STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

APPELLANT

APPELLATE CASE NO. 2015-000513

FINAL BRIEF OF APPELLANT

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II. Did the trial judge violate Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of a statement given by Appellant during custodial interrogation where the police requested Appellant sign his statement after he requested counsel?

III. Did the trial judge violate Appellant's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by refusing to qualify his witness as an expert in the area of ballistics and refusing to permit the witness to testify regarding his opinion based on observations?

IV. Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt?

V. Did the trial judge err in sentencing Appellant to consecutive terms of imprisonment based upon his mistaken belief that his discretion was restricted in such a way that he was required to order consecutive sentences where neither statute nor case law restricted the judge's discretion in sentencing?

STATEMENT OF THE CASE

On October 28, 2013, an Oconee County grand jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime in a single indictment (2013-GS-37-1039). R. 492-493. The state, represented by David Wagner, Jr., called the case for trial before the Honorable J. Cordell Maddox, Jr., and a jury on February 23, 2015. R. 1. W. Wilson Burr represented Appellant. R. 1. The jury found Appellant guilty of the lesser-included offense of voluntary manslaughter. R. 473, lines 19-21. The jury also found Appellant guilty of possession of a weapon during the commission of a violent crime. R. 473, line 22 – R. 474, line 1. Judge Maddox sentenced Appellant to twenty-five years' imprisonment suspended upon the service of fifteen years' imprisonment and probation for five years. R. 477, lines 11-15; R. 494. He also sentenced Appellant to five years' imprisonment to be served consecutively with the sentence for involuntary manslaughter. R. 477, lines 20-24; R. 495.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. The trial judge violated Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of statements he gave during custodial interrogation based on the totality of the circumstances, including (1) the first officer, who advised him of his rights, informing Appellant the rights did not mean anything, (2) Appellant's intoxication, (3) the length of the interrogation, and (4) the officer's failure to honor his request for counsel, which rendered Appellant unable to voluntarily, knowingly, and intelligently waive his rights.

Relevant facts

On the morning of July 9, 2013, Officer John Towery arrived at the scene of a shooting. R. 2, lines 17-20. Towery encountered Appellant and advised him of his rights pursuant to Miranda v. Arizona, 384.U.S. 426 (1966). R. 3, lines 8-11. To do so, Towery used a form provided by the Sheriff's Office. R. 3, lines 12-19; R. 478. Towery "put [Appellant] in the back [of his] patrol car." R. 4, line 14.

When Towery and Appellant interacted around 7:30 a.m. on July 9, 2013, Towery noticed Appellant appeared to be under the influence of drugs and alcohol. R. 6, lines 8-10; R. 8, line 23. Appellant was shouting, his speech was "very rushed," and he appeared to be having a "very high-type [of] experience." R. 6, lines 10-12. Also, Appellant was slurring his words. R. 6, lines 19-20. Towery said Appellant "didn't really understand what he was talkin' [about]." R. 6, line 13. Towery recalled Appellant was "just runnin' on and on about, you know, he didn't mean to do it that that, you know, that that he did not mean to do [it]." R. 6, lines 22-24.

Sergeant Justin Ward arrived on the scene around 8:20 a.m. R. 47, lines 5-7. He encountered Appellant very early. R. 47, lines 8-13. He described Appellant as appearing "very, uh excited, and uh, uh, outta sorts." R. 48, lines 1-2.

While advising Appellant of his rights, Towery said, "This does not mean anything, it's just somethin' the law [says] we gotta do." R. 9, lines 8-11. When asked if he "took away all the meaning of the rights advisements" by saying "it doesn't mean anything," Towery responded, "It coulda been." R. 9, lines 12-15.

Investigator Amanda Tinsley arrived on the scene around 8:30 a.m. while Appellant was in Towery's patrol car. R. 11, lines 17-22. Tinsley advised Appellant of his rights as well, beginning at 9:46 a.m. and ending at 9:48 a.m. R. 12, lines 1-13; R. 479. Tinsley then interrogated Appellant regarding his involvement in the shooting death of the deceased. R. 14, line 18 – R. 18, line 18. Thereafter, Tinsley asked Appellant to provide a written statement. R. 18, lines 19-21; R. 482. This statement was concluded at 1:47 p.m. with Appellant having been transported to the Sheriff's Department and placed in a locked interrogation room. R. 23, lines 1-2; R. 59, line 21 – R. 60, line 4.

