THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Dorchester County
Hon. Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2020-000095
Lower Court Case No. 2016A1810300547

The State ..... Respondent,

vs

Keunte Cobbs, ... Appellant

INITIAL BRIEF OF APPELLANT

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Question II: Did the trial court err in failing to dismiss the charges based upon the speedy trial provision of Article I § 14 of the Constitution of the State of South Carolina and the Sixth Amendment to the United States Constitution when the two year delay in the first trial and the eighteen month delay in the second trial were attributable to the State not being prepared to try the case?

Statement of the Case

Keunte Cobbs was arrested and charged with murder on June 27, 2016 for a shooting that occurred on June 5, 2016. He filed a motion for a speedy trial on December 18, 2017 and again on June 18, 2018. After the first speedy trial motion, the case was ordered to be tried in January of 2018. When the case was not tried, bond was set at $400,000 and a new speedy trial motion was filed and heard on June 18, 2018.

A trial was held on August 20-23, 2018. At this trial, Mr. Cobbs was convicted of assault and battery of a high and aggravated nature. The jury was unable to reach a verdict on the charge of murder.

The State re-tried the murder charge on January 6-9, 2020. At this trial, the jury convicted Mr. Cobbs of voluntary manslaughter. He was sentenced to 30 years in prison. Mr. Cobbs filed his Notice of Appeal on January 17, 2020.

Standard of Review

As the trial Court erred as a matter of law in failing to direct a verdict, the standard of review should be de novo. While no South Carolina case specifically so holds, other states have recognized the standard of review as de novo. "We hold review of a grant of a directed verdict is, in fact, de novo." *City of Mattoon v. Mentzer*, 282 Ill. App. 3d 628, 633, 668 N.E.2d 601, 604 (1996).

As to the issue of a denial of a speedy trial, the standard of review is abuse of discretion. "The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. . . . An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support." *State v. Hunsberger*, 418 S.C. 335, 342, 794 S.E.2d 368, 371–72 (2016)(internal citations omitted)

Argument

Question I

Did the trial court err in failing to direct a verdict in favor of Keunte Cobbs when the State failed to prove substantial circumstantial evidence of either malice aforethought or sudden heat or passion based upon sufficient legal provocation nor did they disprove a element of self-defense?

The trial court applied an incorrect standard in ruling upon the motion for a directed verdict

The trial judge twice denied the motion for directed verdict. At the conclusion of the trial, the judge stated, "And, again, the question is, for me - - is there evidence on each and every element, and there is. I don't weigh it. I just have to ascertain if it exists. It does." Rec, at 537, ll 2-5. In her ruling, she decided the motion on the existence of any evidence and not on whether substantial circumstantial evidence exists. The appellate courts in our state have long held that if the case is based upon circumstantial evidence, the evidence must be substantial. *State v. Mitchell,* 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998); *State v. Hernandez,* 382 S.C. 620, 677 S.E.2nd 677 S.E.2d 603 (2009).

Simply looking as to whether there is the existence of evidence on each element is applying a scintilla of evidence standard. The United States Supreme Court specifically rejected the scintilla standard in *Jackson v. Virginia,* 443 U.S. 307 (1979). As the Court said, "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, . . . could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. *Jackson* establishes a

federal constitutional floor below which no state may go. An "any evidence" standard of review is below that floor. The trial court did not apply the correct standard.

The trial court also incorrectly stated as to the evidence, " I don't weigh it." This is simply not correct. Our Supreme Court has said on more than one occasion, "In ruling on a motion for a directed verdict, a trial judge is concerned only with the existence of evidence, not with its weight." *State v. Venters*, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). In the same opinion the Court stated, "In reviewing a denial of a motion for a directed verdict, the evidence must be reviewed in the light most favorable to the State and if there is any direct or any substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, we must find that such issues were properly to be decided by the jury." *Id.* at 264, 387 S.E.2d at 272–73. The Court did not explain, nor has the Court since explained, how a trial judge determines if the circumstantial rises from the level of a scintilla of circumstantial evidence to substantial circumstantial evidence without weighing the circumstantial evidence. Even concluding the direct evidence is more than a "modicum" would require a trial judge to weigh the evidence.

As the trial judge applied an improper standard, this Court is not bound by any factual determinations the trial court made. This issue should be reviewed de novo.

