Carolina from the Myrtle Beach area. (Tr. pp. 176-177; pp. 212-215; p. 220; p. 223; pp. 227-228; p. 231; pp. 397-398).

Ultimately, based on the investigation into the shooting, Appellant and McIver were arrested in Charlotte in connection to Victim's death.[10] (Tr. p. 370; p. 398). Following the arrests, Appellant was indicted for murder, kidnapping, possession of a weapon during the commission of a violent crime, and grand larceny, and he proceeded forward to trial. (Tr. pp. 13-14; Indictments). Subsequently, at the conclusion of trial, the jury convicted Appellant of only the grand larceny charge. (Tr. pp. 650-651). The trial judge then sentenced Appellant to a five-year term of imprisonment for that offense. (Tr. pp. 663-664).

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[8] Significantly, McIver was connected to the burning of Victim's car by a nine-year-old eyewitness who saw him fleeing after the vehicle was set on fire and who identified him with absolute certainty from a six-person photographic lineup. (Tr. pp. 310-313; p. 317; pp. 321-323; pp. 327-333).

[9] Around the time Victim's car was burned, McIver made numerous phone calls to Appellant. (Tr. p. 440).

[10] During a law enforcement interview conducted after his arrest, Appellant apparently implicated McIver as the individual who shot Victim, but his statement was not introduced during trial. (Tr. p. 378).

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.").

## ARGUMENT

**The trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable South Carolina law to the jury, properly declined to present the requested jury instruction on evidence of flight because that instruction would have constituted an improper, confusing, misleading, and unconstitutional comment on the facts in direct violation of the mandates of the South Carolina Constitution.**

Appellant contends the trial judge committed reversible error by declining to instruct the jury evidence of flight alone cannot constitute substantial circumstantial evidence. In support of that request, Appellant—without addressing or even acknowledging the trial judge's express finding the requested instruction would have constituted an improper comment on the facts—maintains such a jury instruction would have "served only to ensure that the State met its burden in offering substantial circumstantial evidence" while further contending it was somehow supported by the evidence presented. Contrary to Appellant's contention, the trial judge, who otherwise completely and accurately instructed the jury on all the applicable law, correctly declined to present a jury instruction singling out and commenting on the potential weight of flight evidence because—just as the trial judge found—such an instruction would have constituted an impermissible comment on the facts. As a result, the trial judge committed no conceivable error by declining to present an instruction to the jury that would have violated the mandates of the South Carolina Constitution. Appellant's conviction should be affirmed.

## RELEVANT FACTS

During the course of the evidentiary phase of trial, evidence and testimony was presented establishing Victim was fatally shot after a gun was pressed to her head while she was inside her car, which had a value between $10,000 and $16,000, with just two other individuals—Appellant and McIver—in the parking lot of a restaurant located in North Myrtle Beach. (Tr. pp. 106-107; p. 147; p. 151; p. 161; p. 171; pp. 238-239; pp. 241-242; p. 492; pp. 498-500; p. 505).

Additionally, evidence and testimony was presented establishing Appellant and McIver jointly removed Victim from her car immediately after she was shot before quickly absconding from the scene together with Victim's vehicle once they had callously dumped her body onto the ground outside it. (Tr. p. 89; pp. 91-92; p. 98; pp. 103-104; p. 108; p. 126; p. 429; p. 478). Furthermore, evidence and testimony was presented establishing Appellant and McIver used Victim's car to leave the scene of the killing together, drove back to their motel together, quickly loaded McIver's truck with their belongings together, and then promptly left the area and headed back to Charlotte in separate vehicles. (Tr. p. 89; pp. 290-291; p. 305; p. 370; p. 402; p. 429; p. 431; p. 470; p. 478; State's Ex. # 17). Beyond that, evidence and testimony was presented establishing Appellant and McIver continued communicating with one another by phone after leaving the area, McIver used Victim's credit cards along the way home, and McIver completely destroyed Victim's car by setting it on fire once he had made it back to Charlotte later that day. (Tr. p. 217; p. 220; pp. 227-228; pp. 290-291; p. 307; pp. 310-312; p. 321; pp. 328-333; pp. 344-345; p. 371; p. 384; pp. 397-398; pp. 432-433; p. 440).

At the conclusion of the evidentiary phase of trial, the trial judge discussed his intended jury instructions with the parties, and Appellant's defense counsel asked the trial judge to instruct the jury "flight alone is not substantial circumstantial evidence" while citing to State v. Lewis, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013), as support for his request. (Tr. p. 560; p. 565). In response, the trial judge noted jury instructions on flight evidence had been determined to constitute impermissible comments on the facts in South Carolina and, as a result, declined to present the requested charge. (Tr. p. 566). However, the trial judge noted the parties would be free "to argue about flight or escape based on their view of the evidence." (Tr. p. 566).

Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 568-642). Through his jury instructions, the trial judge explained the jury's role was to determine whether the State met its burden of proving Appellant's and his co-defendant's guilt for each of the charged offenses beyond a reasonable doubt, thoroughly defined reasonable doubt for the jury, explained Appellant and his co-defendant were presumed to be innocent and were not required to prove anything during the trial, defined the elements of the charged offenses, and indicated the jury's verdict must be unanimous. (Tr. pp. 630-631; pp. 634-639; p. 641). Additionally, the trial judge directly advised the jurors on the differences between direct and circumstantial evidence, correctly explained "a greater degree of certainty of one over the other is not required[,]" and accurately noted the State was required to meet its burden of proof regardless of what type of evidence it used or relied upon.[11] (Tr. pp. 633-634). Furthermore, consistent with his earlier ruling, the trial judge did not present any instructions specifically addressing evidence of flight or indicating flight alone was not substantial circumstantial evidence.[12] (Tr. pp. 630-642).

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[11] Specifically, regarding direct and circumstantial evidence, the trial judge instructed the jury as follows: "There are two types of evidence that are normally presented in virtually every criminal trial, and this case is no exception. It's called direct and circumstantial evidence. Direct evidence, that's the testimony of a person who asserts or claims to have actual knowledge of a fact. Circumstantial evidence, that's proof of a chain of facts indicating the existence of a fact. The law does not make a distinction between the two, and a greater degree of certainty of one over the other is not required. But, to the extent the State of South Carolina relies on any circumstantial evidence, all of the circumstances must be consistent with each other and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt. If the circumstances merely portray the defendant's behavior as suspicious, that proof has failed. The state has the burden of proving these defendants guilty beyond a reasonable doubt of the crimes charged. That burden rests on the state whether the state relies on direct evidence, circumstantial evidence or a combination of the two." (Tr. pp. 633-634).

[12] At the end of the jury instructions, Appellant's defense counsel lodged an objection to the trial judge's failure to present the requested jury instruction on flight evidence, and the trial judge noted that objection. (Tr. pp. 643-644).

Subsequently, at the conclusion of trial, the jury convicted Appellant of grand larceny while acquitting him of the other charges. (Tr. pp. 650-651). The trial judge then sentenced Appellant to a five-year term of imprisonment for that conviction. (Tr. pp. 663-664).

## ANALYSIS

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To carry out that purpose, a trial judge is required to charge the jury on the current and correct South Carolina law applicable to the case based on the evidence presented. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). However, a trial judge in South Carolina is constitutionally prohibited from making any comments that could be construed as offering an opinion on the facts of the case. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also State v. Smith, 288 S.C. 329, 331, 342 S.E.2d 600, 601 (1986) ("The trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of the witnesses, the guilt of the accused or as to controverted facts."). Importantly, so long as the trial judge's jury instructions are substantially correct, adequately cover the applicable law, and do not run afoul of the constitutional prohibition against comments on the facts, those instructions are considered to be appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460,

464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."); see also State v. Deas, 202 S.C. 9, 14, 23 S.E.2d 820, 822 (1943) ("Of course, under our Constitution and practice the jury are the sole judges of the facts in criminal trials and it is error for the Judge to communicate his views of them to the jury.").

In the case sub judice, the trial judge, through his jury instructions, identified the correct burden of proof for the jury, accurately explained the burden of proof rested solely on the State, thoroughly defined the concept of reasonable doubt, and correctly conveyed Appellant was presumed to be innocent and had no burden whatsoever to prove anything during his trial. Furthermore, the trial judge specifically advised the jurors on the differences between direct and circumstantial evidence and accurately explained the State was required to prove Appellant's guilt beyond a reasonable doubt regardless of the type of evidence introduced and relied upon. Viewing those jury instructions together as a whole, the trial judge's jury instructions correctly conveyed the relevant and applicable South Carolina law to the jurors and afforded the jurors the appropriate test for resolving the issues raised by the evidence in Appellant's case. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); see also Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 ("Failure to give requested jury instructions in not prejudicial error where the instructions given afford the proper test for determining the issues."). As a result, the trial judge's jury instructions were sufficient and proper. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."); see also State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980) ("The Constitution of this State requires that the trial judge declare the

law, but no particular verbiage is necessary. It is sufficient if the precepts stated to the jury adequately cover that law which is applicable.").