Near the end of this interrogation, the police asked Appellant to take a polygraph. R. 49, line 24 – R. 50, line 1. Appellant responded that he wanted a lawyer. R. 24, lines 8-15. According to Tinsley, the police stopped talking to Appellant "[a]t that point in time." R. 24, lines 16-18. However, Ward was clear that after Appellant requested an attorney, Ward asked him to sign the statement he had prepared and swear to it. R. 50, lines 2-7. Only when the police had the signed statement did the interrogation cease per Appellant's request for the presence of counsel. R. 50, lines 8-10.

Tinsley claimed Appellant re-initiated the interrogation at approximately 5:45 p.m. by turning off the light and banging on the table or wall in the locked interrogation room. R. 25, lines 4-6. Tinsley further claimed Appellant said he wanted to add information to his statement. R. 25, lines 7-9. Tinsley advised Appellant of his rights again. R. 25, lines 14-25; R. 480. Appellant then provided oral and written statements to law enforcement. R. 25, line 22 – R. 27, line 21; R. 484-485. Tinsley took notes during this interrogation, which she requested Appellant sign prior to requesting Appellant provide a written statement. R. 30, lines 13-20; R. 43, lines 23-24; R. 488-490. Appellant's second written statement concluded at 7:54 p.m. R. 29, lines 10-11. Tinsley also asked Appellant to use a diagram during this interrogation. R. 29, lines 16-21; R. 491.

After Appellant provided the written statement, the police confronted him with information they claimed contradicted his story. R. 32, lines 1-11. Appellant told the officers he was tired and wanted to sleep. R. 32, lines 15-20. Tinsley placed Appellant under arrest for murder and transported him to the detention center. R. 32, lines 21-23.

The following day around lunch time, the officers removed Appellant from the jail and took him to the Sherriff's Office where the interrogation resumed. R. 32, line 24 – R. 33, line 16. Tinsley warned Appellant of his rights again. R. 33, line 21-25; R. 481. In addition to giving an oral statement, Appellant provided a third written statement. R. 34, lines 13-14; R. 486-487.

At the close of the hearing, defense counsel argued Appellant's statements should be excluded based on Towery telling Appellant "the warnings he was about to give him did not mean anything" and Towery's observation that Appellant "appeared to be intoxicated." R. 61, lines 15-19. Defense counsel argued the errors in the initial Miranda warnings tainted all

subsequent interrogations. R. 61, lines 19-21. The trial judge ruled that anything Appellant said to Towery was excluded because "you can't tell somebody this doesn't really matter." R. 63, lines 7-10. However, the judge ruled Appellant's subsequent statements to law enforcement were admissible because new Miranda warnings were given. R. 64, lines 7-12.

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, "[t]he waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 421, 421 (1986)); see also Johnson v. Zerbst, 304 U.S. 458, 464

(1938)("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

Intoxication

Clearly, a defendant's level of intoxication is a factor to consider when determining whether a defendant waived his rights in a knowing and voluntary manner. See State v. Young, 875 P.2d 1119, 1122 (N.M. Ct. App. 1994)(explaining the "[d]etermination of whether a defendant validly waived his rights depends upon the totality of the circumstances, including the defendant's mental and physical condition and his conduct," which necessarily includes intoxication). However, in some cases, intoxication *alone* may result in an involuntary and unknowing waiver. In State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973), the South Carolina Supreme Court held "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." Therefore, intoxication alone "does

not render the statement inadmissible as a matter of law.". Id. The intoxication must be "such that [the accussed] did not realize what he was saying." Id.

