STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHNATHAN LAMAR HILLARY,

Appellant.

Appellate Case No. 2019-001048

FINAL BRIEF OF RESPONDENT

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2. Did the trial court err, under Rule 404, SCRE, in admitting evidence of a robbery allegedly involving appellant that occurred over a month after the shooting in this case, in another county, and under different circumstances?

3. Alternatively, whether appellant's conviction for kidnapping should be vacated because he was also sentenced for murder, pursuant to S.C. Code Ann. § 16-3-910?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge abused his discretion when the record shows solid evidentiary support for his fact-finding which supports his conclusion that the State presented evidence to carry its initial burden of showing Hillary was neither threatened nor promised anything, consequently, his will was not "overborne" by such, thus Hillary's statement was voluntary and admissible.

2. Whether the trial judge abused his discretion in admitting limited and highly probative evidence of a strikingly similar, close in time, robbery, pursuant to Rule 404, SCRE, especially when the evidence of the second crime was found in the same home at the same time as the evidence of the crimes against the murder victim.

3. Given that the Supreme Court of South Carolina does not allow plain error review, whether this Court should address Hillary's patently unpreserved sentencing issue.

STATEMENT OF THE CASE

On September 29, 2016, appellant Jonathan L. Hillary murdered Timothy Buckley in Horry County. Hillary was arrested November 26, 2016 in Atlanta, Georgia and extradited to Horry County, South Carolina. The Horry County grand jury then indicted Hillary for murder, kidnapping, armed robbery, and possession of a weapon during a violent crime. (Ind. #s 2016-GS-26-655, 57, 59, & 90; R. pp. 856-63). On June 10, 2019, Hillary proceeded to a jury trial before the Honorable William A. McKinnon, Circuit Court Judge. Assistant Solicitors Nancy Livesay and Jonathan Miles represented the State. R. Scott Joye represented appellant. (R. 1). At the conclusion of trial, the jury found Hillary guilty of murder, kidnapping, armed robbery, and the weapon charge. (R. 826-27). Judge McKinnon sentenced Hillary to life imprisonment for murder and concurrent sentences on the other charges. (R. 769-770). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

Timothy Buckley ("the victim") retired from the New York City Police Department (N.Y.P.D.) after of 30 years' service as a policeman. He moved his family to Myrtle Beach, S.C. in 2011 because the cost of living was lower and to enjoy retirement. Buckley was married and had three young daughters; Kaitlin, Elizabeth and Bridget. (R. 176-77; 185-86). While enjoying retirement, Buckley also worked as a bell valet at the Anderson Ocean Club. (R. 188). Buckley and his family lived in the Arrowhead area of Horry County over the Intracoastal Waterway in Conway, S.C. In addition to his house, Buckley also had a camper at Springmaid Pier Campground that he used as "a getaway place," and that was also used on occasion by his children and their friends. (R. 203).

Buckley's wife was terminally ill at the time of his disappearance in 2016. She was bed ridden and required 24 hour a day care. Because she was so ill, Buckley did everything around the house and for his daughters. He cooked, cleaned, and drove his daughter's to school and cheerleading practice. Buckley's wife died approximately one month after Buckley was murdered. However, in 2015, before she became deathly ill, she bought her husband a shiny new black 2015 Ford F-150 King-Cab pick-up truck with four doors. The victim was proud of the truck and took good care of it. He said the truck was what millionaires drive. The truck had a distinctive hard bed cover, recognizable even from a distance. The license plate on the victim's truck was LMR 301. In the truck, the victim kept his Charter Arms .38 revolver in the glove box. The gun was kept in a distinctive molded holster with a broken buckle. (R. 187-88, 196-197; 308, 604-05). On his person, the victim always carried his wallet. Because he was a valet, he always had cash on his person. He also carried a cell phone, which was an iPhone. His cell phone number was (516)-297-1226. (R. 191, 419-21).

On the afternoon of September 29, 2016, the victim did not pick up one of his daughters from cheerleading practice, which had never occurred before. (R. 188–189; 177). His oldest daughter, Kaitlin, tried to call him, but the victim did not answer his cell phone, which also had never occurred. The victim's oldest daughter drove to the camper at Springmaid Campground, but there was "no sign of " the victim. She called the hotel where the victim worked and learned he did not show up for his shift. She then called the police and filed a missing person's report. (R. 189-90).

From September 29th to October 5th, 2016, neither the victim nor his truck could be located. (R. 288). The victim's family continued to search for him after calling the police. (R. 190-91). Two of victim's friends from New York drove to Myrtle Beach to assist in the search. (R. 206-07). On October 5, 2016, the friends drove around the City of Myrtle Beach attempting to locate the victim's truck. They eventually found Buckley's truck in downtown Myrtle Beach parked in the parking lot of an old apartment complex on 29th street about 200 yards of the "main drag" between Oak Street and Kings Highway. (R. 207-10). The truck was locked, but when they looked inside, they could see a large amount of blood on the passenger's side. (R. 215–18).

