ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County

The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Jason Carver ("Appellant") was indicted by the Anderson County grand jury for the murder of Steven Cameron (2016-GS-04-2279). At trial, Appellant was represented by Donald L. Smith, Esquire. Assistant Solicitor, Chelsey Lauren Moore, Esquire, prosecuted the case on behalf of the Tenth Circuit Solicitor's Office. (R. p. 438). Appellant was tried before the Honorable R. Lawton McIntosh, August 21st, through August 25th, 2017. (R. p. 438). At the conclusion of the trial the jury found Appellant guilty. (R. p. 775, ll. 13-24). Following the conviction, Judge McIntosh sentenced Appellant to the minimum sentence of thirty (30) years. (R. p. 771, ll. 16-19). Appellant then filed a timely Notice of Appeal.

Appellant's defense counsel continued representation and perfected the appeal by the submission of a briefing. Respondent submitted an Initial Brief of Respondent on July 30, 2018. Appellant subsequently submitted a Reply Brief on August 9, 2018. Thereafter, on August 29, 2018, Appellant submitted a motion to limit the pages to be included in the Record on Appeal. Respondent responded by letter consenting to the page reduction but designating additional items to be included. On October 19, 2019, Appellant moved this Court to hold his appeal in abeyance in order to file a motion for a new trial based on after-discovered evidence.

On October 29, 2018, Respondent submitted a response disagreeing with Appellant's assertions regarding the after-discovered evidence, but consenting to holding the appeal in abeyance. On December 12, 2018, this Court granted Appellant's motion. Thereafter, on December 20, 2018, Appellant submitted to the trial court a motion for a new trial pursuant to SCRCrimP, Rule 29. Appellant submitted an amended motion on December 28, 2018. Appellant's motion was subsequently denied by the Honorable R. Lawton McIntosh. Appellant moved for reconsideration which was also denied. Appellant has since submitted a Notice of Appeal seeking review of Judge McIntosh's dismissal of the New Trial Motion. Appellant also

sought to consolidate this case with his Direct Appeal. Respondent responded that it did not oppose the motion should this Court determine the consolidation appropriate. On April 4, 2019, this Court issued an order granting Appellant's request for consolidation. Appellant submitted his Initial Brief on May 3, 2019. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

On the evening of March 28, 2016, Jason Carver ("Appellant") was at the home of James Milton Gambrell repairing the transmission of a car. (R. pp. 633, l. 14 – p. 634, l. 15). Appellant worked as a technician at a transmission repair shop, but repaired vehicles on the side for extra money. (R. pp. 625, l. 24 – p. 627, l. 1; p. 632, ll. 15-23). While Appellant was busy with the car repair, Gambrell was finalizing the purchase of a dirt bike from the victim, Steven Cameron. (R. p. 636, ll. 15-21; p. 545, ll. 2-12). Also present at Gambrell's house was Woodrow Curry. (R. p. 634, ll. 8-25; p. 544, ll. 3-16). Once the sale was completed, Gambrell asked Appellant to drive Cameron, who was without transportation, back to his home. (R. p. 639, l. 2 – p. 640, l. 9; p. 544, l. 22 - p. 545, l. 21). Appellant agreed and drove Cameron back to his home at 108 Sterling Bridge Road. (R. p. 640, l. 23 - p. 642, l. 10). Appellant then proceeded back to Gambrell's home to finish up on the car he had been working on. (R. p. 644, l. 17 – p. 645, l. 10; p. 546, ll. 6-10). When he arrived, Gambrell informed Appellant that Cameron had stolen a large amount of cocaine. (R. p. 546, l. 20 – p. 547, l. 7). Appellant did not own a cellphone, so Gambrell was unable to reach him during the drive. (r. p. 644, ll. 4-6). Gambrell instructed Appellant to take Curry and go back to Steven Cameron's house. (R. p. 646, l. 4 - p. 647, l. 7; p. 546, ll. 11-19). They were told to bring back the drugs, the money, or Steven Cameron. (R. p. 647, ll. 5-7; p. 366, ll. 1-7). Gambrell then gave Curry a .38 caliber and .25 caliber handgun. (R. p. 547, ll. 15-24). Appellant had his own gun. (R. p. 569, ll. 6-7).

Appellant took Gambrell's Buick sedan and drove back to Cameron's house with Curry. (R. p. 647, ll. 8-13; p. 648, ll. 17-20; p. 548, ll. 8-17). As they were driving, Appellant told Curry to leave his gun behind. (R. p. 574, ll. 1-13). When they arrived they knocked on the door but no one answered. (R. p. 651, ll. 3-10; p. 548, ll. 19-21). As they stepped away from the patio, Curry observed Cameron peeking out from the window. (R. p. 652, ll16-21). They then reapproached

the home, whereupon, Cameron came out the front door to confront the two. (R. p. 652, l. 22 – p. 653, l. 1; p. 548, l. 25 – p. 549, l. 2). Appellant stood by the patio steps while Curry spoke with Cameron on the patio. (R. p. 651, ll. 18-20; p. 653, ll. 3-5; p. 549, ll. 3-22). The discussion quickly turned physical when Cameron shoved Curry. (R. p. 653, ll. 13-20; p. 550, ll. 18-19). Curry then pulled the .25 caliber handgun that he'd had hidden on his person and pointed it in Cameron's face. (R. p. 653, ll. 20-25). Cameron, undeterred, slapped the gun away from his face. (R. p. 654, ll. 4-18). Curry then fired three shots. (R. p. 655, ll. 10-13; p. 550, ll. 19-25). One round hit the house, while the other two entered Cameron's neck and chest killing him. (R. p. 454, l. 8 – p. 455, l. 15; p. 456, ll. 14-18).

Appellant and Curry quickly departed the scene. (R. p. 655, ll. 13-25; p. 551, ll. 8-12). Appellant alleged that during the drive Curry threatened Appellant to keep his mouth shut about the murder. (R. p. 657, ll. 13-18). Curry denied having made any threats. (R. p. 565, ll. 4-8). The two then drove back to Gambrell's with the headlights turned off. (R. p. 658, ll. 2-12). After dropping off Curry at Gambrell's, Appellant returned to his mother's home, where he was currently residing. (R. p. 662, ll. 11-21). He claimed that he then spotted Curry driving past his mother's home later that same night. (R. p. 664, ll. 2-15). Curry denied this as well. (R. p. 565, ll. 9-20). After law enforcement arrested Gambrell and Curry on drug related charges, Appellant went to the Anderson County Sheriff's Office to give a statement. (R. p. 669, ll. 9-13; R. p. 670, ll. 3-13). Appellant disclosed what had occurred and admitted his involvement in the murder. (DVD unredacted statement of Carver).

Curry later elected to plead guilty to involuntary manslaughter. (R. p. 553, ll. 1-15). Appellant, on the other hand, proceeded to trial. At trial, Appellant claimed that he was unaware that they were going to Steven Cameron's house in response to Cameron stealing drugs from

Gambrell. (R. p. 647, ll. 20-24). His understanding was that they were to simply bring Cameron back to Gambrell's. (R. p. 649, ll. 17-21). However, Curry testified for the State. During his testimony, he claimed that Appellant was aware that they were going to Cameron's with instruction to bring him back, or recover money or the stolen drugs. (R. p. 546, l. 23 – p. 547, l. 7).

SUMMARY OF THE ARGUMENT

Appellant first contends that the trial court erred in denying his motion for a new trial in light of after-discovered evidence presented during the trial of Appellant's co-conspirator. However, the judge was within his discretion in denying Appellant's motion, because the evidence presented by Appellant was plainly available at the time of Appellant's trial or could have been discovered through due diligence. Furthermore, the evidence undoubtedly would not have affected the outcome of Appellant's trial. Also, despite Appellant's contention, the State acted within its discretion in charging Appellant and deferring the sentencing of his accomplice. Lastly, the trial court was correct in finding that the State did not commit misconduct in providing Appellant with certain discovery material two-weeks prior to trial.

Next, Appellant claims that the trial court erred in instructing the jury on the "hand of one is the hand of all" because the evidence presented did not support accomplice liability. Contrary to Appellant's assertions, the evidence presented at trial supported that Appellant and Curry were involved in a criminal scheme to either kidnap or force the victim to turn over drugs or money. Thus, the facts of record suggest the shooting death of the victim was a likely and probable outcome of the enterprise. Moreover, Appellant asserts that the trial court erred in not granting his motion for a directed verdict because the State failed to prove criminal intent. However, the State presented evidence at trial that Appellant was aware of the criminal scheme prior to driving his codefendant to the victim's house.

Lastly, Appellant avers that he was denied Due Process. Appellant asserts that the trial court reflected bias when, among other examples, it denied Appellant the opportunity to examine a codefendant after the codefendant asserted Fifth Amendment right against self-incrimination, and declined to allow a continuance on the fifth and final day of trial when Appellant sought additional time to locate two other witnesses. Nevertheless, the Record reflects that the trial

satisfied the Appellant's Constitutional rights, and that the trial judge executed his duties in a fair and impartial manner. Appellant is not entitled to any relief.