The Ninth Circuit held a defendant's confession was inadmissible where the defendant "was in a state of gross intoxication." Gladden v. Unsworth, 396 F.2d 373, 380-381 (9th Cir. 1968)(explaining that "[i]f by reason of mental illness, use of drugs or extreme intoxication, the confession could not be said to be the product of a rational intellect and a free will, ..., it is not admissible and its reception in evidence constitutes a deprivation of due process"). Likewise, the District Court for the Middle District of North Carolina found a confession inadmissible where the defendant "was under the influence of alcohol and drugs to such an extent as to affect his judgment." Logner v. State, 260 F.Supp. 970, 975 (M.D.N.C. 1966). As explained by the court, "[a] person who has lost control of his mental faculties is incapable of making an admissible confession." Id. at 976.

Advisement of Rights – Does not mean anything

In 1966, the United State Supreme Court issued its landmark decision Miranda v. Arizona, 384 U.S. 436 (1966). As explained by the Court in Duckworth v. Eagan, 492 U.S. 195, 201 (1989), Miranda established "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." In Miranda, the Court delineated four specific warnings: "(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants." Miranda, 384 U.S. at 479. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one's will, the Court held advising an

individual of his right to consult with a lawyer and to have the lawyer present during interrogation was "an absolute prerequisite to interrogation." Id. at 471.

It is in the very case of Miranda that the Supreme Court disapproved of the conduct used by the police in this case. Explaining why the Court would require the warnings to be given in every instance of custodial interrogation, the Court provided an example of an officer using psychological condition to overcome a suspect's refusal to talk. Id. at 454. In the example, the officer informed the suspect of his right to remain silent and noted the officer was "the last person in the world" who would try to take that right away. Id. The officer went on to ask the suspect to reverse roles and to imagine would the suspect would think if the officer refused to answer questions. Id. According to the officer, the suspect would think the officer had something to hide and would probably be right in thinking that. Id. In another example, the Court noted a common police ploy of dissuading a suspect from exercising his right to speak with an attorney by suggesting the suspect first tell the truth to the interrogator, instead of involving someone else. Id. The interrogator would also note the suspect could save the expense of the professional services of a lawyer if the suspect would simply cooperate with the investigation. Id.

Totality of the Circumstances

The totality of the circumstances surrounding the custodial interrogations in the present case requires exclusion of his statements to law enforcement. Towery's statement that the rights did not mean anything completely nullified his advisement of rights. Towery's statement runs counter to the very purpose of providing the rights and the Constitutional requirement that individuals be advised of their rights. Appellant was interrogated for well over twelve hours. He first encountered Towery around 7 a.m. He was

in police custody continuously from that point forward. He was finally placed into the detention after he told the officers he was tired, which occurred sometime after the conclusion of his final written statement of that day – 7:54 p.m. R. 484. While it is true the interrogation was not continuous, his detention certainly was. The interrogation continued the following day when law enforcement removed Appellant from the jail and re-initiated contact. Further, at least two of Appellant's interrogators admitted he appeared to be under the influence or, at a minimum, "outta sorts." Finally, the officers failed to honor Appellant's request for counsel near the end of the first interrogation. This was a clear indication to Appellant that Towery was absolutely correct and the advisement of rights really did "not mean anything." The totality of these circumstances requires exclusion of Appellant's statements to law enforcement.

Subsequent Interrogations Tainted

The officers' provisions of Miranda warnings subsequent to Towery's cavalier admonition that the warnings did "not mean anything" were tainted by Towery's improper and coercive conduct. In Missouri v. Seibert, 542 U.S. 600 (2004), The United States Supreme Court confronted a case very similar to the one presented in the instant matter. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her Miranda warnings. During this discussion, the officer obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was set to cover up the death of Seibert's disabled child. After obtaining this admission, the officer permitted Seibert a twenty-minute break. Id. at 604-605.

The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert by confronting her with her prewarning statements. Again, the officer obtained the answer he wanted – that Seibert knew the teenager was supposed to die in the fire. Id. at 605.

At trial, the officer testified that he used an interrogation technique in which he questioned the witness first, then gave the warnings, and then repeated the questioning until he got the answer that the witness had already provided once. Id. at 605-606. The trial judge suppressed Seibert's prewarning statements, but admitted the postwarning statements. Id. at 606. The United States Supreme Court held this was in error.