Even if the trial court had applied a proper standard, this Court should still review the evidence de novo. In ruling on a motion for directed verdict, the court is ruling that as a matter of law, the State has or has not produced sufficient evidence to sustain a conviction. As the lower court ruled on a matter of law, the standard of review should be de novo. This court considers the evidence in the same manner as the trial court. The evidence is viewed in the light

most favorable to the State. Neither the lower court, nor this court should consider credibility.[1] As to self-defense, the South Carolina Supreme Court has said, "While the State must present evidence to support the existence of each element of the crime charged, the State is under no burden to produce evidence to refute the existence of self-defense. However, if there is some evidence to support each element of self-defense—whether found in the State's presentation of evidence or produced by the defendant—it becomes the State's burden to persuade the jury beyond a reasonable doubt that at least one element of the defense does not exist." *State v. Williams*, 427 S.C. 246, 249–50, 830 S.E.2d 904, 906 (2019). This case must be analyzed to determine if the State has offered sufficient evidence to negate one of the required elements of self-defense.

The State failed to negate an element of self-defense

In this case, Keunte Cobbs testified and contended he was confronted by two armed men in the small confines of the men's restroom of an IHOP restaurant in Dorchester County. Rec. at 504, l 20 to 507, l24. One person was wounded. The other died several days later in the hospital. The surviving person did not testify nor did he make any statements to law enforcement at the time of the shooting or while he was in the hospital. Lt. Dwayne Peters with the Dorchester County Sheriff's office testified Bradford Spells, the survivor, has a reputation in the community for violent and criminal behavior. Rec. at 521, l 12-22. Mr. Cobbs also testified he knew the reputation of Mr. Spells for violence. Rec. 495, l 18 to 497, l 2. The undisputed fact in this case is both individuals had a bad reputation for violence. The State offered no evidence to refute this

[1] Of course if the testimony is so incredible that no reasonable juror could believe it a trial court and this Court should not hesitate to disregard it.

conclusion.

This case should be decided by the principles set forth in *State v. Dickey,* 394 S.C. 491, 716 S.E.2d 97 (2011). In that case the Court found the State had failed to negate self-defense when the defendant raised a plausible case of self-defense. The Court first noted the essential elements of self-defense:

> A person is justified in using deadly force in self-defense when:
> (1) The defendant was without fault in bringing on the difficulty;
> (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.
> *Id.* at 499, 716 S.E.2d at 101.

In this case the State has failed to negate any of these factors.

The Defendant was without Difficulty in Bring on the Difficulties

The facts in this case show that Mr. Cobbs first entered the restroom alone. He was followed within seconds by two men both of whom were armed. The facts establish that neither man first seated himself in the restaurant before heading to the restroom. They entered and both went to the restroom. Under these facts, Mr. Cobbs did nothing to bring on the difficulty. The State offered no proof that Mr. Cobbs did any act or made any comment that brought on the difficulty. Thus, no credibility issue exists for the jury to decide on this element. The State failed to negate this element.

The Defendant Actually Believed he was in Imminent Danger of Losing his Life or Sustaining Serious Bodily Injury, or he Actually was in Such Imminent Danger

The fact is also undisputed that both men who entered the restroom behind Mr. Cobbs were armed with pistols. Mr. Cobbs testified he observed the pistols before he started shooting. Rec. at 506, ll 17-19. As our Supreme Court has said. "The accused has a right to rely upon his belief in the necessity, provided that the circumstances in which he was placed were such as would, in the opinion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason." *State v. Blackstone*, 157 S.C. 278, 154 S.E. 161, 161 (1930). The State cannot over come its burden by suggesting that Mr. Cobbs did not actually see a firearm. "Fuller was entitled to a charge that the jury could find that Fuller could act on appearances because he testified that he saw Dixon and Phillips open the trunk of their car and also thought he saw a shiny object in Dixon's hand." *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989). In addition to the above testimony, the evidence is undisputed that both individuals who were shot had reputations for being violent people. Here, the State has failed in its obligation to prove that Mr. Cobbs improperly believed he was in danger of losing his life or serious bodily injury.

A Reasonable Prudent Man of Ordinary Firmness and Courage Would have Entertained the Belief he was in Danger of Losing his Life or Serious Bodily Injury

The State has to prove that Mr. Cobbs acted unreasonably when he perceived two armed men in the restroom both of whom had reputations for violence. The State offered no such evidence. As a matter of law, any person of ordinary firmness and courage would be fearful of two armed men, known to be violent, when confronted by them in the small confines of a

restroom of a restaurant. The State has offered no evidence this belief by Mr. Cobbs was not reasonable.