ARGUMENT

I. The Trial Court Was Within Its Discretion In Denying Appellant's New Trial Motion.

How the Issue Arose

On December 20, 2018, Appellant, by Counsel, moved the trial court for a new trial. In support, Counsel submitted a forty-page brief in which he cites the following grounds as basis for his motion:

1. Witnesses from the Carver case, such as Detective Kreig Marzolf and Curry, took the witness stand against Gambrell. These two witnesses offered statements that were either not introduced or ran inconsistent with their previous testimonies in the Defendant's case. He believed [sic] that these statements should be explored in depth as they go through [sic] the very core of the crime for which Carver was convicted and sentenced to thirty (30) years of imprisonment. (Amended Motion for New Trial, December 27, 2018, p. 297).
2. The newly discovered evidence consists of statements by witnesses in the Carver trial, whom [sic] the defense could not have been obtained during his trial since they were inconsistent and false statements. (Amended Motion for New Trial, December 27, 2018, p. 298).
    a. "[D]uring the trial for Carver's case, Curry denied having named anyone as the shooter, insisting that it was him who shot Cameron. . . . However, in the Gambrell trial, Carver learned that Curry, [sic] initially tried to pin the shooting on Carver. (Amended Motion for New Trial, December 27, 2018, pp. 297-298).
    b. "[W]hen Curry was asked what he did after leaving [the victim's] house during Car's [sic] trial, Curry stated in a straightforward manner that they went back to Gambrell's house. . . . However, when the same question was asked at the Gambrell trial, Curry revealed, for the first time, that he called Gambrell on the way back to this house and told him of [the victim's] shooting." (Amended Motion for New Trial, December 27, 2018, p. 300).
    c. "[A]t the Carver trial, Curry testified that Gambrell instructed Carver to drive Cameron to his house. . . . In his subsequent testimony at Gambrell's trial, Curry implied that Carver voluntarily took Cameron home." (Amended Motion for New Trial, December 27, 2018, p. 301).
    d. "Curry, implicated Carver by testifying that he had a gun when they went to Cameron's house, only to deny the same in his subsequent testimony. . . . Gambrell dismissed these contradicting statements of Curry. Gambrell confirmed that Carver did not have a gun on March 28 or 29, 2016.

(Exhibit 7-Gambrell Affidavit). Gambrell stated that the only time he saw Carver with a gun was in 2015, one year prior to the shooting incident. At that time, Carver was showing his brother's gun to Gambrell." (Amended Motion for New Trial, December 27, 2018, pp. 301-302).

e. "[I]n recalling what transpired between him and [the victim], Curry testified that he only realized that he had a gun with him when Cameron came charging at him and that he had no choice but to shoot the latter. . . . In his testimony at Gambrell's trial, Curry testified that he pulled the gun to intimidate Cameron, who charged at him at that point. He pulled the gun prior to any exchange of words between him and Cameron." (Amended Motion for New Trial, December 27, 2018, pp. 302-303).

f. "[I]n Gambrell's trial, Curry testified that upon returning to Gambrell's house from Cameron's place, Carver went in to return the gun to Gambrell. Of course, this testimony conflicts with Curry's testimony that Carver had his own gun." (Amended Motion for New Trial, December 27, 2018, p. 304).

g. At Gambrell' s trial, Detective Kreig Marzolf testified that during one of their neighbor canvasses, one of his detectives talked to a neighbor who heard about an argument between Cameron and [sic] unidentified person wherein the word "dirt bike" was mentioned. . . . This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Carver hearing. Carver maintains that this should have been disclosed in the previous trial as this confirms what he has long been saying: that he was being sent back to Cameron in relation to the sale of the dirt bike. This statement goes through [sic] his lack of criminal intent. (Amended Motion for New Trial, December 27, 2018, p. 308).

h. Carver's counsel asked Marzolf twice regarding Cameron's violent tendencies, which the officer denied having heard of any such instance. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 47). However, Marzolf had knowledge of Cameron's volatile behavior. He admitted that he got [sic] hold of a supplemental report from Officer Scott Hill who interviewed a neighbor who recounted the [sic] Cameron's volatile behavior. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 47). Marzolf himself interviewed Cameron's siblings, Erica and Christopher. Erica told him of Cameron's history of domestic violence against his wife. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 97). Christopher stated that Cameron had punched him at one instance and jumped on his daughter and left bruises on her. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 97). (Amended Motion for New Trial, December 27, 2018, pp. 19-20).

i. As discussed in the previous section, Marzolf has shown no qualms in offering conflicting testimonies/statements. He testified not having knowledge of, nor even participated [sic] in, Curry's plea-bargaining deal. Curry exposed that it was Marzolf and the prosecutor's idea to reduce his charges. (Amended Motion for New Trial, December 27, 2018, p. 309).

3. Carver further asserts that he is entitled to new trial and motion to vacate and/or set aside judgment by reason of the State's misconduct in the handling of this case. Carver insists that the prosecution abused its discretion in filing different charges against him, Curry and Gambrell. The prosecution's theory was that the three conspired to rob or kidnap Cameron, and that under the "hand of one is hand of all" doctrine, all three of them were guilty of the killing of Cameron. However, the prosecutor charged Curry and Carver with murder and "the boss", Gambrell, with the lesser crimes of solicitation to commit a felony and accessory before the fact to a felony. The same prosecutor handled Carver's and Gambrell's trial. But while she was very emphatic and steadfast with her argument on the application of the accomplice liability doctrine on Carver and Curry, she has deliberately and cautiously omitted the same argument in her prosecution of Gambrell. (Amended Motion for New Trial, December 27, 2018, pp. 309-310).
    a. First, according to the prosecution's star witness. Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording of the time they visited Curry to speak to him on his manslaughter deal. (Amended Motion for New Trial, December 27, 2018, p. 310).
    b. Second, the State deferred Curry's sentencing for over a year, when the Order specifically stated that it will only be until after Carver's trial. However, they liked the results of holding the anvil over Curry's head so much that they held off sentencing for another year, or after Gambrell's trial. (Amended Motion for New Trial, December 27, 2018, p. 311).
    c. Third, Curry's sentencing was deferred for more than one year with no legitimate reason other than to ensure that his testimony would once again be beneficial to the State. This piece of information only came to light after the Gambrell trial, where Curry was called a witness. The only logical conclusion was that the State dangled Curry's sentencing over his head for him to testify according to its wishes. (Amended Motion for New Trial, December 27, 2018, p. 312).
    d. Fourth, in prosecuting the case, the State failed to disclose information and/or witness that may exculpate Carver. A prosecutor's primary duty is to seek justice. Under the law, a prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. (Rule 3.8(d) of the Rules of Professional Conduct). It failed to do the same. Instead, it allowed its star witness, Curry, to offer inconsistent and false statements during Carver and Gambrel's respective trials. The State also failed to disclose the terms of its plea bargaining with Curry, which coupled with the deferment of his sentencing, is suspect. (Amended Motion for New Trial, December 27, 2018, p. 313).
    e. Carver repeatedly requested the discovery materials, which included surveillance video which ran in excess of 36 hours. These materials have been in the State's possession since the first week of the investigation. Carver was provided the materials only a year after. Another set of materials which included an audio recording and three supplemental

reports was provided by the State on August 9, 2017, or two (2) weeks prior to Carver's trial. The State failed to give the defense the opportunity to review materials which it had for more than one (1) year. Even the trial court judge took notice of this. (Amended Motion for New Trial, December 27, 2018, p. 313).

f. Fifth, the State's questionable conduct continued during Gambrel's trial, when it deliberately offered Curry despite knowledge of his tendencies to lie and/or withhold information from the beginning. (Amended Motion for New Trial, December 27, 2018, p. 316).