The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611. Thus, the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" Id. at 613-614 (quoting Moran, 475 U.S. at 424).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and "the questioning was systematic, exhaustive, and managed with psychological skill." Officers paused only for twenty minutes before resuming questioning and providing the required warnings. Officers "said nothing to counter the probable

misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." Through the style of questioning employed which included repeated references to prior responses, the officers fostered the impression that further questioning was a mere continuation of the earlier questions. Id. at 616. Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Our Supreme Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, he gave a statement at the hospital to police, but was very upset and officers thought the statement was incomplete. Officers learned from the pathologist that the cause of death was smothering or suffocation. Id. at 297, 688 S.E.2d at 839. The following day, officers went to Navy's home with the intent of transporting him to the sheriff's office for further questioning. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. After this statement, Navy received another smoke break. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, Officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

The Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to the court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree to which the interrogator's questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

As explained by the United States Supreme Court and the South Carolina Supreme Court, provision of complete and accurate Miranda warnings without any added coercion to convince a suspect to cooperate, such as Towery's statement that the rights did not mean anything, cannot remove the taint from the prior improper police conduct. Although Towery read Appellant his rights, he did so while telling Appellant the rights were meaningless. This statement resulted in no advisement or rights at all. This taint could not be removed by Tinsley's subsequent advisement or rights to Appellant over the course of a twelve-hour marathon interrogation that ceased only when Appellant requested rest.

II. The trial judge violated Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of a statement given by Appellant during custodial interrogation where the police requested Appellant sign his statement after he requested counsel.

Relevant facts

Near the end of the interrogation culminating in Appellant's first written statement, the police asked Appellant to take a polygraph. R. 49, line 24 – R. 50, line 1; R. 482-483. Appellant responded that he wanted a lawyer. R. 24, lines 8-15. Despite Tinsley's claim that the police stopped talking to Appellant "[a]t that point in time," Ward was clear that *after* Appellant requested an attorney, Ward asked him to sign the statement he had prepared and swear to it. R. 24, lines 16-18; R. 50, lines 2-7. Only when the police had the signed statement did the interrogation cease per Appellant's request for the presence of counsel. R. 50, lines 8-10.

Defense counsel argued Appellant's statements to police should be excluded because he requested counsel and this request was not honored as evident by Ward's request that he sign the statement despite his clear and unequivocal request for a lawyer. R. 61, lines 19-24; R. 118, lines 7-8. Despite the objection, the trial judge permitted the state to use the statements during the course of the trial. R. 64, lines 7-12. According to the judge it was "more of a factual issue." R. 65, lines 24-25.

Discussion

"[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege." Miranda, 384 U.S. at 469. This right to counsel includes "not merely a right to consult with counsel prior to questioning, but to have

counsel present during any questioning." Id. at 470. According to the Supreme Court, a defendant may waive his rights. Id. at 444.

> If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 444-445. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. Amend. V; Edwards v. Arizona, 451 U.S. 477 (1981). If a suspect invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police. Id.; see also Davis v. United States, 512 U.S. 452, 458 (1994).

The Supreme Court "set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." Smith v. Illinois, 469 U.S. 91, 98 (1984)(citing Solem v. Stumes, 465 U.S. 638, 646 (1984))(emphasis in original). This purpose of the prohibition is to eliminate "explicit or subtle, deliberate or unintentional" conduct by police that "might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." Id. (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983); Fare v. Michael C. 442 U.S. 707, 719(1979)).

It simply cannot be denied in this case that Appellant invoked his right to counsel and the police failed to cease all interrogation by asking Appellant to sign the written statement. Appellant was entitled to consult with counsel at any time during the interrogation, including what the police perceived to be nearing the end – the signing of the statement. In fact, a suspect signing a written statement may be the most important part of

an interrogation from a police perspective due to the talismanic significance of a signature. There was no suggestion, or even argument, that Appellant's request for counsel was anything but clear and unambiguous. The police knew Appellant sought legal advice, but instead of honoring that request, as the officers knew they were required to do pursuant to the United States Constitution, the officers continued the interrogation by asking Appellant to sign the statement. As a result, Appellant's statements to police should have been excluded from consideration by the jury.

"Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." Smith, 469 U.S. at 98. "[A]n accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked." Id. The fact that Appellant signed the statement cannot be used to determine that he waived his earlier unambiguous invocation. See Edwards, 451 U.S. at 484 (holding a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation").

III. The trial judge violated Appellant's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by refusing to qualify his witness as an expert in the area of ballistics and refusing to permit the witness to testify regarding his opinion based on observations.

Relevant facts

The defense called Richard Belmore, the owner of Salem Gun & Archery Club and Richard's Firearms as an expert witness. R. 380, lines 16-19. Belmore owned a firearm training center. R. 380, lines 20-22. Belmore instructed individuals on firearms and firearms safety. R. 380, line 24 – R. 381, line 8. Additionally, Belmore was a gunsmith repairman. R. 381, lines 9-11. Belmore held a federal firearms license, NRA instructor license, and SLED license for concealed weapon permit training. R. 381, lines 16-21. He had been educated and trained at the American Gunsmith Institute. R. 381, lines 22-25. He was a member of the National Shooting Sports Foundation. R. 382, lines 1-7.

Appellant offered Belmore as an expert in gunsmith and ballistics. R. 382, lines 8-10. The state objected to his qualifications in ballistics because he did not have "any training in that." R. 382, lines 1-12; R. 382, lines 19-25. The judge agreed. R. 382, lines 14-18. When the defense noted the state's expert testified regarding ballistics after having read an article on the subject and that Belmore had practical experience with ballistics, the judge indicated the state's expert's "expertise" "probably [was] a little bit more than that." R. 383, lines 9-18. The state also responded that the state's expert "had been to a lot more schools and stuff like that." R. 383, lines 19-20. Of course, the state was forced to acknowledge the expert "did say she read an article on that as far as ricochets." R. 383, lines

20-21. Nevertheless, the judge limited Belmore's testimony to that of a gunsmith. R. 384, lines 22-23.

The defense proffered Belmore's testimony. Belmore inspected the pellet that was removed from the deceased's body during the autopsy. R. 385, lines 15-17. As an owner of a shooting range, he had inspected ricochet pellets previously. R. 385, lines 18-20. He explained that pursuant to state regulations, he is required to participate in a lead removal program at his range. R. 385, lines 22-23. As part of the program, most of the projectiles he collects "have hit the ground before they hit the berm." R. 386, lines 3-6. His examination of the pellet in this case disclosed characteristics consistent with projectiles striking an abrasive surface, like those collected at his range. R. 386, lines 6-8.

Discussion

The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986) (holding the Sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's Constitution provides similarly: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Taylor v. Illinois, 484 U.S. 400, 408 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). "'The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question or hesitation, the United States Supreme Court declared "'[t]his right is a fundamental element of due process of law.'" Id. Undermining the "ostensible integrity of the investigation" is one method by which a defendant may present a defense. See Kyles v. Whitley, 514 U.S. 419, 448 (1995).

The qualification of a witness as an expert and the subsequent admission of that witness' opinion testimony are matters within the sound discretion of the trial judge. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995); Manning v. City of Columbia, 297 S.C. 451, 453, 377 S.E.2d 335, 336-337 (1989); Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988). Therefore, an appellate court reviews a trial judge's ruling concerning an expert witness' qualification and the admission of opinion testimony for an abuse of discretion. Strange v. South Carolina Dep't of Highways & Pub. Transp., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992); Honea, 295 S.C. at 530; 369 S.E.2d at 849. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without

evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); see also, Suess, 318 S.C. at 285, 457 S.E.2d at 345. If the ruling is "manifestly arbitrary, unreasonable, or unfair," then the trial court abused his discretion. Id.

In order for an individual "[t]o be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-253, 487 S.E.2d 596, 598 (1997) (quoting O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995)). Our Rules of Evidence provide that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill or experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Thus, several criteria must be met prior to the admission of expert testimony. First, the trial court must determine that such evidence will assist the jury to understand the evidence or determine a fact in issue. Second, the witness must be qualified as an expert due to experience or training. Third, the trial court must determine whether the proposed expert testimony satisfies a reliability threshold for the jury's ultimate consideration. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

The first criterion requires the trial judge to determine whether the proffered testimony, which is based upon specialized knowledge, will assist the jury in understanding evidence or determining a fact. A matter understood without any specialized knowledge does not require the witness to be qualified as an expert. Additionally, if the testimony will not assist the jury's understanding of a relevant matter, then no expert testimony is needed.