The Defendant had no Other Probable Means of Avoiding the Danger of Losing his own Life or Sustaining Serious Bodily Injury

The State could not prove that Mr. Cobbs had a duty to retreat because he did not have such a duty. Mr. Cobbs was at a place where he is legally entitled to be. He had no other avenue of escape as the restroom had only one exit. The testimony establishes that the two armed men came into the restroom shortly after Mr. Cobbs. Thus, the undisputed fact is they were blocking the only avenue of escape Mr. Cobbs had. The State has not proposed any facts to suggest otherwise. The State has not negated this element.

The Circumstantial Evidence Does nor Support a Finding of Mr. Cobbs Acting in Sudden Heat or Passion with Sufficient Legal provocation

The jury rejected the argument of the State that Mr. Cobbs acted with malice aforethought in shooting Mr. Mack. The jury, instead, found he acted with sudden heat or passion with sufficient legal provocation. The argument of the State had been that Mr. Cobbs simply started shooting the two individuals when they entered the restroom without regards as to whether they were armed. Rec. at 554, ll 5-11. Under these facts the verdict should have been murder.

What the jury believed to reduce the charge to manslaughter is not known. If they believed that Mr. Cobbs saw both men armed in the restroom, then under the facts, the verdict should have been not guilty as he acted in self-defense. The circumstantial evidence in this case simply does not point to the guilt of the accused. It is speculation at best.

Suppose two men are seen outside a house and both are seen armed with pistols. They

both enter the house and within seconds shots are heard. One man exits the house and the other man is found dead of a gun shot wound from the firearm of the survivor. Under these facts, has the State proven by substantial circumstantial evidence that the survivor is guilty of murder or manslaughter? While murder could be a very real possibility, has it been proven beyond a reasonable doubt? Has the State proven manslaughter under these facts?

Suppose at a trial the survivor testifies he shot in self-defense because the other person pulled his pistol first. Could the State argue the credibility of the testimony is for the jury to decide and therefore the murder charge should be upheld? Is this permissible even if the State did nothing to attack the credibility of the survivor except cross examine him? And if at trial, the survivor does not testify, should the trial judge have directed a verdict? Simply put, when there is no evidence as to who was the aggressor, has substantial circumstantial evidence been presented to sustain a conviction?

Mr. Cobbs argues that the evidence in such a case is not legally sufficient to sustain a conviction. In civil cases our Supreme Court has held that circumstantial evidence must be proven with reasonable certainty. *Gastineau v. Murphy*, 331 S.C. 565, 570-571, 503 S.E.2d 712, 714-715 (1998) ("Viewing the evidence in the light most favorable to Gastineau, the circumstances under which other inspections were performed do not lead with reasonable certainty to the conclusion that Hudson would have told anybody he was there because of Gastineau's report.") If "reasonable certainty" is required in a civil case, then a higher standard is required for a criminal case. The United States Supreme Court has said that a conviction cannot be sustained "without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship,* 397 U.S. 358, 364 (1970). Again, this constitutional floor exceeds the "any evidence"

standard of review. As our Supreme Court said over ninety years ago " Neither the evidence nor the circumstances warrant his conviction; while the whole case raised a suspicion, and a grave one at that, it does not warrant a verdict of guilty." *State v. Turner*, 117 S.C. 470, ___, 109 S.E. 119, 120 (1921). At the most the evidence here raises a grave suspicion.

Over eighty years ago, our state had a standard of review in circumstantial evidence cases that arguably was greater than "substantial circumstantial evidence."[2] "

> All of the facts proved must be consistent with each other, and, taken together, should be of a conclusive nature and tendency, producing a reasonable and moral certainty that the appellant and no one else committed the offense charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true, which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of appellant, then the proof fails. The reason for this is that all presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty. As has often been stated, it is not sufficient to establish a probability of guilt arising from the doctrine of chances that the fact charged is likely to be true. *State v. Kimbrell*, 191 S.C. 238, ___, 4 S.E.2d 121, 122 (1939). *See, also, State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949) *overruled by State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989).