4. First, Carver believes that his case was prejudiced by the actions of the trial judge. In several instances, the trial judge made controversial rulings, such as ruling on sustaining when there was no objection. (Amended Motion for New Trial, December 27, 2018, p. 321).
5. Second, Carver avers that he was denied his right to present his witnesses. Carver believes that Mr. Gambrell was key to the whole case, as he would testify that his instruction to Carver was simply to bring Cameron back to his (Gambrell) house. This then would rule out conspiracy or unity in purpose and action. Gambrell was called as a witness on behalf of Carver. The trial judge advised Gambrell of his rights, particularly his rights against self-incrimination. (Amended Motion for New Trial, December 27, 2018, p. 323).
6. Defense subpoenaed Dequavious Gambrell, Milton Gambrell's nephew, and his friend, Tykeon Gardner. Dequavious had purchased the bike from Cameron that day. When the defense called the witnesses, neither of them were available to testify. As expected, defense counsel could not track down the witnesses. This was especially true since Mr. Gambrell was no longer an issue to testify. Carver was unable to show to the jury that Gambrell had prevented the boys from going that night because he was concerned of the personality clashes that may have occurred had they gone down there. The Court did not attempt to compel the presence of the witnesses with any significance. The defense's Motion for Continuance, which was raised when the witnesses subpoenaed by Carver failed to appear to testify, was summarily dismissed by the judge. Carver believes that the Court had a duty to compel the witnesses who been subpoenaed properly, so as to give Mr. Carver some semblance of equity. (Amended Motion for New Trial, December 27, 2018, p. 327).
7. The trial judge also denied Carver's attempt to introduce in evidence the audiotape of Gambrel's interview with the ACSO officers as an exception to the hearsay rule. Gambrell can be considered as an unavailable declarant under the doctrine laid down in the State v. Doctor, 413 S.E.2d. 36. The judge insisted that contents of the Gambrell's interview do not exculpate Carver, nor were they clearly corroborated by evidence that indicates the trustworthiness of Gambrell's statement. With the new developments in this case, Carver could not have provided evidence that will corroborate the trustworthiness of Gambrell's testimonies because of the lies and conflicting statements that Curry perpetuated. (Amended Motion for New Trial, December 27, 2018, p. 329).

On January 3, 2019, Judge McIntosh issued an order denying Appellant's new trial motion. Judge McIntosh offered the following reasoning as basis for his denial:

> Defendant filed an Amended Motion for a New Trial on December 27, 2018. It is Ordered that the Defendant's Amended Motion for a New Trial is denied without the necessity of a formal hearing. The court finds that there was competent evidence admitted to sustain the jury's verdict of guilty and the court may not substitute its judgment for that of the jury. *State v. Tay lor,* 348 S.C. 152, 558 S.E.2d 917 (Ct.App. 2001).

Order Dismissing Defendant's Motion for New Trial, January 3, 2019.

Standard of Review

"'The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion.'" *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct.App.2011) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)). "If there is no evidence to support a conviction, [this court] should uphold an order granting a new trial." *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct.App.2002) (citing *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). "However, if competent evidence supports the jury's verdict, the trial [court] may not substitute [its] own judgment for that of the jury and overturn that verdict." *Id.* (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985)).

Analysis

a. The Evidence Presented Did Not Qualify As After-Discovered Evidence And Would Not Have Changed The Resulting Conviction

Appellant avers that the trial courts committed reversible error in denying his new trial motion. In the present appeal, Appellant submits "[a]ffidavits of Curry and Gambrell, as well as statements by witnesses in Gambrell's trial" as a basis for a new trial. Appellant further alleges that he could not have obtained this evidence during his trial because "they were either

intentionally omitted or were fabricated." Initial Brief of Appellant, p. 9. Despite the assertions made by Appellant, the evidence he offers do not qualify a new trial. A party requesting a new trial based on after-discovered evidence must show that the evidence (1) would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *State v. Caskey,* 273 S.C. 325, 329 256 S.E.2d 737, 738-39 (1979).

The first examples of "after-discovered" evidence offered in Appellant's Initial Brief consists of various examples of inconsistent testimony offered by co-conspirator Woodrow Curry. Specifically, Appellant contends that Curry provided differing testimony to that offered during Appellant's trial. Initial Brief of Appellant, pp. 9-14. Appellant offers the following inconsistencies as grounds for a new trial:

a. "[D]uring the trial for Appellant's case, Curry denied having named anyone as the shooter, insisting that it was him who shot Cameron. . . . However, in the Gambrell trial, Carver learned that Curry, [sic] initially tried to pin the shooting on Appellant. (Initial Brief of Appellant, pp. 9-10).
b. "[W]hen Curry was asked what he did after leaving [the victim's] house during Car's [sic] trial, Curry stated in a straightforward manner that they went back to Gambrell's house. . . . However, when the same question was asked at the Gambrell trial, Curry revealed, for the first time, that he called Gambrell on the way back to this house and told him of [the victim's] shooting." (Initial Brief of Appellant, p. 10).
c. "[A]t Appellant's trial, Curry testified that Gambrell instructed Appellant to drive Cameron to his house. . . . In his subsequent testimony at Gambrell's trial, Curry implied that Appellant voluntarily took Cameron home." (Initial Brief of Appellant, p. 11).
d. "Curry, implicated Appellant by testifying that he had a gun when they went to Cameron's house, only to deny the same in his subsequent testimony. . . . Gambrell confirmed that Carver did not have a gun on March 28 or 29, 2016. (Affidavit of James Milton Gambrell, November 30, 2018). Gambrell stated that the only time he saw Appellant with a gun was in 2015, one year prior to the shooting incident. At that time, Carver

was showing his brother's gun to Gambrell." (Initial Brief of Appellant, p. 12).

e. "[I]n recalling what transpired between him and [the victim], Curry testified that he only realized that he had a gun with him when Cameron came charging at him and that he had no choice but to shoot the latter. . . . In his testimony at Gambrell's trial, Curry testified that he pulled the gun to intimidate Cameron, who charged at him at that point. He pulled the gun prior to any exchange of words between him and Cameron." (Initial Brief of Appellant, pp. 13).

f. "[I]n Gambrell's trial, Curry testified that upon returning to Gambrell's house from Cameron's place, Carver went in to return the gun to Gambrell. Of course, this testimony conflicts with Curry's testimony that Carver had his own gun." (Initial Brief of Appellant, p. 15).

The trial court's denial of Appellant's new trial motion was appropriate because the inconsistencies cited by Appellant do not qualify as after-discovered evidence. Appellant was aware of any alleged inconsistencies at the time of trial because the was present during the circumstances to which Curry testified and Gambrell swore to. Therefore, he had knowledge of any alleged inconsistencies testified to during trial.

Evidence presented, which was known to the defendant at the time of his trial, cannot be considered "new evidence" for purposes of receiving a new trial. *See Hayden v. State*, 278 S.C. 610, 612, 299 S.E.2d 854, 855–56 (1983). Furthermore, while Appellant presents nefarious reasoning by the State for these differences in testimony[1], they are nonetheless insignificant to the outcome of Appellant's trial as they are immaterial to Appellant's guilt. At the most, Curry's testimony at Gambrell's trial is merely cumulative or impeaching. *See Caskey*, 273 S.C. at 330, 256 S.E.2d at 739 (denying new trial after finding "the alleged after-discovered evidence was at

[1] Appellant offers: "It is clear from the direct examination that the solicitor brought out Curry's alleged call to Gambrell to paint the picture of the consigliere calling the mob boss after he had done a dirty deed on his behalf." He further contends "Appellant believes that the purpose of Curry's new testimony was to eliminate any self-defense argument." Initial Brief of Appellant, p. 11-14.

most merely impeaching of [witness's] credibility and not material to appellant's guilt or innocence.").

The next examples Appellant cites in his brief is testimony offered during Gambrell's trial by Anderson County Detective Kreig Marzolf. Appellant offers that Detective Marzolf omitted statements made by the victim's neighbors. Specifically that a neighbor overheard the word "dirt bike" during the confrontation between the victim and Appellant and Carver.

> At Gambrell's trial, Detective Marzolf testified that during one of their neighborhood canvasses, one of his detectives talked to a neighbor who heard about an argument between Cameron and [sic] unidentified person wherein the word "dirt bike" was mentioned.
>
> [. . .]
>
> This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Appellant's trial. Appellant maintains that this should have been disclosed in the previous trial as this confirms what he previously asserted be believed why he was being sent back to get Cameron. The sale of the dirt bike reasoning shows Appellant's lack of criminal intent.

(Initial Brief of Appellant, pp. 18-19).

The trial court's denial of Appellant's new trial motion was proper in this regard as Law Enforcement's testimony at Gambrell's trial would not have changed the result of Appellant's prior conviction. To obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had . . .). *Clark v. State*, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993) (citing *Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)). While Appellant contends that this testimony regarding the "dirt bike" reflects on a lack of criminal intent, it would not change the outcome in a new trial. This testimony concerning statements made by the victim's neighbors could only be hearsay and possesses no exculpatory value. Because the victim had gone to Gambrell's home to sell a dirt bike on the day of the murder, the mention of "dirt bike" during the altercation is unsurprising and does not change the circumstances of the murder. *Caskey*, 273 S.C. at 329, 256 S.E.2d at 739 (holding that evidence

sufficient to grant a new trial must be such as would probably change the result if a new trial was had).

Appellant further seeks to impeach Law Enforcement testimony, alleging that Detective Marzolf had prior knowledge of the victim's violent tendencies. Specifically:

> Appellant's counsel asked Marzolf twice regarding Cameron's violent tendencies, which the officer denied having knowledge. (Carv. Trial R., p. 502, 20.25). However Marzolf had knowledge of Cameron's volatile behavior. He admitted that he had a supplemental report from Officer Scott Hill who interviewed a neighbor who recounted Cameron's violent behavior. Marzolf himself interviewed Cameron's siblings, Erica and Christopher. Erica told him of Cameron's history of domestic violence against his wife. (Marzolf's Supplementary Report, April 13, 2016).