The Horry County crime scene investigators responded and processed the truck. The victim's wallet and i-phone were not in the truck and the victim's revolver and molded holster were also missing from the glove box where he regularly kept it. (R. 235-236). The truck, which appeared new, had scratches on the outside going down its sides as if it had been driven through woods or a field. Mud was also on the truck's side and in the wheel wells. (R. 236-238, 253). Inside the truck, on the passenger side, on the seat and at the bottom of the front passenger door was a large amount of blood that had pooled. There was blood spatter on the inside of the front

passenger door *and* blood on the running board of the passenger side of the truck. There was also what appeared to be bone or brain matter from a head shot within the blood on the inside of the front passenger door. (R. 240-53). D.N.A. testing confirmed the blood was the victim's. (R. 256-57, 261).

On November 10th, 2016, two students who attended a motorsports academy located near Hwy. 501, found a decomposing human body in a wooded area at the end of a dirt road off the highway. (R. 265-68, 275). The body had a camouflage watch on the left wrist and a wedding ring on the left hand. (R. 268). The date inscribed on the ring matched the victim's wedding date. The body was also wearing a New York Fire Dept. (N.Y.F.D.) T-shirt. (R. 197, 282-84, 286, 291-92).

The autopsy confirmed the body was that of the victim Timothy Buckley. The autopsy also revealed the victim died from a gunshot wound to the back of the head that exited the front of his skull in the area of his nose. (R. 567). Police also found a bullet hole in the back armpit area of the N.Y.F.D. t-shirt found on Buckley's body indicating Buckley had been shot a second time in the back. (R. 286; 640-641). Despite the t-shirt's deteriorated condition, gunshot residue was found at the hole. (R. 638-43). Based on the blood spatter inside the victim's truck and the blood on the passenger side running board, and the fact that there was no bullet damage to the vehicle's interior or its windows, police were able to deduce that the victim had been shot two times as he was trying to exit the passenger side of his truck with the truck door open or partially open. (R. 242-54).

Bernithia Young and Johnathan Hillary

At some point on September 28, 2016, Buckley came into contact with Bernithia Young ("Bernithia"). Bernithia and the appellant, Johnathan Hillary ("Hillary"), were partners in crime, who also worked for a temporary cleaning service employed by various hotels in the Myrtle Beach

area. When they were not cleaning hotel rooms, Bernithia and Hillary would rob people. Bernithia would pose as a prostitute and Hillary would then rob the "John" who arranged to have sex with Bernithia. Benithia and Hillary were not from South Carolina, but from Georgia. (R. 348-49, 570, 588-90, 655-62, 689).

On the night the victim disappeared, September 29, 2016, around 3:00 a.m., the victim was near his camper at Springmaid Pier Campground. (R. 505-07). Phone records show that between 3:02 and 3:17 a.m., the victim's phone and Bernithia Young's phone both used a tower near the victim's camper. (R. 516-17). At or round 3:15 to 3:23 a.m., the victim's phone was slightly away from the camper, and Hillary's phone was using the same tower. (R. 517). By 3:45, all three phones are using the same a tower in the same area. (R. 517-18). Bernithia and Hillary are texting each other. (R. 518-19). The victim was never heard from again. The victim never made another call from his cell phone. When his truck was eventually recovered several days later, at another location, it contained the victim's blood, containing his DNA, on the passenger seat and spattered on the passenger door. (R. 190, 207-10, 214-18, 248-54, 257-261, 288-92, 332-333).

Even though the victim never made another phone call, both the victim's cell phone and appellant Hillary's cell phone "pinged" from the area near the camper at Springmaid Pier Campground down Highway 17 to the City of Myrtle Beach, then onto Hwy. 501 toward Florence, S.C., and then stopped on Los Palmas Road, a dirt road that runs off of Highway 501 and behind Tanger Outlets and the Chick Fil-A. Simultaneous with this occurring, Bernithia Young's cell phone pinged from the area near the victim's camper at Springmaid Pier Campground back to the area near the Ocean Plaza Motel on Ocean Blvd. in Myrtle Beach. After reaching the area of Los Palmas road, the victim's cell phone and Hillary's cell phone then began to ping together from the same area back down Highway 501 and back into the City of Myrtle Beach. During this time,

Hillary and Bernithia's cell phone records show they were in near constant contact by phone. (R. 517-534). The State used a cell phone records analyst to compare the phone records of the victim Timothy Buckley, Bernithia Young, and Hillary to conclude that their cell phones were in the same vicinity in Myrtle Beach on September 29th, and that the victim and Hillary's phone moved in a similar pattern that morning to the area where Buckley's body was eventually found. (R. 503-532, State's Ex. 187).

A network of cameras allowed investigators to track much of the movement at that time. As the victim's truck re-entered the City of Myrtle Beach, a license plate reading camera captured a picture of the victim's truck at approximately 5:18 a.m. (R. 309-11). The cameras showed the victim's truck entered the city from the direction of Las Palmas Road and eventually got on Ocean Boulevard. In the surveillance videos at this time, the victim's truck stops at a red light on Ocean Blvd., and it can be seen the driver is a black male and there is no one in the passenger seat.[1] (R. pp. 313, 318-19, 329). The truck eventually pulls into the parking lot of a hotel. (R. 320). The truck did not park at the hotel, but left the lot followed by a white sedan to the place where the victim's truck was later found by his friends, the old apartment complex. (R. 321-22). A black male appears to leave the victim's truck and walks down the street and across an intersection, and gets into the white sedan that followed the victim's truck from the motel. (R. 313-14, 322–324). The black male is wearing a sleeveless orange or red vest with white sleeves underneath and what appears to be blue jeans. As the black male is walking, he appears to be talking on a cell phone and holding another cell phone or bag in his other hand. He then gets in the passenger side of the

[1] The victim Timothy Buckley is a white male. Images were captured on the 28th showing a different driver – either a white male, or someone in a light-colored shirt, consistent with the victim's use of the truck. (See R. p. 331). No images were found to show the victim in the truck in the early morning hours of the 29th. (R. 332).

white sedan. The cameras then show the white sedan travel to the 1000 block of Ocean Boulevard where several hotels were located, including the one where Bernithia Young was staying, the Ocean Plaza Hotel. (R. 324–26; State's Exhibit 171).