This standard of review became firmly entrenched until *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) which held the standard is whether there is substantial circumstantial evidence. In *Edwards,* the South Carolina Supreme Court held a judge "should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury *if there be any substantial evidence which reasonably tends to*

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[2] Arguably "substantial circumstantial evidence" would have to exclude another reasonable hypothesis to be substantial. As mentioned earlier, if both hypothesis are close to equal the evidence is not, as a mater of law, substantial.

prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Edwards*, at 275, 379 S.E.2d 888, 889 (1989)(emphasis in original). The Court did not, however, provide any definition of "substantial circumstantial evidence." The term remains undefined today.

The South Carolina Supreme Court has, however, applied the *Kimbrell* and *Mains* standard in affirming a conviction. As Justice Toal stated in her concurring opinion, "Put another way, the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis." *State v. Daniels*, 401 S.C. 251, 263, 737 S.E.2d 473, 479 (2012). Support for this standard of review is also found in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) where in footnote 2, after citing the "to the exclusion of every other reasonable hypophysis" standard, the Court stated, "[I]t nonetheless illustrates the lack of evidence against Petitioners." *Id.* at 626, 677 S.E.2d at 606. The same principle applies in this case. Applying the "to the exclusion of every other reasonable hypophysis" standard illustrates the lack of evidence against Mr. Cobbs.

This Court should reverse the conviction of Mr. Cobbs under the standard of appellate review that requires this Court to review the evidence to find if the state has excluded every reasonable hypothesis of innocence or the substantial circumstantial evidence standard. As stated by one author:

> As evidenced by the standards of review currently applied in the federal courts, there has been an apparent shift from a standard tailored to ensuring unjust convictions are overturned to a standard that ensures proper convictions are upheld. This shift implies a value shift from warranting that the innocent are not convicted to ensuring that the guilty are. If the standards causing this shift have been inadvertently implemented, the federal courts should

> reconsider the purpose of these standards. If the courts aim to follow the Fourteenth Amendment and In re Winship, they need to fully assess reasonable doubt under circumstantial evidence by consideration of every reasonable hypothesis of innocence and not which theory fashioned by the evidence preponderates.
> Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 253 (2007)

On three occasions, our Supreme Court has cited with approval the law review article Irene Merker, Rosenberg, Yale L. Rosenberg, *"Perhaps What Ye Say is Based Only on Conjecture" - - Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371 (1995). In that article the authors stated:

> In the case of circumstantial evidence, however, the ultimate determination of guilt is based also on inferences from the evidence, and the court is in as good, if not better, position to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt. Thus, use of the reasonable hypothesis standard for appellate sufficiency review would preserve the appropriate roles of judge and jury in circumstantial evidence cases.
> *Id.* at 1416

In *Holland v. United States,* 348 U.S. 121 (1954), frequently cited as a basis for not giving a circumstantial evidence charge, the Court cautioned appellate courts to review circumstantial evidence case with great caution. The Court said, "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Id.* at 129. The reason for such caution, while not discussed in the opinion, is obvious. A circumstantial evidence case is the only type of case tried in our courts where every witness can tell the truth, but an innocent person can be convicted. We should be reminded of the comments

of Judge G. Duncan Bellinger in his concurring opinion when he stated "The maxim of the law is that it is better that many guilty should escape than that one innocent should suffer, and while I am far from expressing the opinion that the person involved is innocent, I think it consistent with the rules by which this Court is governed in like cases that the defendant should have the benefit of the doubt." *State v. Baker*, 208 S.C. 195, 207, 37 S.E.2d 525, 530 (1946)(concurring opinion)

Such a standard of review is used in many states. *New Hampshire v. Roy*, 167 N.H. 276, ___, 111 A.2d 1061, 1075 (2015) ("[T]he reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt."); *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) ("This heightened scrutiny requires us to consider 'whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.'"); *United States v. Spradlen*, 662 F.2d 724 (1981) ("When reviewing the sufficiency of the evidence supporting a criminal conviction, the standard of review is whether, viewing the evidence and all reasonable inferences derived therefrom in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence."); *Garcia v. State*, 227 So.2d 209, 210 (1969) ("[T]he circumstances relied upon must be not only consistent with guilt, but inconsistent with innocence; and must even go further by excluding every reasonable hypothesis except that of guilt.); *LaPrade v. Commonwealth*, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950) ("[I]f the proof relied upon by the Commonwealth is wholly circumstantial, as it here is, then to establish guilt beyond a reasonable doubt all necessary

circumstances proved must be consistent with guilt and inconsistent with innocence.")

The day has come for our appellate court to define substantial circumstantial evidence. Also, the day has come for our courts to definitively say when the evidence supports another reasonable explanation other than guilt, then the State has not met it burden. Viewing the record under this standard, the evidence is not sufficient to convict.