(Initial Brief of Appellant, p. 19).

Appellant has not alleged that Law Enforcement committed violations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Instead, he simply alleges that Detective Marzolf's testimony was misleading. Dismissal by the trial court was proper in this regard as Appellant was clearly aware of the victim's aggressive tendencies during trial as Counsel questioned Law Enforcement and other witnesses on it. During Appellant's trial, Counsel extensively cross-examined Detective Marzolf with an incident and supplemental incident report that were provided with the State's discovery. R. p. 502, l. 20 – p. 504, l. 3; p. 511, l. 19 - p. 512, l. 9; p. 536, l. 2 – p. 539, l. 6. Additionally, Counsel examined the victim's neighbor who further testified to instances of aggression by the victim. R. p. 713, l. 17 – p. 715, l. 10. The trial record supports that Appellant was fully aware the victim's aggressive tendencies at the time of trial. Therefore, testimony substantiating this element of the victim's character cannot be presented as after-discovered evidence. *See Hayden*, at 612, 299 S.E.2d at 855–56 (denying new trial motion because evidence offered was clearly known by and available to respondent at trial). Further, the only value to be gleaned from this testimony would be purely for impeachment of Detective Marzolf and other

Law Enforcement. This is not sufficient to grant a new trial. *See Caskey,* at 329, 256 S.E.2d at 738-39. Lastly, this issue would not have changed Appellant's conviction. The victim's aggressive tendencies were presented to the jury during Appellant's trial and did not affect their determination.

Appellant continues his focus on Detective Marzolf in the next cited sub issue:

> As discussed in the previous section, Marzolf has shown no qualms in offering conflicting testimonies/statements. He testified [sic] not having knowledge of, nor even participated in, Curry's plea-bargaining deal.
>
> [. . .]
>
> Curry contradicted Marzolf's statement. In his sworn affidavit, Curry specifically stated that Marzolf and Solicitor Moore suggested to reduce his charge to voluntary manslaughter, if he plead guilty and implicated Appellant. (Affidavit of Woodrow Walter Curry, November 5, 2018). Curry exposed that it was Marzolf and the prosecutor's idea to reduce his charge.

(Initial Brief of Appellant, pp. 19-20).

Appellant's allegation is based purely on conjecture. Furthermore, it acts solely to impeach Detective Marzolf's testimony. *State v. Fowler*, 264 S.C. 149, 153, 213 S.E.2d 447, 449 (1975) ("The present testimony was therefore cumulative and impeaching. As such, it could not be after-discovered evidence."). Applying *Caskey* to the evidence offered by Appellant, it is clear that the lower court was well within is discretion in denying Appellant's new trial motion as the evidence failed to satisfy the necessary elements. *See generally State v. Wells*, 249 S.C. 249, 263, 153 S.E.2d 904 (1967) ("The trial judge has the power to weigh the credibility of newly discovered evidence offered in support of a motion for a new trial.").

b. State Acted Within Its Broad Discretion In Charging Appellant And His Fellow Accomplices.

Appellant next asserts that he is entitled to a new trial due to the State's misconduct in filing different charges against himself, Curry, and Gambrell. (Initial Brief of Appellant, p. 21). Respondent interprets the presented issue as claim of prosecutorial misconduct.[2] The trial court acted properly in dismissing Appellant's claim as the facts presented do not support such an allegation. "[A] defendant asserting prosecutorial misconduct carries a "heavy burden of proving that the ... prosecution 'could not be justified as a proper exercise of prosecutorial discretion." *U.S. v. Wilson*, 262 F.3d 305, 316 (4th Cir.2001) (internal quotations omitted). Additionally, a prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

In *United States v. Goodwin*, the U.S. Supreme Court held, "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *U.S. v. Goodwin*, 457 U.S. 368, 382 (1982). In *United States v. Esposito*, the Third Circuit Court of Appeal eloquently held, "[w]e will not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case is justified by the evidence and does not put the defendant twice in jeopardy. Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts

[2] "[O]ur supreme court has abolished the rule against inconsistent verdicts in this state." *State v. Mitchell*, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012) (citing *State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991).

of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace.... We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality." *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir.1992).

Nothing in the Record support's a claim of Prosecutorial Misconduct. Petitioner was indicted by the Anderson County Grand Jury for murder. *See* R. p. 442, l. 23 – p. 443, l. 2. He elected to proceed to trial. A jury of his peers found that the evidence presented at trial supported a conviction of murder under a "hand of one, hand of all" theory of accomplice liability. The road to Appellant's conviction was procedurally proper. Furthermore, the State acted within its broad discretion in charging Appellant with murder and pleading his accomplice to manslaughter. *See State v. Harry*, 420 S.C. 290, 297, 803 S.E.2d 272, 276 (2017 (affirming a petitioner's murder conviction under "hand of one, hand of all" theory of accomplice liability, despite the fact that codefendant shot the victim and later pled guilty to voluntary manslaughter). For these reasons the issue is without merit.

c. The State Was Not Required To Provide Appellant With Recordings Of The State's Alleged Plea Bargaining With Woodrow Curry

AND

d. The State Acted Within Its Discretion In Deferring Woodrow Curry's Sentencing

Appellant next faults the State for not providing him with video recordings of alleged bargaining between the State and Curry:

> First, according to the prosecution's star witness, Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording, or failed to make one, of the time they visited Curry to speak to him on his manslaughter deal. Appellant's counsel received two video interviews, but the Solicitor withheld (or conveniently did not make) the

> third. Appellant was not shown the video, or any other evidence, of what exactly the prosecution offered Curry. Curry maintained that Marzolf and Ms. Moore would reduce his charges to voluntary manslaughter, if he plead guilty and testified against Appellant. (Affidavit of Woodrow Curry, November 5, 2018).

(Initial Brief of Appellant, p. 22).

Appellant also cites Misconduct in the State's Deferment of Woodrow Curry's sentencing:

> [T]he State deferred Curry's sentencing for over a year, when the Order specifically stated that it would only be until after Appellant's trial. (Curry Plea-Bargaining Trial, p. 427, 2.6). However, the State liked the results of holding the anvil over Curry's head so much that they held off sentencing for another year; or, after Gambrell's trial.

(Initial Brief of Appellant, pp. 22-23).

"The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (citing *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994). "A defendant demonstrates a Confrontation Clause violation when he is prohibited from 'engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias ... from which jurors ... could draw inferences relating to the reliability of the witness.'" *Id.* (quoting *State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009)).

Appellant was aware of Woodrow Curry's plea during trial and made use of this knowledge to impeach Curry's testimony:

> Q. Did you remember when you pled guilty yesterday?
>
> A. Yes.
>
> Q. You don 't have a sentence yet; right?
>
> A. Right.
>
> Q. Right. Why not?
>
> A. They deferred sentence on me.
>
> Q. What' s that?

A. I said that they deferred sentencing.

Q. What are we waiting for? Is something going to happen?

A. No.

Q. Okay. You've been in trouble before.

A. (Affirmative nod).

Q: And you've been sentenced before?

A: (Affirmative nod).

Q. How many times have you had a deferred sentence before?

A. Not any. I never had.

Q. So you've never had a deferred sentence before this time?

A. No, I hadn't.

Q. You were part of that conversation, right?

A. I don't know what you mean.

Q. Well, this is different than anything that you'd experienced before.

A. Yeah.

Q. I want to know why.

A. I don't know.

R. p. 557, l. 1 – p. 558, l. 8.

Appellant is unable to show any error or prejudice. Appellant was aware Curry's plea and was permitted the opportunity to cross-examine the witness concerning bias

In regards to deferring Curry's sentence, a prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012). "The decision whether to offer a plea bargain is within the solicitor's discretion." *State v. Whipple*, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing *State v. Chisolm*, 312 S.C. 235, 439 S.E.2d 850 (1994)). "This Court is not empowered to infringe upon the exercise of this prosecutorial discretion." *Id.* (citation omitted).

In *State v. Wright*, our Supreme Court address whether the deferral of sentencing of codefendants until after an appellant's trial encouraged perjury and deprived appellant of due process of law. *State v. Wright*, 269 S.C. 414, 416, 237 S.E.2d 764, 766 (1977). In this regard, the Court held:

> An unsentenced codefendant is a competent witness for the State. *Taylor v. State*, 258 S.C. 369, 188 S.E.2d 850 (1972); *State v. Lewis*, 255 S.C. 466, 179 S.E.2d 616 (1971). Although these decisions did not consider the issue on Due Process grounds, it is exceedingly clear to us that appellant has failed to demonstrate a denial of his Due Process rights in the court's allowance of Lazarus' and Stanley's testimony before sentencing them. This ground is without merit.