The surveillance cameras also captured the license plate of the white sedan following Hillary to where the victim's truck was abandoned, and after it picked up Hillary and returned to the motel. (R. 321-25). Bernithia Young stayed at the Ocean Plaza Hotel on the night of September 28th and listed a white sedan, (a Chevrolet Impala), as her car on the registration form. She listed the tag number that matched to the images. (R. 346-53). Surveillance cameras at her hotel, the Ocean Plaza, captured her and Hillary re-entering the Ocean Plaza at approximately 6:00 a.m., shortly after she picked Hillary up. Hillary is carrying the orange or red sleeveless vest in his hand or over his arm as he enters the hotel. (R. 313-14, 354-55).

Bernithia Young stayed at various hotels managed by the same group as the owners of the Ocean Plaza during the month of September 2016. (R. 347–53). The only other person who provided an I.D. for staying with Bernithia Young at any of these hotels was appellant Hillary. (R. 347-348, 354-58).

Police learned that Bernithia and Hillary worked as hotel housekeepers for a temporary staffing agency in Myrtle Beach during September of 2016. (R. 368-84). Bernithia and Hillary told the staffing agency they had just moved from Georgia and were looking for work. (R. 371). At first, they told the staffing agency they were brother and sister, but upon further questioning admitted they were together as lovers. They specifically wanted to work together so they could travel to work together and save on gas. (R. 372). They were assigned to work together at Bay Watch Resort for two weeks. Their last day of work was September 25th or 26th 2016. They did

not receive a paycheck until September 30th. Hillary and Bernithia picked up their paychecks together on September 30th, 2016 at the staffing agency in Myrtle Beach. (R. 376-82).

When he applied for a job, to the staffing agency, Hillary gave an address of a hotel just off of Highway 501 that was on a road that intersected with Los Palmas Road and in the vicinity of where the victim's body was later found. (R. 371-73). Hillary also stated he was staying at another hotel located at 1001 South Ocean Blvd. (R. 371).

The police also obtained Georgia cell phone numbers that Bernithia Young and appellant Hillary gave the staffing agency. (R. 380-81). Hillary's phone number was (706) 564-9774. Bernithia's phone number was (404) 621-5932. It was through these cell phone numbers that police were able to obtain record information tracking the movements of Hillary and Bernithia during the early morning hours of September 29, 2016, when the victim was murdered, his body was disposed of, and his truck was abandoned at the apartment complex.

Hillary and Bernithia's Capture

In November of 2016, members of the United States Marshall's Fugitive Task Force and the Atlanta Police Dept. went to a townhouse in Atlanta where they found Bernithia and Hillary. They were living in the townhouse. (R. 583–84). In the townhouse, police found a 9mm semiautomatic handgun under the couch. In the bathroom, police found the victim Timothy Buckley's stolen revolver and distinctive holster in an upstairs' bathroom, under the bathroom counter in a cut out in the drywall. (R. 585; 587; 579). Police also found credit cards, driver's licenses, and IDs belonging to other people, including a man named Bocar Bah from Tennessee, and a woman from Alabama. These were found in the same bedroom where paperwork belonging to Hillary was found. And, in the upstairs' bedroom, police found eleven cell phones which were collected. One of these phones was stolen and belonged to Bocar Bah. (R. 589-90, 594-98, 612).

Outside the townhome, police found Bernithia Young's white Chevrolet Impala. This was the same vehicle used to pick up Hillary after he dumped the victim's truck in Myrtle Beach. Inside Bernithia's car in Atlanta, police found various items linking the vehicle to Myrtle Beach during the relevant time period including a receipt for brake work done on the car in Myrtle Beach on September 22, 2016 on Waccamaw Blvd., a parking permit for the Viking Motel, various motel room computer key cards, and parking permits for the Sea Banks Motel at 2200 South Ocean Blvd. and the Bermuda Sands Motel, 104 North Ocean Blvd. in Myrtle Beach. The parking permit for the Viking Motel was for September 28th and another permit was for September 24th through 30th. Also found in the vehicle was a 9mm unfired bullet, the same caliber as the semi-automatic weapon found in the Atlanta townhome under the couch. (R. 605-12).

On November 10, 2016, Myrtle Beach police, while in Atlanta, also interviewed Bernithia Young and collected a second cell phone from her that belonged to her. That phone number was (678) 984-8349. That phone contained videotape of her and Hillary together singing at the Viking Motel in Myrtle Beach, in a motel room. It also contained pictures of Bernithia and Hillary together at various locations. (R. 415-16, 445-54).