What exactly does "substantial circumstantial evidence" mean? Logic would seem to require that the evidence favoring conviction must be substantially more probable than the evidence favoring an acquittal. Substantial circumstantial evidence cannot mean the odds are equal as to the probability of the defendant being guilty or innocent. Nor can substantial mean a mere 51% probability of being guilty. Such a standard would be a mere modicum.

Under the facts of this case, there are no facts that make the guilt of Mr. Cobbs substantially more likely than likely than his innocence. While credibility is for the jury, the facts established in this case do not depend upon credibility. At the close of the State's case, all that had been proven was two armed men entered the bathroom of the IHOP shortly after Mr. Cobbs. One person was shot and wounded and the other killed. No facts exist by which the jury could determine whether or not Mr. Cobbs saw the weapon of at least one of the two men who were shot. Once two men, both armed and known to be violent, enter the confines of a small bathroom, Mr. Cobbs has the right to act upon appearances. The State has failed to establish by substantial circumstantial evidence that Mr. Cobbs shot in sudden heat or passion with sufficient legal provocation. The conviction of Keunte Cobbs should be reversed.

Question II

Did the trial court err in failing to dismiss the charges based upon the speedy trial

provision of Article I § 14 of the Constitution of the State of South Carolina and the Sixth Amendment to the United States Constitution when the two year delay in the first trial and the eighteen month delay in the second trial were attributable to the State not being prepared to try the case?[3]

This case should be controlled by *State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016). In that case the delay between indictment and trial was approximately 10 years. The Court attributed about two years to the defendant which left an eight-year delay attributed to the State. *Id.* at 346, 794 S.E.2d at 373. Furthermore, the case was complicated by Mr. Hunsberger being extradited to Georgia and tried on a serious case there arising out of the same set of facts. The Court discussed the four factors to be considered in making an analysis under the speedy trial provisions of the state and federal constitutions. The court noted that "An accused's speedy trial right begins when he is 'indicted, arrested or otherwise officially accused." *Id.* at 342, 794 S.E.2d at 372. (internal citations omitted). "Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness." *Id.* at 343, 794 S.E.2d at 373. The Court then proceeded to discuss the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972).

Mr. Cobbs was arrested on June 27, 2016 for a shooting that occurred on June 5, 2016. For a reason not explained in the lower court proceedings, Mr. Cobbs was not appointed counsel until June 14, 2017. Rec. at 15, ll 19-20. On December 14, 2017 Mr. Cobbs filed his first request for a speedy trial. Rec. at (first speedy trial motion). This motion was granted and a trial ordered for January of 2018. This trial was not held. When the case was not tried, Mr. Cobbs

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[3] This identical issue is presented in State v. Cobbs, Appellate Case № 2018-001599. This case includes the delay after that trial as an additional reason to grant the motion.

was granted a $400,000 bond which he was unable to make. Rec. at 17, ll 1-4. On June 8, 2018 a motion for a PR bond and a renewed motion for a speedy trial was filed. Rec. at 17, ll 5-6. The case was ultimately tried on August 20-24, 2018. The jury convicted Mr. Cobbs of assault and battery of a high and aggravated nature. The jury was unable to reach a verdict on the murder charge. The murder trial was then called for trial on January 6, 2020. At this trial Mr. Cobbs was convicted of voluntary manslaughter.

The delay in this case is in excess of four years. While Mr. Cobbs was tried once on the murder charge, there was a delay of approximately 17 months in conducting the second trial. This period of delay is sufficient to require the State to explain or justify the delay and establish a lack of prejudice. *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012)(holding a 23 month delay "is presumptively prejudicial and triggers the remaining *Barker* inquiry.") Thus, this case must be examined with the burden being on the State to justify the delay. Mr. Cobbs' right to a speedy trial starts when he was arrested and not when he was appointed counsel. *Langford*, at 442, 735 S.E.2d at 482 ("In the case before us, Langford's speedy trial clock began when he was arrested on October 3, 2008, and ran until he was tried twenty-three months later on September 7, 2010."). Of particular note in this case, is the fact that a speedy trial motion by his appointed counsel was filed six months after being appointed.

1. Length of Delay

The initial delay was more than two years from the date of arrest to the date of the first trial. After the first trial, another 17 months passed before the second trial. This length of time is sufficient to require the State to establish a reason for the lengthy delay. No action by Mr. Cobbs prevented the State from proceeding to trial.