In arguing to the contrary, Appellant contends the trial judge's instructions were somehow not sufficient because they did not contain specific verbiage informing the jury flight evidence alone was not substantial circumstantial evidence. Importantly though, even assuming such an instruction on flight evidence somehow constituted a correct statement of South Carolina law that was categorically true in all cases and under all circumstances, the trial judge would have erred had he given such a jury instruction because—just as the trial judge recognized—it would have constituted an impermissible comment on the facts that would have violated the South Carolina Constitution's bar on judges in our state commenting to the jury on the facts of a case.[13] See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also State v. Hartley, 307 S.C. 239, 240-241, 414 S.E.2d 182, 183-184 (Ct. App. 1992) (rejecting a contention the trial judge erred by refusing to give a requested charge where that requested charge would have constituted an impermissible comment on the facts).

Significantly, in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), our Supreme Court addressed the propriety of a jury instruction that—like the instruction requested in Appellant's case—directly commented on the potential strength of certain evidence presented.

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[13] Tellingly, the case relied upon Appellant as support for his requested flight instruction did *not* state flight evidence alone categorically could never constitute substantial circumstantial evidence of guilt for any offense under any circumstances and, instead, simply found the guilty conduct evidence presented in that particular case was not sufficient under the specific circumstances involved to withstand a motion for a directed verdict. See State v. Lewis, 403 S.C. 345, 357, 743 S.E.2d 124, 130 (Ct. App. 2013) ("The State also asserts Lewis's flight and suicide attempt are sufficient evidence to withstand a directed verdict. We disagree with the State's contention *under these facts*. The State did not present any evidence of an overt act or the requisite state of mind for aiding and abetting, and thus, evidence of flight and a suicide attempt alone will not suffice to withstand a motion for a directed verdict." (emphasis added)).

Specifically, the trial judge in Cheeks's case—over objection—instructed the jury actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use. Id. at 327, 737 S.E.2d at 484. After analyzing that particular jury instruction on appeal, the Supreme Court found it to be violative of the constitutional prohibition on comments on the fact because the use of the word "strong" necessarily constituted a comment on the weight of the evidence. Id. at 329, 737 S.E.2d at 484. Based on that finding, the Supreme Court instructed "the bench to no longer use the 'strong evidence' charge, which is derived from a statement on the sufficiency of the evidence [from an appellate decision]." Id. Furthermore, the Supreme Court noted:

> Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.

Id. at 328, 737 S.E.2d at 484. Ultimately though, the Supreme Court affirmed Cheeks's convictions after finding he was not prejudiced by the giving of the improper instruction based on the overwhelming evidence of guilt presented in his case. Id. at 329, 737 S.E.2d at 484.

Subsequent to the decision in Cheeks, our Supreme Court reiterated the significance of the South Carolina Constitution's prohibition against comments on the facts in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). In that case, the trial judge instructed the jury on the statutory non-corroboration language from Section 16-3-657 of the South Carolina Code of Laws simply by informing the jurors the testimony of a victim in a sexual assault case need not be corroborated, which was an unquestionably accurate statement of law. Id. at 497, 787 S.E.2d at 482; see S.C. Code Ann. § 16-3-657 ("The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658."). On appeal, the Supreme Court found

that particular jury instruction to be unconstitutionally erroneous and reversed. Stukes, 416 S.C. at 496, 787 S.E.2d at 481. In reversing, the Supreme Court concluded a jury instruction on the statutory language of Section 16-3-657 was confusing and "violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." Id. at 499, 787 S.E.2d at 483. Specifically, the Supreme Court explained:

> [I]t is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge confused the jury. Specifying this qualification applies to one witness creates the inference the same is not true for the others.

Id. at 499-500, 787 S.E.2d at 483 (footnote omitted).

Beyond Cheeks and Stukes, our Supreme Court in State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980), was specifically confronted with a challenge to a jury instruction on flight evidence and analyzed whether such an instruction was proper. Upon analyzing the matter in that case, the Supreme Court found a charge on flight evidence "oftentimes has the potential for creating more problems than solutions" and would place "undue emphasis" upon that particular evidence. Id. at 408, 272 S.E.2d at 172. As a result, our Supreme Court expressly held jury instructions on flight evidence "should not be charged" in South Carolina. Id.