Bocar Bah testified that he was the victim of an armed robbery perpetrated by Bernithia and Hillary on November 1, 2016 in Summerville, S.C., just five weeks after the victim's murder. Bah testified he contacted Bernithia on her cell phone for a sexual encounter and was robbed at gunpoint by Hillary as he and Bernithia were about to get out of her car to enter a motel room and engage in the sex act. Bah testified that Hillary used a semi-automatic weapon, similar to the one found under the couch in Atlanta, in the armed robbery. Bah identified Bernithia and Hillary from photo line-ups. Bernithia's and Hillary's phone records revealed she was texting Hillary before

the armed robbery and signaling Hillary when to commit the armed robbery of Mr. Bah. Hillary and Bernithia returned to Atlanta after robbing Bah. (R. 653– 68).

The Interrogation of Hillary in Atlanta

Horry County investigators traveled to Atlanta and interviewed Hillary. (R. 22-23). Hillary admitted he and Bernithia Young had stayed in Myrtle Beach for a couple of weeks in September on vacation. He admitted he and Bernithia worked for a temp agency.

Hillary eventually stated a white man named John, in a white truck, spoke to Hillary on the boulevard and took him to a bar and bought him something to eat. (R. p. 786, State's Exhibit 3). He also stated that at about three in the morning he was walking on Ocean Blvd. and a white male who was a "meth head" pulled up to him in a truck looking for drugs. (R. pp. 780-788, State's Exhibit 3). Hillary stated he gave the meth head some bath salts, tricking him into thinking they were drugs, in exchange for borrowing the truck. (R. pp. 780-789, State's Exhibit 3). Hillary admitted he then took the black truck, which was a nice truck, clean inside, and drove around Myrtle Beach. When the meth head started calling Hillary repeatedly on his cell phone, Hillary abandoned the black "boss man truck" and called Bernithia to come pick him up. (R. pp. 780-789, State's Exhibit 3). When confronted with the surveillance photos and his phone records, Hillary continued to state that *he was in the victim's black truck*, and stated he abandoned it in a parking lot of an apartment complex, and called his girlfriend, Bernithia, who came and picked him up in her car. He denied he took anything out of the victim's truck. He denied he did anything to the victim. (See R. pp. 780-87; 795-96; 801-806, State's Exhibit 3).

Investigators told Hillary that this was his chance to give his side of the story, and asked him if the shooting was an accident, in self-defense, or if there was some other reason. (See State's Exhibit 3, pp. 803-08). Hillary then told the investigators about getting a ride from a man who

made unwanted sexual advances. (R. p. 809, State's Exhibit 3; State's Exhibit 2, at approx. 51:18). The man pulled up into a dark area and a fight occurred after another unwanted sexual advance. (R. pp. 809-810, State's Exhibit 3). The man pulled a pistol, there was a fight, the pistol was wrenched from the man's hands and after escaping out the passenger window, Hillary shot back into the truck killing the victim. (R. p. 811, State's Exhibit 3). Hillary then repeatedly stated he had to defend himself, he panicked. (R. p. 810-812, State's Exhibit 3).

Hillary admitted that he understood he was going to be "sitting" for a long time, and that he hoped that the officers would be able to help him. (R. pp. 825-839, State Exhibit 3).

As stated above, based on the evidence, the jury found Hillary guilty as charged.

ARGUMENT

I.

The trial judge did not abuse his discretion in concluding that Hillary was neither threatened nor promised anything, consequently, his will was not "overborne" by such, and his statement was voluntary and admissible. The record supports the relevant factual findings such that Hillary cannot show an abuse of discretion.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). Appellate courts are "bound by the trial court's factual finding unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "When reviewing a court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). A circuit "court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *Id.* (citing *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998)).

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." *State v. Peake,* 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (citing *State v. Rabon,* 275 S.C. 459, 272 S.E.2d 634 (1980)).

What Occurred Below

The defense moved to suppress the statement arguing it was involuntary. Defense counsel explained that "they threatened him with the death penalty, when he specifically questions them about them helping him... while they don't make explicit promises, they say, 'Yeah, we'll talk with them.' " (R. p. 19, ll. 22-25). Counsel argued "the implications were that they were going to do something to help him in his situation in which they had just threatened him with the death penalty, not once, but twice...." (R. p. 20, ll. 2-5).

In response to the motion, the State presented evidence to show, by a preponderance of the evidence, that the statement was voluntary. *See, e.g., State v. Arrowood,* 375 S.C. 359, 367, 652 S.E.2d 438, 442 (2007) ("the State must affirmatively show the statement was voluntary and taken in compliance with *Miranda.*") (citing *State v. Middleton,* 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986)). The State presented Detective Gregory Lent, who participated in the interview. (See R. p. 21). The State also offered the *Miranda* rights form, (R. p. 25; State's Exhibit 1),[2] an audio copy of the entire interview, (R. pp. 19, 31, 35 and 38, State's Exhibit 2), and a transcript of the audio recording, (R. p. 25; State's Exhibit 3).

The transcript is 66 pages long. (R. pp. 774-839, State's Exhibit 3). The recording adds tone and specifics to the transcript. (State's Exhibit 2). Together, the exhibits reflect that Hillary neither appeared emotional nor compromised. He initially denied knowledge. In fact, he indicated boldly to the detectives that had he known officers were looking for him in connection to the murder, he would not have "run" but "would've came to y'all." (R. p. 792, State's Exhibit 3).