2. Reason the Government Assigns to Justify the Delay

In this case, the reason attributed to the first delay was simply inexcusable. The first inexcusable act was not appointing counsel for almost a year. Nothing in this record established why the delay was so lengthy. Next, the excuse used by the government was the first investigator left the office in January of 2017. Another investigator was not assigned to the case until early 2018. Rec. at 25, ll 9-11. When the second investigator was placed on the case in January of 2018, he learned many items had not been sent to SLED for analysis. Rec. at 30, ll 15-20.

3. Accused's Assertion of the Right to a Speedy Trial

In this case, Mr. Cobbs twice filed separate motions for a speedy trial. Rec. at (two speedy trial motions). As noted above, within 6 months of being appointed, counsel for Mr. Cobbs filed a speedy trial motion. Mr. Cobbs could have done no more. "A defendant has no duty to bring himself to trial the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker v. Wingo*, at 527. While Mr. Cobbs did not file a motion for a speedy trial after the trial resulting in a hung jury, the State was well aware Mr. Cobbs wanted his case tried. Mr. Cobbs never threw any obstacle in the path of the State that would have prevented the case from being called. Mr. Cobbs clearly asserted his right to a speedy trial.

4. Prejudice to the Accused

Of particular importance in this case, the original investigator apparently lost cell phones belonging to Mr. Cobbs. Rec. at 27, ll 5-6. Rec. at 10, ll 1-13. The trial court noted there was confusion as to the prejudice from the loss of the cell phones. Rec. at 52, ll 4-18. The Court finally concluded, "It is very difficult to assess the level of prejudice." Rec. at 53, ll 1-2. The Court then concluded as to prejudice from the loss of the phones, "So, I think that issue really

weighs against both sides, although, I think probably more against the state than the defendant." Rec. at 53, ll 8-10. The finding was in error.

The trial court failed to explain how the loss of the cell phones while in the possession of the state could ever be the fault of the defendant. She concluded that the prejudice was in part against the defendant because "defendant did not . . . make a request of the Court to preserve the phones or the records or to obtain the records." Rec. at 53, ll 5-7. Mr. Cobbs has the right to rely upon the State to properly preserve the evidence. With the cell phone in the possession of the State, Mr. Cobbs had no need to request the records from the cell phone company. The phone contained all the records that were needed. And the State knew that because the phone was missing and the records could not be obtained, Mr. Cobbs had no means to contest the testimony of Mikell Nelson, who claimed an incriminating call was made to Mr. Cobbs.

The State did not establish when the cell phones were noticed as missing. The State never called as a witness Officer Keith Elmore, the officer who seized the phones. The only known fact is when Officer Dwayne Peters took over the investigation, the cell phones were missing. The records established that the cell phones were seized from Mr. Cobbs. Rec.448, l 21 to 449, l 13. With a delay in the first trial of over two years, the presumption of prejudice is in favor of Mr. Cobbs. The State has not produced sufficient evidence to overcome this presumption of prejudice.

If the presumption of prejudice means anything, it has to mean the defendant is prejudiced when the State, with no explanation as to why, loses evidence that could help prove the innocence of the defendant. The trial court erred in failing to dismiss the charges for a violation of the speedy trial provision of Article I, § 14 of the Constitution of the State of South

Carolina and the Sixth Amendment of the Constitution of the United States of America.

CONCLUSION

For the foregoing reasons this Court should reverse the conviction of Keunte D. Cobbs on the ground that he was denied his right to a speedy trial and on the ground that the facts were not sufficient to convict him of voluntary manslaughter.

December 1, 2020

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Hon. Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2020-000095
Lower Court Case No. 2016A1810300547

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CERTIFICATE OF SERVICE

I hereby Certify that I am the Secretary for C. Rauch Wise, attorney for the Appellant in the above entitled case. That on December 1, 2020, I did send via e-mail a copy of the Initial Brief and Destination of Matter in the above case addressed to William M. Blitch, Jr., at the South Carolina Attorney General Office,. wblitch@scag.gov.

December 1, 2020

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December 1, 2020

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SC Court of Appeals

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State of South Carolina vs. Keunte Cobbs, Case No. 2020-000095

Dear Ms. Kitchings:

I am enclosing herewith for filing the Initial Brief of Appellant and Destination of Matter in the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc William M. Blitch, Jr.