Id., at 417, 237 S.E.2d at 766.[3]

Appellant is unable to show error by the trial court in dismissing his new trial motion as the State acted within its discretion in pleading Curry and deferring his sentence. Furthermore, Appellant was made aware of these actions prior to trial and was permitted meaningful cross-examination of the witness on the issues. Appellant's above claims are without merit and must be dismissed.

e. The Trial Court Properly Found That The State Did Not Intentionally Withhold Evidence From Appellant At Trial

Appellant raises issue with the fact that evidence was not timely turned over to his defense counsel during trial.

> The investigation on Appellant's case was completed April or May 2016. The State offered Appellant a copy of the discovery response in December 2016, which Appellant was unable to open. By the State's own admission, what they provided had been faulty.
>
> [. . .]

[3] *Cf., Missouri v. Frye*, 566 U.S. 134, 144, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992)) ("To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.").

> Appellant repeatedly requested the discovery materials, which included surveillance video which ran in excess of 36 hours. These materials have been in the State's possession since the first week of the investigation. Appellant was provided the materials a year after. Another set of materials which included an audio recording and three supplemental reports was provided by the State on August 9, 2017, or two (2) weeks prior to Appellant's trial. The State failed to give the defense the opportunity to review materials which it had for more than one (1) year.

(Initial Brief of Appellant, pp. 24-25).

"[W]here a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the nondisclosed evidence, or enter such order as it deems just under the circumstances." *State v. Kerr*, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (citing Rule 5(d)(2), SCRCrimP; *State v. Trotter*, 322 S.C. 537, 542, 473 S.E.2d 452, 458 (1996)). "Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.* (citing *State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992)).

The tape that Appellant cites to consists of audio from an interview with the victim's brother. R. p. 457, l. 25 – p. 458, l. 24. Appellant does not specifically state a Rule 5 / *Brady* violation. However, he does raise issue with the timeliness of the of particular discovery material. *See* SCRCrimP Rule 5(d)(2) (Time for Disclosure. The prosecution shall respond to the defendant's request for disclosure no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court.). "Rule 5(d)(2),2 as does its federal counterpart, FED.R.CRIM.P. 16(d)(2), gives the court a broad discretion in deciding what should be done where material that should have been produced in response to an earlier request does not become known until during or just before the trial." *State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991).

During the trial court's inquiry into the delay, the court determined that the delay resulted from Law Enforcement misplacing the particular piece of material. R. p. 461, l. 17 – p. 463, l. 11. While the trial judge in Appellant's case rebuked the State for failing to turn over the particular material in a timely manner, it determined that suppression was inappropriate under the circumstances. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 261 at 126 (1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion). The trial judge was well within his discretion in reaching this determination. The trial court determined that Appellant was in possession of the tape for two-weeks and have been allocated sufficient time to review it prior to trial. *See* R. p. 463, ll. 19-24 (Trial Court to Defense Counsel: "First, let me -- I'm giving them a hard time. You received it on the 9th, it is now the 22nd and you told me that you haven't listened to it. That's unacceptable as well. You have an obligation. So that cuts both ways."). In addition, the trial court adjourned court early on the day the discovery issue arose, in order to permit Defense Counsel additional time to review the cited material. *See* R. p. 465, l. 22 – p. 466, l. 1; *see also Patterson v. South Carolina*, 482 U.S. 902 (1987) (the State's failure to produce tape of interview with a prosecution witness until the morning of jury selection did not warrant a dismissal or a mistrial where the court allowed defense counsel to listen to the tape before the witness took the stand for direct examination and the court delayed cross-examination until the next day).

Lastly, Appellant asserts that the State "failed to disclose information and/or witness that may exculpate Appellant."Initial Brief of Appellant, p. 24. In support, Appellant offers that he was unable to open portions of the digital discovery provided by the State. *During a pretrial hearing*, Defense Counsel briefly commented that he had had trouble opening a video on his

computer. Counsel did not make any accusations of prosecutorial misconduct. The trial court instructed the parties to get together and facilitate Defense Counsel's access to the material. The State indicated that Counsel could review the material at their office, and affirmed that it had already offered Defense Counsel this opportunity. The trial court took notice of this during trial and moved on after both sides declined to take up further issue. R. p. 440, l. 24 – p. 441, l. 9.

It is a violation of a defendant's due process rights for the prosecution to withhold evidence favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution's obligation to turn over evidence favorable to the defense applies to both exculpatory and impeachment evidence. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). However, in *Anderson v. Leeke*, 271 S.C. 435, 438, 248 S.E.2d 120, 122 (1978), our Supreme Court held that the Brady rule "applies only to favorable evidence which the prosecution has but which is unavailable to the defendant."

In the present case, the digital material was provided to Appellant's Counsel prior to trial. While Appellant's Counsel cites difficulty in opening the file on his computer, the record wholly support that this material was nonetheless available to Appellant and his Counsel through due diligence. Accordingly, the access issue with the document does not constitute any violation by the State.

f. The State Did Not Commit Misconduct By Not Charging Appellant With "Kidnapping, Robbery, Attempted Assault

Lastly, Appellant cites misconduct in the State failure to charge Appellant with various other crimes:

> [T]he State charged Appellant with murder. He was indicted for said crime. Nowhere in his charge sheet was he charged with kidnapping, robbery, attempted assault or drug distribution, and yet the State included the aforesaid felonies during the trial. At most, Appellant was denied his right to be informed of what he was charged.

(Initial Brief of Appellant, p. 28).

What Appellant offers as "charges" constitutes the *res gestae* of the subsequent murder. "Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." *Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (citing *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)); *see also State v. Hough*, 325 S.C. 88, 480 S.E.2d 77 (1997) ("One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case"). When evidence is admissible to provide this "full presentation" of the offense, there is "no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." *State v. Sweat*, 362 S.C. 117, 133, 606 S.E.2d 508, 517. Without reference to Appellant and Curry's illegal conspiracy, the jury would not be able to discern the context of the victim's subsequent murder. The State's reference to the criminal conspiracy was necessary for a full presentation of the evidence to the jury. Moreover, the acts are not independent, prior acts. Rather they are part and parcel of the same series of events involving the same actors. The State did not commit misconduct by introducing these prior acts at trial. Of note, Appellant did not object to its admission.

II. The Trial Court Did Not Abuse Its Discretion In Instructing The Jury On "Hand Of One, Hand Of All" Where The Evidence Presented At Trial Supported That Appellant's Codefendant Murdered The Victim, Appellant Was Present, And Prior To The Murder Appellant And Codefendant Were Planning On Either Kidnapping Or Robbing The Victim As Redress For A Prior Drug Theft.

Issue Preservation

Appellant failed to preserve the above issue for appellate review, as he failed to offer any objection to the court's jury charge during trial. *See State v. Williams*, 303 S.C. 410, 411, 401

S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."). The trial court gave Appellant the opportunity to object at both the charge conference and at the conclusion of the jury charge. Appellant declined both times. R. p. 698; p. 737; *see State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) ("[A] defendant's failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal.").

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, appellate courts must consider the trial court's charge as a whole and in light of the evidence and issues presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." *Id.* at 90-91, 747 S.E.2d at 448. A charge that is substantially correct and covers the law does not require reversal. *Id.* "[I]f as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

Analysis

"The law to be charged is determined from the evidence presented at trial." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (citing *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000)). "A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. *Id.* If any evidence exists to support a charge, it should be given." *Id.,* (citing *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999)).

Under the "hand of one is the hand of all" theory of accomplice liability, a person who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Our Supreme Court has further held that "[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of a fact." *Barber v. State*, 393 S.C. 232,236, 712 S.E.2d 436,439 (2011). In *Barber*, four men committed an armed robbery and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 236, 712 S.E.2d at 438. Our Supreme Court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." *Id.* at 237, 712 S.E.2d at 439. Under this test, the Court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439; *see State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989) ("The law to be charged to the jury is to be determined by the evidence presented at trial.").