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[2] There was no objection to the form. The form reflected the information conveyed, but the detective wrote "unable to sign, handcuffed" in the area for Appellant's signature. (R. p. 25, ll 3-4). Appellant did not contest that he received and understood his *Miranda* rights. (See R. pp. 97-98).

After that pronouncement, the detectives began showing Hillary evidence, such as pictures from various cameras around Myrtle Beach. (See, for example, R. pp. 792-796, State's Exhibit 3). The officers did twice reference the possibility of the death penalty in South Carolina. Neither reference was made in the form of a threat.

The first appears at State's Exhibit 3, p. 800, "Let him go back to South Carolina and he can tell it to a jury when they give him the death penalty." In response, Hillary states: "I sure will" and " 'Cause I didn't kill anyone.' " (R. p. 800, State's Exhibit 3; see also p. 777; State's Exhibit 2 at approx. 36:40). The detectives shared more information including cell phone records. (R. p. 801, State's Exhibit 3). They additionally shared that the victim was retired officer from New York. (R. p. 805, State's Exhibit 3). After further discussion of evidence showing Hillary was in the victim's truck, and that Hillary took the victim's gun back to Atlanta, Detective Dudley stated, "Let's put it like this. When a jury sees you driving around with the truck for hours with blood on the inside with no remorse for what you did, you think they're going to hesitate to put a needle in your arm." (R. pp. 806-807, State's Exhibit 3; State's Exhibit 2 at approx. 45:30). The detectives continued to ask for his story as to what happened. (R. pp. 807-809, State's Exhibit 3). Only then did Hillary give a statement that he shot the victim in "self-defense" after the victim made unwanted sexual advances and pulled a gun. (R. p. 809-811, State' Exhibit 3). During a discussion on what Hillary did with the victim's gun, Hillary asked, "I mean, how are y'all going to be able to help me?" (R. p. 819, State's Exhibit 3). Detective Lent responded, " 'Cause we can tell them." (R. p. 819, State's Exhibit 3; State's Exhibit 2 at approx. 1:07:50). The tape and transcript later reflect that Detective Lent explained, "we're filling all the f****** holes in because I can tell you, when me and David go back and we talk to the solicitor, he said, well alright, when we went and talk[ed]" to Hillary, he was truthful based on the evidence recovered or "remorseful." (R. p. 831,

State's Exhibit 3; State Exhibit 2 at approx.1:30:40). Near the end of the interview, Hillary asked if they were "go[ing] to the solicitor and figure out ...," Detective Dudley explained, "go give them your side of the story." (R. p. 836, State's Exhibit 3; State's Exhibit 2 at approx. 1:38: 31). Hillary stated: "And I hope my owning the truth, I hope by, by being truthful, do, and able to, you know what I mean to help me and just justify the situation." (R. p. 839, State's Exhibit 3, State's Exhibit 2 at approx. 1:42:20). Hillary had also previously expressly recognized that he was going to be "sitting for a long time," and that he would be denied bond, (State's Exhibit 3, p. 825, State's Exhibit 2 at approx. 1:18:47). Hillary asked for specific help in switching commissary money, which the detectives expressed they could not do, (R. p. 836, State's Exhibit 3), and also asked the detectives directly to spare the victim's daughters the details, which the detectives agreed to do, (R. p. 839, State's Exhibit 3); and, finally, acknowledged he would likely not see the detectives again, (R. p. 839, State's Exhibit 3). (See also State's Exhibit 2 at approx. 1: 38:13 and approximately 1:43:00).

Hillary opted to present testimony at the pre-trial hearing challenging voluntariness. Hillary answered in the affirmative the question posed by defense counsel asking if Hillary "bec[a]me so scared that [he] gave a statement implicating yourself in the murder – in the killing of Mr. Buckley." (R. p. 74, ll. 19-22). He testified: "They told me I needed to tell them something to help myself," he believed to avoid "getting the death penalty." (R. p. 74, l. 24- p. 143, l. 2). He testified that he "told them what they wanted to hear because they felt like I need to tell them something to help myself." (R. p. 75, l. 5-6). He testified, "I made up a scenario about self-defense after they told me I should go and give them a story for something for them to go back and give the Solicitor though that I had tried to tell them the truth about something that they wanted to know about." (R. p. 76, l. 20-23).

After considering the testimony and argument, the trial judge ruled:

> ... the test is whether it was knowingly, intelligently and voluntarily given under the totality of the circumstances. In this case I think it's pretty clear that the statement was voluntarily given.
>
> There are two references to the death penalty, both of them are, are with regard to the jury imposing the death penalty, not a threat the officers are going to do it or the officers are going to manipulate the system. There is no - - there's never an expressed promise of leniency. The interview is less than two hours long. He never asks for a break or a drink or a bathroom break. There's no - - in the Court's opinion there's no evidence at all that it - - that, that there were oppressive tactics used.

(R. p. 101, ll. 21 – 102, l. 8).