See Manning, 297 S.C. at 453-454, 377 S.E.2d at 337 (holding that "[t]o qualify as an expert, a person must have acquired by study or practical experience a special knowledge of a subject matter about which the jury's good judgment and average knowledge is inadequate"); Honea, 295 S.C. at 531, 369 S.E.2d at 849.[1] The third criterion requires the trial judge to ensure the proffered testimony "meets a reliability threshold for the jury's ultimate consideration." White, 382 S.C. at 270, 676 S.E.2d at 686. As explained by the South Carolina Supreme Court, "[r]eliability is a central feature of Rule 702 admissibility." Id.

The second criterion, which is at issue in Appellant's case, requires the expert's proffered testimony be based upon "knowledge, skill, experience, training, or education." In order for a witness to be competent to testify as an expert, the "witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995). Qualification as an expert "depends on the particular witness' reference to the subject." Gooding v. St. Francis Xavier Hospital, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997); see also Suess, 318 S.C. at 285, 457 S.E.2d at 346. "'[A]n expert is not limited to any class of persons acting professionally.'" Gooding, 326 S.C. at 253, 487 S.E.2d at 598 (citing Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)). In addition, our

[1] There can be little doubt that the evidence proffered was relevant to the issue before the jury. See Assoc. Mgmt. v. E.D. Sauls Constr.Co., 279 S.C. 219, 305 S.E.2d 236 (1983)(explaining that evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears); Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)(stating "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent"); Rule 401, SCRE (defining relevant evidence).

courts place no exact requirement regarding how that knowledge or skill must be acquired by the witness. Honea, 295 S.C. at 531, 369 S.E.2d at 849. In fact, "[e]ven where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter." Id.

In Gooding, 326 S.C. at 252, 487 S.E.2d at 597, the South Carolina Supreme Court held an emergency medical technician (EMT) and paramedic, was qualified to testify as an expert on intubation. The EMT testified that in addition to being a certified paramedic, he had intubated over one hundred patients, and instructed and tested physicians on intubation and extubation procedures. Id. at 251, 487 S.E.2d at 597.

The trial judge erred in refusing to permit Appellant to permit the expert testimony of Belmore regarding the deformity of the pellet recovered from the deceased's body during the autopsy. At the trial, no one disputed the gun in Appellant's possession fired the fatal shot. The question for the jury was whether Appellant aimed the gun and fired at the deceased or whether Appellant threw the gun and it discharged from the impact with the ground or whether the gun discharged when Appellant re-loaded. Belmore's testimony went to this very issue. According to Belmore's proffered testimony, the deformity in the pellet was consistent with pellets he had handled that had struck abrasive surfaces. Such testimony was relevant to the jury's decision regarding whether the pellet that struck the deceased had ricocheted following an accidental discharge.

Additionally, Belmore had significant knowledge, skill, and experience in this area. He owned a firearms training center and shooting range. As part of his duties and the

state regulations for shooting range owners, he had inspected ricochet pellets regularly and participated in a lead removal program required by the state health and environmental control agency. He was very familiar with the appearance of ricochet pellets. This experience, training, and skill qualified him to testify as an expert in this area.

In light of the jury's struggles with the verdict and the prosecutor capitalizing on the judge's erroneous exclusion of the expert evidence during closing argument by noting the state's expert had testified the pellet was consistent with having struck the deceased's spinal column, not a ricochet, the judge's error was not harmless beyond a reasonable doubt.

IV. The trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt.

Relevant facts

During the charge conference, the trial judge indicated he was going to charge murder, voluntary manslaughter, and involuntary manslaughter. R. 406, lines 16-17. Additionally, the judge explained he would charge accident. R. 406, line 20. The state responded, "I'm fine with those four choices." R. 407, line 5.