Here, the evidence presented at trial supported the inference that Appellant and his accomplices conspired to kidnap or rob the victim, leading to his murder. *See State v. Fleming*, 243 S.C. 265, 274,133 S.E.2d 800, 805 (1963) (holding the State need not show a formal expressed agreement to prove parties acted as accomplices, but may prove the agreement by circumstantial evidence and the conduct of the parties). The State presented testimony from

codefendant Woodrow Curry. Curry testified that after it was discovered that the victim had stolen drugs from James Gambrell, Gambrell instructed Curry and Appellant to go to Cameron's house and either get money, the drugs, or bring Cameron back. *See* R. p. 546, l. 20 – p. 547 l. 7; p. 567, ll. 3-7. Curry testified that Gambrell then provided Curry with two guns. *See* R. p. 547, l. 15 – p. 548, l. 7. Moreover, he stated that Appellant had his own gun prior to departing for the victims house. *See* R. p. 547, ll. 20-24. Curry also testified that Appellant drove to and from the murder scene and was present at the moment of the shooting. *See* R. p. 548, ll. 8-10; p. 549, ll. 11-15; p. 551, ll. 9-22. Curry's testimony is evidence that he, Gambrell, and Appellant were involved in a criminal scheme, to commit armed robbery and/or kidnapping, that went tragically wrong. *See State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (internal quotation omitted) ("Under the hand of one is the hand of all theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.").[4]

Finally, the trial court did not abuse its discretion in its instructions where the record shows the jury charge, as a whole, was correct. *See Logan*, 405 S.C. at90, 747 S.E.2d at 448 (holding appellate courts must consider the jury charge as a whole and in light of the evidence presented at trial when reviewing the instructions for error). The court instructed the jury at length on the law of the case, including the elements of the charged crimes, witness credibility and reasonable doubt. (R. p. 720, l. 4 – p. 730, l. 15). During the accomplice liability charge, the court also cautioned the jury that a defendant's mere presence at the scene was insufficient to

[4] Appellant asks this court to find error based solely on the credibility of Appellant's trial testimony, despite contradicting testimony from his codefendant. Initial Brief of Appellant, p. 30. However, "[t]he assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, at 464, 725 S.E.2d at 141.

prove he was guilty, reminding the jury that they must find the State demonstrated, beyond a reasonable doubt, that appellant actively participated in the crime. (R. p. 730, l. 16 – p. 733, l. 12). The record shows the jurors thoroughly and thoughtfully considered the entire charge, as they deliberated for close to two hours and requested that the judge repeat the instructions regarding "hand of one, hand of all." (R. p. 767, l. 12 – p. 774, l. 13). *See Logan*, 405 S.C. at 90-91, 747 S.E.2d at 448 (holding a jury charge is correct if, when read as a whole, it adequately covers the law, and such a charge does not require reversal). Therefore, the trial court did not err in charging the jury on accomplice liability as the evidence presented at trial supported the instruction.

III. The Trial Court Properly Denied Defendant's Motion For A Directed Verdict Because The Evidence Shows That Prior To The Murder, Appellant Was Knowingly Engaged In The Conspiracy To Rob Or Kidnap The Victim.

Standard of Review

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Bennett*, 415 S.C. 232, 235–36, 781 S.E.2d 352, 353–54 (2016) (quoting *State v. Butler,* 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *Id.* (citing *State v. Cherry,* 361 S.C. 588, 593, 606 S.E.2d 475, 478–79 (2004)). "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Id.* 415 S.C. at 236, 781 S.E.2d at 354. However, "[u]nless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

Analysis

Appellant argues the trial court erred in denying his motion for a directed verdict because the State failed to present evidence which reasonably tended to prove his guilt. However, the record in the present case supports the trial judge's denial of Appellant's directed verdict motion because the State presented direct evidence supporting Appellant's guilt.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Cherry*, at 593, 606 S.E.2d at 477–78. "If the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, the case must go to the jury." *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999) (citing *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254 (1993)).

In the similar case of *State v. Harry*, the appellant appealed his murder conviction under the "hand of one, hand of all" theory of accomplice liability. He argued the circuit court erred in denying his motion for directed verdict, as the State failed to present any direct or substantial circumstantial evidence he acted in concert with his codefendant who had admitted shooting the victim. *State v. Harry*, 420 S.C. 290, 803 S.E.2d 272 (2017). In the Order of Dismissal, our Supreme Court set forth the following:

> This tragic story culminates with an attempt by Petitioner and his enlisted cohorts to retrieve Petitioner's forty-seven-inch plasma-screen television from Kevin Bowens (Victim). Victim was shot and killed on his property by one of Petitioner's accomplices during the confrontation. The State contends the evidence demonstrates that Petitioner intended to retrieve his television by any means necessary, including the use of force. According to the State, Victim's death was therefore a natural and foreseeable consequence of Petitioner's plan to retrieve his television and, under the theory of accomplice liability that says the hand of one is the hand of all, Petitioner is guilty of murder. Petitioner counters that he only wanted to peacefully reclaim his television, he had no idea his accomplice was armed, and he actually tried to be a calming influence when the situation became tense. In light of the differing inferences that may be drawn from the evidence, we emphasize that because we are reviewing a directed verdict

> motion, we are required to " 'view[ ] the evidence and all reasonable inferences in the light most favorable to the State.' " *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)).

Harry, at 293, 803 S.E.2d at 273.

To withstand Appellant's directed verdict motion in the trial of this case, the State was required to produce evidence of Appellant's presence at the scene of the shooting as a result of a prior arranged plan to undertake an illegal act. The gist of Appellant's argument that he was entitled to a directed verdict harkens back to his argument regarding the jury charge: Appellant believes there is insufficient evidence to show he and his co-defendant were acting in concert. As explained in the first issue above, evidence was presented to show that they did in fact act in concert. The State presented the testimony of Appellant's codefendant Woodrow Curry to prove that Appellant participated in the criminal scheme to rob and/or kidnap Steven Cameron. Furthermore, during Gambrell's interview with Law Enforcement, he specified that he told Curry and Carver to go let Cameron know that they were aware he had stolen the drugs and that he needed to pay. R. 3: James-Milton-Gambrell-Second Interview- DVD: 12:30-16:40; 1 8:20-19:1 0. Furthermore, Gambrell stated that Appellant did not like the victim. R. 3: James-Milton-Gambrell-Second Interview-DVD: 41:32-41:40 .Appellant has cited the proper standard of review, but rejects it in application, preferring instead to recast the evidence in a light favorable to him. *See Harry*, at 299, 803 S.E.2d at 277. Despite this, the record clearly shows that State presented evidence sufficient to overcome the nominal burden of a directed verdict.

Lastly, Appellant repeatedly asks this Court to accept the credibility of his trial testimony over that of his codefendant's. *See State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("[O]ur duty is not to weigh the plausibility of the parties' competing explanations.").

This Court should refrain from Appellant's invitation to act as a thirteenth juror and usurp the jury's role in weighing the evidence. *See United States v. Ashley*, 606 F.3d 135, 141 (4th Cir. 2010) (internal citation omitted) ("Though a jury may not convict on the basis of 'rank speculation,' it is entitled to deduce and to infer. . . . Our system of lay juries is designed to allow jurors to draw upon common experience and to rely upon reasonable intuitions, and it is not the province of an appellate court to undermine these virtues by picking apart a properly instructed verdict.").

IV. Appellant's Trial And Subsequent Conviction Satisfied Sixth Amendment And Due Process Requirements.

Appellant raises several perceived injustices by the trial court, and asserts that these resulted in violations of his Sixth Amendment and Due Process Rights. In support, Appellant presents a ten page argument, citing very little authority. Appellant's argument is largely conclusory. *See State v. Tyndall*, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (conclusory arguments constitute an abandonment of the issue on appeal.); *State v. Colf*, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) (issue is deemed abandoned if argument in brief is merely conclusory); *State v. Black*, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995) (a conclusory argument of an issue by appellant amounts to an abandonment of the issue). Nevertheless, careful review of the record reflects that the trial court maintained its role as judicial administrator and neutral arbiter in every issue raised by Appellant. Below, Respondent has addressed Appellant's sub-issues as presented in his Initial Brief of Appellant

a. "The Court denied Appellant his right to be informed of the charges against him."

Issue Preservation

Should this court determine that in presenting the above issue, Appellant seeks to attack the sufficiency of the indictment, this issue is not preserved for review. "A challenge to the

indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "Because appellant did not raise the sufficiency of the indictments before the jury was sworn, he cannot now raise this issue on appeal." *Id.* The issue is not preserved for review.

Analysis

Appellant offers that his right to due process was violated by the State not presenting the "underlying offenses" of kidnapping and robbery prior to trial. Initial Brief of Appellant, p. 43. Appellant contend that the court committed error in "allowing the State to argue using these terms that were not part of the charge."

Fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S.C. Code § 17–19–20 (1976); *see also State v. Hiott*, 276 S.C. 72, 81, 276 S.E.2d 163, 167 (1981). "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." *State v. Baker*, 411 S.C. 583, 589, 769 S.E.2d 860, 864 (2015) (quoting *State v. Tumbleston*, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." *Id.*, (quoting *State v. Wade*, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

Appellant was duly indicted for the murder of Steven Cameron. Appellant was not charged with any other crime. The indictment stated with sufficiency the crime charge, the victim, the location, and the narrow period to time in which the crime occurred. *See* R. 1: Indictment. Given the sufficiency and circumstances, it would be unreasonable to believe

Appellant was caught by surprise. The indictment for murder was sufficient to give Appellant proper notice.

Moreover, the State proceeded on a theory of "hand of one is the hand of all" theory. "Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002). Accordingly, it was the States burden, under this theory, to prove that Appellant joined with Curry to accomplish an illegal purpose. At trial, the State maintained its burden by establishing that Appellant and Curry conspired to kidnap and/or rob the victim prior to the murder.