In further support that Hillary was not actually expecting any concrete help from the detectives, the trial court noted:

> ... when you get to the end of the interview Mr. Hillary makes a comment talking about he's going to be in jail for a long time, his bond is going to get denied. He's clearly not expecting any kind of help from the officers, and then the only concrete thing he asks for at the very end of the interview he asks if they could transfer his commissary account from the Atlanta jail to the South Carolina jail, and they say, "We can't even do that. ..."

(R. p. 102, ll. 9-16).

The judge concluded, "there's no evidence in my opinion that he expected to get any kind of treatment or leniency from the officers." (R. p. 102, ll. 17-19). Simply offering to generally help is "not the kind of promise ... to make a statement involuntary." (R. p. 102, ll. 19-22). The trial judge found the statement was admissible.

The recording, redacted in part at request of the defense, was played for the jury, with the trial judge noting the defense's objection. (R. p. 465, ll. 7-23; p. 467, l. 23; see also 103-115). Prior to the jury hearing the recording, the trial judge instructed them that while admissible, "you make the ultimate decision of whether or not the ... Defendant made this statement" and whether the statement was voluntary. (R. p. 466, ll. 12-18). Specifically, he instructed, "this means you

must decide the statement was not caused by pressure or force or fear or threats or coercion or intimidation or any hope or a promise of leniency or reward of any kind." (R. p. 466, ll. 18-21). The judge gave examples of factors to consider, such as age, education, intelligence, and background. (R. p. 466-67). The judge further instructed that it was the State's burden to prove, beyond a reasonable doubt, that the statement was voluntarily given, and if they jury should so find, it was further up to them to assign the appropriate weight to the statement. (R. p. 467). Finally, the judge instructed plainly that should the jury find "the alleged statement was not the free and voluntary statement of the Defendant," the jury "should not consider it at all." (R. p. 467, lines 18-20).

Law / Analysis

Hillary does not contest that he received *Miranda* warnings, nor does he challenge his understanding of those warnings. (See R. pp. 97-98). Rather, Hillary asserts his statement was not voluntary because the police "threatened" him with the death penalty, then "promised" to help him. (FBOA, p. 4; see also R. p. 39, 41, 45). The trial judge disagreed that the interview rendered Hillary's statement involuntary. Two very important factual findings defeat Hillary's position on appeal.

First, that there was no coercion. The detectives simply did not make a promise regarding the possibility of a death sentence. In fact, Hillary conceded there were no explicit promises made. (R. pp. 19-20). Second, there is no evidence Hillary acted consistently with some belief of an implied promise. As the trial judge noted, the evidence supported that Hillary did not have an expectation of a certain course of action – to the contrary, Hillary did not see himself going anywhere soon, and did not even see himself being released on bond. Further, the trial judge noted the entire interview was less than two hours and did not support that Hillary was deprived of food

or water, or subjected to any mistreatment. The record and law support the judge's decision that the State met its burden, and the statement was voluntary and admissible. Hillary cannot show an abuse of discretion on this record.

"A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." *Peak,* 291 S.C. at 139, 352 S.E.2d at 488 (citing *State v. Broome,* 268 S.C. 99, 232 S.E.2d 324 (1977); and 23 C.J.S., *Criminal Law,* § 825.)). If an inducement is made, the key consideration is "whether the defendant's will was 'overborne.'" *Arrowood*, 375 S.C. at 368, 652 S.E.2d at 443 (citing *State v. VonDohlen*, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996)). But the mere hope for a benefit is not enough. *State v. Miller,* 375 S.C. 370, 387, 652 S.E.2d 444, 453 (Ct. App. 2007). *Miller* is instructive.

Like the detectives here, the officers in *Miller* indicated "it was in [Miller's] best interest to cooperate," but "made no direct or implied promise of leniency." *Id.* This Court found that was not enough to show the statement was involuntary. Similarly, in *State v. Simmons,* 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009), this Court again considered voluntariness in light of general statements made during the interview process. In *Simmons*, the defendant claimed "he was induced into making incriminatory statements by the solicitor's promise of leniency and by coercive police tactics." *Id.* at 164, 682 S.E.2d at 29. In *Simmons*, the prosecutor "advised" the defendant that his cooperation " 'would be considered at sentencing.' " *Id.* This Court reasoned that "was not improper." *Id.* Further, and again as the trial judge found here, other evidence supported that circumstances, as a whole, showed a voluntary statement. *Id.* at 164-65, 682 S.E.2d at 29. Again, general statements that indicate cooperation is beneficial are not improper.

Similarly, in *State v. Collier*, 421 S.C. 426, 439, 807 S.E.2d 206, 213 (Ct. App. 2017), this Court considered the voluntariness of a defendant's statement after investigating officers "assured

him that telling the truth would not hurt his situation." Citing to *State v. Rochester,* 301 S.C. 196, 201, 391 S.E.2d 244, 247 (1990), this Court resolved that the broad statement did not negatively affect voluntariness and admissibility. *Id.* This Court's logic in *Collier* and the other above referenced cases soundly rests in the logic and law as reflected in Supreme Court precedent, in particular, *Rochester* and *Peak.*

In *Rochester,* our Supreme Court rejected an argument that a polygraph examiner's statement, " 'it would be certainly, probably, in his best interest to tell the truth,' " could reasonably be considered inducement as it "was not on its face an inducement or hope of lighter punishment" such as those condemned in *State v. Peak,* 291 S.C. 138, 352 S.E.2d 487 (1987). *Peak* well-illustrates the impermissible.