After reviewing the printed version of the judge's intended instructions, defense counsel objected to the judge's instruction regarding malice. Specifically, defense counsel objected to the judge charging the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." R. 408, lines 4-14. Defense counsel noted evidence had been presented to excuse or mitigate the offense, and that by allowing the jury to infer malice from the use of a deadly weapon, the judge was permitting the jury to make an improper conclusion. R. 408, lines 21-23. The judge agreed "there's been evidence potentially that could reduce or mitigate." R. 409, lines 16-17. However, the judge noted "[t]here's also been evidence that they did not." R. 409, lines 17-18. The judge expressed his thought that this was a "factual" issue for the jury to decide. R. 409, line 25 – R. 410,

line 2. Thus, the judge concluded the charge regarding inferred malice was proper in the instant case. R. 409, lines 18-20.[2]

When instructing the jury regarding murder, the judge explained the state must prove malice. The judge defined malice as "hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will ... infer an evil threat or intent." R. 453, lines 8-13. Further, he instructed the jury that "[m]alice aforethought may be expressed or inferred." R. 453, line 20. After explaining "[e]xpress malice," the judge told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." R. 453, lines 8-10. He then defined a deadly weapon for the jury. R. 454, lines 11-21.

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[2] In discussing the proposed jury charge, the judge and defense counsel referred to a "footnote" on the printed proposed instructions. R. 409, line 8. The judge explained the footnote stated, in part, that "'[w]here evidence is presented that will reduce, mitigate, excuse, or justify.'" R. 409, line 11-13. The judge stated "that should not have been in there. That was a note to me." R. 409, lines 13-14. The note to the judge also stated "[b]ut with intent to kill, the jury shall not be charged." R. 409, lines 14-15. Later, the judge said that was "a private note to me that was printed." R. 409, lines 20-21. Although it is unclear from the record, it appears the judge was using the proposed jury instructions from the benchbook and had included within his printed version, the caution contained in the proposed instructions regarding this very issue. Appellant notes that jury instructions within the judge's 2015 benchbook contained a "caution" regarding State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). After stating that "[i]nferred malice may also arise when the deed is done with a deadly weapon," the instructions contained a caution explaining Belcher held "[w]here evidence is presented that would reduce, mitigate, excuse, or justify a homicide or assault and battery with intent to kill caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." See http://www.judicial.state.sc.us/juryCharges/GSInstructions.2015.pdf (last visited November 11, 2015).

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, lines 21-24. The jury also requested additional instruction on murder. R. 467, line 3. Thereafter, the judge instructed the jury on the three charges using most of the same language of his earlier charge. R. 468, line 1 – R. 472, line 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, lines 5-6.

Discussion

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause ant the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt." (internal quotations omitted)); see also In re Winship, 397 U.S. 358 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."). When a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, the Due Process Clause of the Fourteenth Amendment is violated. Sandstrom

v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975).

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), the South Carolina Supreme Court overruled prior law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. The Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the South Carolina's jurisprudence in this area, the Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Belcher, 385 S.C. at 604, 685 S.E.2d at 806. The Court stated, "We are persuaded . . .

that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Belcher, 385 S.C. at 605, 685 S.E.2d at 806. The Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from above established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the "proper application of the charge," the Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," the Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling "return[ed] to the rationale" of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id.

There is no question that evidence was presented in this case that reduced the crime from murder to a lesser crime, including voluntary manslaughter or involuntary manslaughter. In fact, there was an abundance of such evidence. Further, the state consented to the judge instructing the jury regarding the lesser-included offenses based on

the clear and unambiguous evidence in the record to reduce the charged offense. Additionally, the state's evidence and evidence presented by the defense pointed to an accidental discharge of the gun. Thus, the judge instructed the jury on the defense of accident, and the state posed no objection to such a charge. Accident would completely excuse the homicide. In light of the evidence in the record tending to reduce, mitigate, and excuse the charge, the judge violated Appellant's right to due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments, by shifting the burden of proof to Appellant and diluting the state's burden to prove each element of a crime beyond a reasonable doubt

As in Belcher, the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See Rose v. Clark 478 U.S. 570 (1986).