Lastly, the conspiracy entered into between Appellant and Curry constitutes the *res gestae* of the murder. "The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Preslar*, 364 S.C. 466, 473–74, 613 S.E.2d 381, 385 (Ct. App. 2005) (citations omitted). "When evidence is admissible to provide this "full presentation" of the offense, there is 'no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.'" *Id.* (quoting *State v. Sweat*, 362 S.C. 117, 133, 606 S.E.2d 508, 517 (Ct.App.2004)). In order for the jury to fully understand why the victim was murdered, the jury had to understand the illegal conspiracy which Appellant and Curry had endeavored. Consequently, the trial court did not abuse its discretion in admitting the evidence that Appellant and Curry had conspired to rob and kidnap the victim immediately prior to his murder. Further, Appellant did not object to its admission.

b. "The trial judge erred in refusing to let Gambrell take the witness stand."

How the Issus Arose at Trial

At trial, Appellant sought to call codefendant James Gambrell as a witness. Gambrell was present and represented by defense counsel. The trial court indicated that, after discussion with Gambrell and his counsel, it was the court's understanding that Gambrell would be invoking his Fifth Amendment Right. (R. p. 595, ll. 3-9). However, the trial court held an in camera examination to confirm. The trial court began by informing Gambrell of his Fifth Amendment Right. (R. p. 596, l. 7 – p. 599, l. 21). Afterwards, Gambrell's defense counsel then testified that he anticipated that his client to invoke his Fifth Amendment Right. (R. p. 597, l. 22 – p. 598, l. 13). Defense Counsel then proceeded to examine Gambrell in camera. (R. p. 598, ll. 14-18). Gambrell answered several preliminary questions. (R. p. 598, l. 24 – p. 605, l. 6). Once testimony began crossing into the realm of culpability, Gambrell's defense counsel objected and reiterated his advice to his client to invoke the Fifth Amendment. (R. p. 605, ll. 7-20). Gambrell expressed some confusion to his attorney's suggestion, whereupon the trial court again explained the Fifth Amendment and cautioned the witness that he risked incriminating himself if he chose the testify further. (R. p. 605, l. 24 – p. 608, l. 17). The court then allowed the witness additional time to speak with his counsel. (R. p. 439, ll. 19-25). Thereafter, Gambrell elected to exercise his Fifth Amendment Right and to cease testifying. (R. p. 609, ll. 1-9). At this point the trial court released Gambrell. (R. p. 609, ll. 10-12). Thereafter, Appellant requested that the trial court require Gambrell to invoke the Fifth Amendment on the stand in front of the jury. (R. p. 707, ll. 2-5). The trial court quickly denied the request. (R. p. 708, ll. 10-12).

Standard of Review

"The Constitution of the United States guarantees a criminal defendant certain fundamental rights." *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008)

(citing U.S. Const. amend. VI). "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Gillian*, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct. App. 2004).

However, "[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973). "The right to present a defense is not unlimited, but must bow to accommodate other legitimate interests in the criminal trial process." *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). "'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). "Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *Lyles*, 379 S.C. at 343, 665 S.E.2d at 208 (citing *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594).

Analysis

Appellant insists that the trial court's refusal to require Gambrell to assert his privilege against self-incrimination before the jury denied him of Sixth Amendment right. While the Sixth Amendment permits broad protection in Appellant's ability to present a defense, it does not

permit him the ability to ignore well established state evidentiary rules or to ignore the Constitutional rights afford to other defendants.

Similar to Appellant's case, in *State v. Hughes* the trial court denied the petitioner's motion to compel a witness to assert his Fifth Amendment right before the jury. At Hughes' trial for murder, defense counsel sought to call the petitioner's codefendant as an adverse witness. The solicitor advised that the codefendant would not testify for the state and was planning to assert his Fifth Amendment privilege against self-incrimination. The codefendant asserted the privilege during an in camera hearing. The trial court ruled that the codefendant was "unavailable" to testify such that cross-examination before the jury was inappropriate. The trial court held that the petitioner was not permitted to call his codefendant to the stand for the purpose of requiring him to assert his Fifth Amendment privilege. *State v. Hughes*, 328 S.C. 146, 149, 493 S.E.2d 821, 822 (1997)

On review, the Supreme Court of South Carolina modified its prior holdings regarding the issue and held, "[i]t is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation." *Id.*, at 150, 493 S.E.2d at 823. Moreover, "it has been recognized that neither the [S]tate nor the defendant should be allowed to call witnesses who either side knows will invoke the Fifth Amendment in front of the jury and then be subject to inferences in a form not subject to cross-examination." *Id.* at 152, 493 S.E.2d at 823. The *Hughes* Court concluded that, thereafter, a witness may not be called solely for the sake of invoking his or her Fifth Amendment privilege against self-incrimination. *Id.* at 152–53, 493 S.E.2d at 824; *see Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely-tuned review of the wisdom of

state evidentiary rules[.]"); *Spencer v. Texas*, 385 U.S. 554, 563–564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967) (While the Due Process clause guarantees "the fundamental elements of fairness in a criminal trial", the United States Supreme Court is not "a rule-making organ for the promulgation of state rules of criminal procedure.").

Case law reflects that the trial court's actions regarding defense witness's invocation of his Fifth Amendment rights adhered to the juris prudence set forth by this State's highest Court. Therefore, any issue raised by Appellant, in this regard, is without merit.

c. "Appellant was denied a meaningful defense when the Court refused his motion for continuance to present his witness."

How the Issue Arose at Trial

After the Trial Court denied Appellant's request to examine Gambrell, after Gambrell invoked his Fifth Amendment rights, Appellant then sought to introduce into evidence Gambrell's interview with Law Enforcement. (R. p. 610, l. 15 - p. 611, l. 10). After watching and analyzing the case under *State v. Doctor*, 306 S.C. 527, 413 S.E.2d 36 (1992) (holding "out-of-court statements against penal interest by unavailable declarant are admissible in civil and criminal trials; however, if offered to exculpate accused in criminal trial, they are admissible only if corroborating evidence clearly indicates trustworthiness of statement."), the Trial Court denied Appellant's request, concluding that the video did not exculpate but only impeached Appellant's codefendant, Woodrow Curry. (R. p. 613, l. 7- p. 620, l. 16). The entirety of this communication took place outside the purview of the jury. (R. p. 613, ll. 2-5).

Afterward, Defense Counsel then sought to recall one of the investigating detectives regarding potentially impeaching material gleaned from Gambrell's interview. (R. p. 621, ll. 15-16). The Trial Court again denied after noting that Defense Counsel had been in possession of the Gambrell interview well before trial and should have presented that line of questioning

during his extensive and lengthy cross-examination of Detective Marzolf. (R. p. 622, l. 8 – p. 623, l. 16; p. 495, l. 18 – p. 540, l. 22). The entirety of this communication took place outside the purview of the jury. (R. p. 624, ll. 14-15).

At the conclusion of day four, the Defense had several witnesses who had not been located, despite bench warrants being issued. (R. p. 696, ll. 13 – p. 697, l. 6). Despite having already rested, the Trial Court permitted Appellant and Counsel another day to locate the witness. (R. p. 697, ll. 13-20). Thereafter, at the advice of the trial court, Appellant renewed his objection regarding the trial court's denial of the Gambrell law enforcement interview. (R. p. 700, l. 23 – p. 701, l. 4 – p. 702, l. 5). After putting on the Record that it did not find that the statement exculpated Appellant as required by *State v. Doctor*, *supra*, the Trial Court indicated that it would reconsider the issue overnight. Immediately thereafter, the State interjected that it did not have an issue with the Defense introducing Gambrell's interview with Law Enforcement. (R. p. 703, ll. 18-23) (SOLICITOR MOORE: "Your Honor, if Mr. Smith wishes to put into the record another person who says that his defendant knew that they were going to get drugs or money from Steven Cameron, then I agree we need to let him do that."). The entirety of this communication took place outside the purview of the jury. (R. p. 696, l. 12).

On the morning of the fifth day of trial, Defense Counsel indicated that one of the missing witnesses had been located. (R. p. 706, l. 9 – p. 707, l. 1). In response, the Trial Court stated the following:

> THE COURT: Okay. So it would seem to me that the best thing to do is just to tell the jury that some things developed after the case was closed and it is being reopened for that purpose. Also we will allow the playing of the videotape and also additional testimony of one witness and then go to the next phase. Does anybody have a problem with that?

(R. p. 706, ll. 16-24).