In *Peak,* the officer who conducted the interview of the defendant in a murder investigation expressly stated that "the State would not ask for the death penalty" if the defendant would give a statement of what happened. *Id.* at 139, 352 S.E.2d at 488. He even offered to contact "the Solicitor and have him put it in writing...." *Id.* A statement soon followed. Our Supreme Court found "the officer was in a position of apparent authority, and his comments ... tantamount to a promise not to seek the death penalty if the appellant gave a statement." *Id.* Therefore, the prosecution necessarily failed to show the "statement was voluntary and not the product of the officer's promise of leniency." *Id.* The statement was inadmissible.

Here, the recorded interview confirms no such direct promise was made, and Hillary agrees no such promise was made. Rather, Hillary asserts there was an implied promise. But the record

does not show that Hillary acted as if there was an implied promise at the time of the interview. Hillary's reliance on an "implied promise" is defeated by his own treatment of the communication – he did not expect anything, not even securing a bond. He never asked if the detective would (or could) protect him from the most severe penalty for murder. He never asked to see the detectives later to ensure compliance of any perceived implied promise. While Hillary indicated in his testimony that he was scared and talked to attempt to avoid the death penalty, the trial judge did not abuse his discretion in discounting that testimony in light of the contemporaneous record made of the interview. *See Simmons*, 384 S.C. at 165–66, 682 S.E.2d at 30 ("the circuit court did not abuse its discretion in giving greater weight to the officers' testimony in its voluntariness determination based on Simmons's inconsistent testimony of what transpired while in custody."); see also *Arrowood*, 375 S.C. at 367, 652 S.E.2d at 442 ("The trial judge's determination of the voluntariness of the statement must be made on the totality of the circumstances, including the background, experience, and conduct of the accused.") (citing *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252).

Again, the key is whether there was a promise that induced an involuntary statement. Simple mention of the death penalty – which clearly is a possibility in a murder case – does not automatically render a statement involuntary. Attempting to avoid a harsh sentence is a logical consideration and is not, alone, evidence of involuntariness. In fact, it has long been the rule that a guilty plea may be voluntary even if entered specifically to avoid a death sentence. *See, e.g. Dingle v. Stevenson,* 840 F.3d 171, 174–75 (4th Cir. 2016) (citing *Brady v. United States*, 397 U.S. 742 (1970)). Even so, this Court does not review *de novo* the decision on voluntariness and admissibility. The standard of review requires only that the record, in light of the relevant law,

support the trial judge's decision. *See Saltz, supra.* It does, and Hillary is not entitled to any relief.[3]

[3] The record fully supports that Hillary cannot show an abuse of discretion. However, should some error be found, the admission of the statement could only be harmless in light of the other evidence, especially evidence linking Hillary to Young and Young to the crime and dumping of the body such as the copious cell phone tracking points as listed previously; the near constant communication between Hillary and Young at the time of the murder and after; video evidence confirming Hillary's possession of the truck and dumping of the truck; and, the location of the victim's distinctive gun and holster in the Atlanta townhouse. *See State v. White,* 410 S.C. 56, 60, 762 S.E.2d 726, 728 (Ct. App. 2014) ("considering the entire record on appeal, we conclude beyond a reasonable doubt that any alleged error in admitting White's statement was harmless" noting precedent that supports reversal not required when the appellate " 'court finds beyond a reasonable doubt that the error did not contribute to the verdict.'") (quoting *State v. Creech,* 314 S.C. 76, 86, 441 S.E.2d 635, 640 (Ct. App. 1993)). The evidence shows that in the absence of the statement – in which he claims not absence from the truck but self-defense – there remains solid substantial evidence to prove guilt beyond a reasonable doubt such that this Court may find it harmless under the appropriate standard. However, the evidence supports that the trial judge did not abuse his discretion in admitting the evidence, or, for that matter, in instructing the jury to consider voluntariness. There is no error in the admission.

II.

The trial judge did not abuse his discretion in admitting limited and highly probative evidence of a strikingly similar, close in time, robbery, pursuant to Rule 404, SCRE, especially when the evidence of the second crime was found in the same home at the same time as the evidence of the crimes against the murder victim.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61 (1973)). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 208, 631 S.E.2d at 265.

What Occurred Below

The State filed a pre-trial "Motion to Introduce Subsequent Bad Acts." (R. (Motion)). In pre-trial, the State presented testimony from Bocar Bah, one of Bernithia's and Hillary's victims. (R. 118-142). Bah was a truck driver. (R. 128). His stolen driver's license, credit card, and cell phone were found in the Atlanta townhome with Bernithia Young and appellant Hillary. This was the same townhome where the deceased victim Tim Buckley's stolen revolver and distinctive holster were found. (R. 594– 97).