V. The trial judge erred in sentencing Appellant to consecutive terms of imprisonment based upon his mistaken belief that his discretion was restricted in such a way that he was required to order consecutive sentences where neither statute nor case law restricted the judge's discretion in sentencing.

Relevant facts

When the jury returned with its verdicts, the judge moved into the sentencing portion of the trial. After asking for the sentencing range for voluntary manslaughter, the judge asked, "And then the weapons charge is consecutive, right? Five consecutive?" R. 475, lines 8-9. Defense counsel responded, "Correct." R. 475, line 10. When defense counsel was providing mitigation to the judge to support a lesser sentence, defense counsel again indicated his belief that the sentence for the weapons charge must be served consecutively. R. 476, lines 13-15.

After hearing aggravating and mitigating factors, the judge again expressed his understanding of the law that he was required to sentence Appellant to a consecutive term of five years' imprisonment concerning the weapons charge: "The way the law is set up is, obviously, I don't have any real leeway. The possession of a weapon charge is consecutive." R. 477, lines 5-7. Thereafter, he sentenced Appellant to five years' imprisonment to be served consecutively to the sentence for voluntary manslaughter. R. 477, lines 20-24; R. 495.

Discussion

The trial judge erred in determining that he was required to sentence Appellant to a term of years to be served *consecutively* to the sentence for the principal crime. Pursuant to statute, a person who was in possession of a firearm during the commission of a violent

crime and is convicted of a violent crime "must be imprisoned five years, in addition to the punishment for the principal crime." S.C. Code Ann. § 16-23-490(A). Further, the statute provides that "[t]he court may impose this mandatory five-year sentence to run consecutively or concurrently." S.C. Code Ann. § 16-23-490(B).

Certainly, "[j]udicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction." State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990); see also Major v. South Carolina Dept. of Probation, Parole, and Pardon Services, 384 S.C. 457, 465-466, 682 S.E.2d 795, 799-800 (2009). However, the legislature created no restriction on a sentencing judge's ability to order a sentence for violation of section 16-23-490(A) to run consecutively or concurrently. This is clear from the text of section 16-23-490(B). See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (providing that "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature"); In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (explaining that under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)(holding that where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning); State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993)(explaining the rules of statutory construction, courts must strictly construe the criminal statutes against the state); Charleston County Sch. Dist. v. State Budget and

Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (noting the cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature).

Further, the South Carolina Supreme Court made clear that judges retain this discretionary power as it pertains to this charge through case law. See Major, 384 S.C. at 466, 682 S.E.2d 795, 799 (stating a sentencing court has the ability to order whether a sentence is consecutive or concurrent and citing section 16-23-490(B)).

The judge clearly believed his sentencing discretion was restricted in such a way as to require him to order consecutive sentencing. However, a review of the clear and unambiguous language of the statute coupled with controlling case law on the subject reveal no restrictions on the judge's ability to order the sentences to be served consecutively or concurrently. As such, the judge erred in sentencing Appellant to a consecutive term of five years where the sentencing structure was based upon the judge's mistake of law.

Appellant acknowledges there was no objection to the sentence at the time of imposition. Nevertheless, Appellant respectfully requests this Court address the issue presented in the interest of judicial economy.[3] See State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009); State v. Bonner, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012). Based upon the clear statutory language and the abundance of case law on the matter presented, the judge based his sentencing structure on a mistake of law. Thus, judicial economy weighs heavily in favor of this Court addressing the merits of the claim at this time. Appellant respectfully requests this Court address the merits of the issue and vacate

[3] If the case were affirmed on procedural basis, defense counsel could not articulate any strategic reason for failing to object at a post-conviction relief proceeding, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) and the prejudice is manifest.

his sentence for possession of a weapon during the commission of a violent crime and remand for re-sentencing.

CONCLUSION

As to Issues I, II, III, and IV, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. As to Issue V, Appellant respectfully requests this Court vacate his sentence for possession of a weapon during the commission of a violent crime and remand for a new sentencing proceeding.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of February, 2016.

CERTIFICATE OF COUNSEL

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

February 16, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.