Like the jury instructions found to be improper in Cheeks, Stukes, and Grant, the flight evidence jury instruction requested by Appellant's defense counsel would have singled out just one portion of the evidence presented during the trial—the evidence of Appellant's and McIver's flight—and classified that singled-out evidence as being alone insufficient to constitute substantial circumstantial evidence. Significantly, by singling out that evidence and commenting

on its potential weight, such a jury instruction naturally could have been—and would have been—construed as expressing the trial judge's opinion on that specific evidence to the jury and, as a result, would have constituted an impermissible and unconstitutional comment on the facts. See Grant, 275 S.C. at 108, 272 S.E.2d at 171 ("[W]e believe that the 'law of flight' in a judge's charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter."); cf. Stukes, 416 S.C. at 499, 787 S.E.2d at 483 ("By addressing the veracity of a victim's testimony in its instruction, the trial court emphasizes the weight of that evidence in the eyes of the jury."); Cheeks, 401 S.C. at 328-329, 737 S.E.2d at 484 ("[C]harging a jury that 'actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use' unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence."); Hartley, 307 S.C. at 241, 414 S.E.2d at 184 ("[T]he trial judge was requested, in effect, to charge that particular evidence (*i.e.*, evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on a fact that the jury was to determine."). Moreover, such an instruction had a high potential to confuse the jury based on the fact it would have addressed the weight and significance of flight evidence *alone*, which could have potentially misled the jurors into believing flight evidence was the only circumstantial evidence of guilt presented during the trial or into thinking they could not properly draw an inference of guilt from flight evidence despite the fact flight evidence has long been recognized as supporting such an inference. See State v. Pauling, 264 S.C. 275, 278, 214 S.E.2d 326, 327 (1975) ("It is . . . well settled that the weight and sufficiency of the evidence is for the jury. It is the province of that body to weigh the evidence and decide on its sufficiency in reaching a verdict."); State v. Battle, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (Ct. App. 2014) ("The task of determining the weight of the evidence lies within the exclusive province of the

jury."); see also State v. Freely, 105 S.C. 243, 250, 89 S.E. 643, 645 (1916) ("The flight of one charged with crime has always been held to be some evidence tending to prove guilt. Solomon wrote as a proverb the 'wicked flee when no man pursueth;' and Shakespeare made guilty Hamlet to soliloquize that 'conscience does make cowards of us all.' "); cf. Stukes, 416 S.C. at 499, 787 S.E.2d at 483 ("Specifying this qualification applies to one witness creates the inference the same is not true for others."); State v. Cheeks, 408 S.C. 198, 200, 758 S.E.2d 715, 716 (2014) (finding a "strong evidence" jury instruction to be improper where it "unduly emphasized the evidence" and "deprived the jury of its prerogative to draw inferences and to weigh evidence"). Accordingly, the requested charge was not constitutionally permissible or proper under South Carolina law. See S.C. Const. art. V, § 21 (prohibiting trial judges from instructing the jury on matters of fact).

For all those reasons, the trial judge, who otherwise presented instructions that fully provided the jurors with all the relevant law needed for them to be able to properly decide Appellant's case, correctly declined to present a jury instruction that would have improperly singled out flight evidence alone and commented on the potential weight of that evidence since such an instruction would have constituted a confusing, problematic, impermissible, and unconstitutional comment on the facts.[14] See State v. Thorne, 237 S.C. 248, 251, 116 S.E.2d

[14] In light of the surveillance footage that directly captured Appellant using Victim's car to get back to his motel room along with McIver just after Victim was killed, any possible error that occurred as a result of the trial judge's decision not to present the improper jury instruction on flight evidence would have been harmless beyond a reasonable doubt and could not have had any impact on Appellant's grand larceny conviction. See State v. Logan, 405 S.C. 83, 98, 747 S.E.2d 444, 452 (2013) ("[E]rroneous jury instructions are subject to harmless error analysis."); see also State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding the erroneous admission of evidence was harmless where its impact was minimal in the context of the entire record); cf. State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982) ("[T]he refusal in this case to instruct the jury on the issue of good character was not reversible error, because we are not convicted that such refusal prejudiced the appellant.").

854, 855 (1960) ("The Judge must be careful to avoid expressing, or even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations, of opinion by the Judge."); see also Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 (recognizing a jury charge is correct if it correctly defines the relevant and applicable law when read as a whole); cf. State v. Edwards, 127 S.C. 116, __, 120 S.E. 490, 491 (1923) (finding the trial judge correctly refused to instruct the jury the absence of a motive may be sufficient to raise a reasonable doubt because such an instruction would have constituted an impermissible comment on the facts). Appellant's conviction should be affirmed.

## CONCLUSION

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

Respectfully submitted,

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Attorney General

MARK R. FARTHING
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ATTORNEYS FOR RESPONDENT

July 24, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2018-000851



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THE STATE,

Respondent,

vs.

TERRELL FREEMAN,

Appellant.

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**PROOF OF SERVICE**

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I, Shana Montgomery, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 24th day of July, 2019.

Shana Montgomery

SHANA MONTGOMERY
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 24 2019
SC Court of Appeals

July 24, 2019

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Terrell Freeman – Appellate Case No. 2018-000851

Dear Mr. Gilliam:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services

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