Defense then requested that Gambrell be required to plead the Fifth on the witness stand, in front of the jury. (R. p. 707, ll. 7-10). This request was denied. (R. p. 708, ll. 10-12). Defense then requested a continuance so that the other two witnesses could be located. (R. p. 708, ll. 16-21). When asked by the court about the substance of the missing witnesses' testimony, the following communication took place:

> MR. SMITH: They would testify to - - what I know they would testify to is things related to that bike, things related to Mr. Cameron,
>
> THE COURT: Things related to what?
>
> MR. SMITH: To the bike, the dirt bike. The bike that was sold.
>
> THE COURT: What would that have to do with the guilt or nonguilt of your client?
>
> MR. SMITH: Basically that Mr. Cameron was there, everybody had a good relationship, the vehicle--the bike was sold. I'm not sure if the monies were transferred. And Mr. Quay Gambrell, uh, is the one that was dealing with Mr. Cameron. He is the one that sold--Mr. Cameron sold him the bike. I don't know what Mr. Gambrell gave him in exchange for the bike. I don't know if it was the cocaine that we are talking about. I'm not sure. In order to exhaust my client's defenses, I need those people to testify.
>
> THE COURT: At most what I am hearing you say that you could elicit from these witnesses, other than the circumstances of this collateral issue of the sale of the bike, that there was an amicable relationship between everybody out there. Right?
>
> MR. SMITH: That Quay and the other gentleman under subpoena, they were originally going to get Mr. Cameron and then they didn't go get Mr. Carver. This could all be elicited while they are on the stand. It's imperative that the jury see all of these things because of what my client is charged with.
>
> THE COURT: And the other witness, you'll elicit the same information?
>
> MR. SMITH: He was the one that knew how to ride the bike and was part of the sale by Mr. Cameron.
>
> THE COURT: All right. I'm going to deny your Motion.

(R. p. 708, l. 24 – p. 710, l. 15). The entirety of this communication took place outside the purview of the jury. (R. p. 711, l. 14).

Thereafter, the jury was brought in and the law enforcement interview with Gambrell was played. (R. p. 712, ll. 12-16).

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial court. *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). Specifically, a motion for continuance based upon the absence of a witness is addressed to the sound discretion of the trial judge. *State v. Bradley*, 263 S.C. 223, 209 S.E.2d 435 (1974). These types of rulings will not be disturbed absent an abuse of discretion. *Saltz*, *supra*; *Bradley*, *supra.*

Analysis

Appellant asserts that he was denied a meaningful defense to present witnesses that would exculpate him. First, addressing the issue of the recorded law enforcement interview with Gambrell, the record supports the Trial Court's initial denial to admit it. Under *State v. Doctor*, "out-of-court statements made by an unavailable declarant that are offered to exculpate the accused in a criminal trial, are admissible only if corroborating evidence clearly indicates the trustworthiness of the statement." *Doctor*, 306 S.C. at, 529, 413 S.E.2d at 38 (applying SCRE 804(b)(3)). The Trial Court was correct in concluding that there was no other evidence in the record that could corroborate the trustworthiness of Gambrell's statement to law enforcement by as required by *Doctor*. *See* R. p. 619, l. 20 – p. 620, l. 16. Gambrell had incentive to lie, as he was facing significant charges in relation to Cameron's murder. *See* R. p. 619, ll. 23-25; R. 3: James-Milton-Gambrell-Second Interview-DVD. Furthermore, as the trial court indicated, nothing in the interview exculpated Appellant. *See* R. p. 616, l. 18 – p. 619, l. 19. During the interview, Gambrell confirmed that Appellant was aware of why he was to retrieve the victim. R.

3: James-Milton-Gambrell-Second Interview-DVD: 12:30-16:40; 18:20-19:10. Gambrell also indicated that Appellant did not like the victim. R. 3: James-Milton-Gambrell-Second Interview-DVD: 41:32-41:40. If anything, the interview further established Petitioner's complicity in the criminal scheme.

Despite being within the court's discretion to deny the admitting the record interview, it eventually permitted Appellant to play it to the jury without objection. *See* R. p. 703, l. 18 – p. 704, l. 14; p. 707, ll. 21-24; p. 712, l. 16. Therefore, any initial error was rendered harmless by the trial court's own actions.

Second, addressing the trial court's refusal to allow for continuance for the defense to locate its missing witness, Appellant's issue is without merit. This court, along with the Supreme Court of South Carolina has repeatedly set out that "[r]eversals of refusal of a continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957)). More specifically, "[w]here there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996). No new or novel points would have been raised had Appellant been permitted time to locate witness Quay Gambrell. Defense Counsel's statements to the court indicated that Quay's testimony was merely cumulative to evidence already admitted. *See* R. p. 708, l. 24 – p. 710, l. 15; Initial Brief of Appellant, p. 18. Defense had already presented testimony from Carver, Curry, and Gambrell in which they discuss in detail the victim's sale of the dirt bike to Quay Gambrell. *See* R. p. 545, ll. 2-15; p. 562, l. 16 – 563, l. 13; p. 579, ll. 11-16; p. 600, l. 18 –

p. 601, l. 16; p. 633, l. 15 – 638, l. 10; p. 644, ll. 10-16; R. 3: James-Milton-Gambrell-Second Interview-DVD.

Lastly, in regards to Appellant's attempts to recall Detective Marzolf, the trial court's denial of the request was the proper decision. Appellant asserts his reason for recalling Marzolf was "[a]ccording to Detective Marzolf [sic] testimony, Curry disclosed to him that Gambrell gave him the guns, which run counter against Gambrell's statement that Curry took the gun without his permission. Appellant intended to clarify the disparity in the testimonies." Initial Brief of Appellant, p. 46.[5] Yet, Curry actually testified *at trial* that Gambrell had given him the guns. R. p. 555, l. 11 – p. 556, l. 20.[6] Thereafter, Gambrell's interview with law enforcement was presented to the jury. During the interview he alleges that Curry stole the guns. Accordingly, the testimony Appellant sought to extract by recalling Marzolf was already clearly presented to the jury. Therefore, the Trial Court did not abuse its discretion in denying Appellant's recall request.

d. "The trial judge's actions in the presence of the jury suggested lack of neutrality."

Standard of Review

The Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. *Christy v. Christy*, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433

[5] Appellant also contends that the Trial Court was in error in denying his request to recall Sheila Curry, however, Appellant fails to provide any explanation in his brief as to what additional testimony Sheila Curry could have offered. *See* Initial Brief of Appellant, p. 46.

[6] Curry further testified that Appellant had his own gun when they went to the victim's house on the night of the murder. R. p. 569, ll. 6-9.

S.E.2d 856 (1993). It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000)

Analysis

Appellant's contends that the trial court's actions suggest an outcome or lack of neutrality *to the jury*. However, every single transcript quote Appellant has cited in support of this allegation was made outside the presence of the jury, during discussions of legal matters necessary to affect a fair proceeding. *See* R. p. 696, l. 12; p. 610, l. 13; p. 613, ll. 3-5; p. 718, l. 4; p. 777, l. 1.

In addition, Appellant cites to the trial court's statement found at Trial R. p. 718-719. However, these statements by the trial court, away from the jury, were made immediately after Appellant's motion for a directed verdict. R. p. 718, ll. 10-14 ("Mr. Smith: I move for a directed verdict on the [sic] based on the fact that Mr. Carver is not party of any conspiracy, did not have knowledge that a crime was going to be commited."). While Appellant takes issue to the trial court's statements, the Record would reflect that they were simply offered as support for the court's decision in regards to the directed verdict motion.

Lastly, Appellant takes issue with the judge's statement during sentencing. "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing *Wasman v. United States*, 468

U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)). "It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come." *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (citing *U.S. v. Magliano*, 336 F.2d 817 (4th Cir. 1964); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). The judge's statements during sentencing articulated the Court's reasoning for the sentence imposed and conformed to the evidence presented at trial. *See* R. p. 776, l. 9 – p. 786, l. 12.[7] Respondent contends that the judge was professional and maintained his role as neutral arbiter, despite presiding over a contentious trial plagued with delays. Appellant's claim of judicial bias is without merit.

e. "On the issue of video with the missing two-hour [sic]"

In regards to the missing two-hour, this issues contradicts the Defense's entire theory at trial. Appellant's entire defense at trial was based on mere presence. *See* R. p. 445, l. 10 – p. 450, l. 9 (Opening Statement by Defense). He never wavered from the fact that he was present at the scene when Curry shot the victim. Despite this, Appellant now appears to assert a third-party defense on appeal. In *State v. Gregory* the South Carolina Supreme Court held that a defendant seeking to present evidence of third party guilt must meet a heightened standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941)

The *Gregory* court furthered:

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[7] Of note, the trial court sentenced Appellant to the minimum 30-years for the murder conviction. R. p. 786, ll. 5-10.

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535 (citing 20 Am. Jur. 254).

The only support for the current issue is a vague surveillance footage of a women showing up to Appellant's home hours after the murder occurred. R. p. 491, l. 19 – p. 493, l. 12. Appellant's belated third-party defense argument is unsupported by the evidence presented at trial and falls far short of the heightened standard required by *Gregory*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

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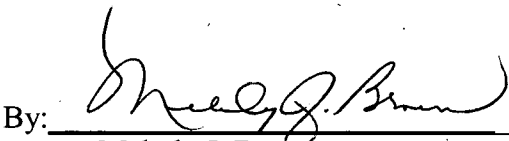
By: 
Melody J. Brown

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

October 28, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County
The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

CERTIFICATE OF COMPLIANCE

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

This 28th day of October, 2019.

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ATTORNEY FOR RESPONDENT