Bah testified he met Bernithia Young at a store on I-20 in South Carolina. (R. 128). Bah bought Young snacks at the store and the two exchanged phone numbers. (R. 128 – 29). Bah, who was married with children, kept in touch with Young. (R. 653– 55; 131). Later, on November 1, 2016, Bah, when he was to be in South Carolina, phoned Bernithia using his cell phone. They were going to meet at a truck stop but Bernithia said there were police there and she could not meet there. Instead Bah drove to a Walmart parking lot. Bah parked his rig at Walmart in

Summerville and got into Bernithia's car, a white Chevrolet Impala sedan. (R. 131-133). They first went to a gas station where Bah bought Bernithia some wine. (R. 132). They next went to a hotel to get a room. (R. 131 – 133). Bah noticed Bernithia was texting someone on her cell phone as they pulled into the hotel parking lot. (R. 134-35). Bah asked her who she was texting and she said no one. She decided to park away from the lobby area at the hotel. (R. 132-33).

After they parked, when Bah opened the door, a black male, he later identified as Hillary in a photo line-up, pointed a semi-automatic gun at him and took his wallet. (R. 133, 135; see also 664-66). The man told Bernithia, "You're going to take me out of here," and she said she would not make any trouble. (R. 134). Hillary and Bernithia then drove off together in Bernithia's white sedan. (R. 134, 136). Bah then went to a clerk from the hotel who happened to be on her phone outside, and asked her to call the police that he had been robbed. (R. 136; see also 669).

The cell phone records of Hillary and Bernithia Young showed they were acting together in the armed robbery of Bah and were texting each other as she went to meet Bah, as she met Bah at the Walmart, and as she took Bah to a hotel for what Bah believed was going to be sex. Once they arrived at the hotel, Bernithia texted Hillary and told him the victim [Bah] was ready to be robbed and she would signal Hillary with her brake lights. She did so and then Hillary committed the armed robbery. Instead of trying to escape, Bah submitted to the armed robbery and told Hillary to take whatever he wanted. Hillary and Bernithia stole Bah's wallet and cell phone and left the area together in Bernithia's white Chevrolet Impala. (R. p. 124, 133, 148, 687-90).

The robbery of Bah happened in November 2016, just five weeks after Buckley was armed robbed and murdered and disappeared. (R. 118, 160). The State argued that evidence of Bah's robbery was so similar to Buckley's disappearance that it was admissible as a common scheme or plan under Rule 404, SCRE. The State argued the evidence of Bah's armed robbery also proved

Bernithia Young's and Hillary's intent on the night they went to meet the victim, to armed rob him, which was contrary to Hillary's statement to police. (R. 121-25, 155-58). Hillary argued the two incidents were not at all similar – particularly since Bah was not killed – were too far apart, and Rule 404 and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) prohibited admission. (R. 118-120, 148-54, 158-61).

After hearing the testimony of Bah, and the testimony of the investigating officer in Bah's armed robbery who testified to Bah's identification of Hillary and Bernithia Young from a photographic line-up, Judge McKinnon admitted the evidence, finding a "strong logical connection" to Buckley's murder and that it was evidence of motive or intent, where Hillary claimed in his statement to police that he killed the victim in the present case, Buckley, in self-defense. (R. 161). Judge McKinnon found the State presented clear and convincing evidence that supported finding a common scheme or plan – a male victim, alone, use of the white sedan, cash/wallet stolen, and "the strongest parallel is the communications between Mr. Hillary and Ms. Young." (R. 161). Further the evidence showed the Bah armed robbery occurred just five weeks after the murder victim's death and armed robbery, (see R. 160), and there was evidence Hillary and Bernithia Young acted together in the murder and robbery of Buckley as they did in Bah's robbery, including phone and text messages, and Bernithia Young used the same vehicle to drive Hillary away from the location where Hillary dumped the victim's truck, as she did to drive away from the armed robbery of Bah (R. 161). The trial judge also reasoned, noting Hillary's claim of self-defense in his statement, that "this is strong evidence of motive or intent that ... counteracts the self-defense evidence, and its probative value, therefore, substantially outweighs the prejudice" such that it was admissible. (R. 161).

The trial court did not err in admitting this evidence under Rule 404(b) because it was logically connected to the circumstances of Buckley's death, which is the test. *State v. Perry,* 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020), *reh'g denied* (June 10, 2020).

On appeal, Hillary argues that a single dissimilarity stands out as dispositive in this case—the lack of any involvement of Bernithia with the victim Buckley. (FBOA, p. 20). According to Hillary, no evidence showed that Bernithia ever communicated with Buckley. (Id.) He submits that the cell phone evidence that placed Hillary near the location where Buckley's body was found did not place Bernithia at that scene, and, again according to Hillary, Bernithia's involvement was limited to picking up Hillary after he called her upon returning to the beach. (Id.) In short, he argues nothing showed that Bernithia lured Buckley anywhere as she lured Bah. (Id.) Hillary also argues that like the defendant in *State v. Cope*,[4] the Bah robbery occurred long after Buckley's death—five (5) weeks later in a different county, thus is distinguishable. (Id.) However, Hillary is wrong.

Cell phone records evidence supports that the victim Buckley first contacted Bernithia at approximately 3 a.m. on September 29, 2016. (R. 516-17). Both Bernithia's and Hillary's cell phone tower information shows, after the victim called Bernithia's phone, Bernithia and Hillary were in the area of the victim's camper. (R. 517-18). The jury could infer from this evidence that the victim believed he was going to meet Bernithia but did not know Hillary would be coming. When they arrived at the campground, Hillary robbed the victim at gunpoint, as he did Bah, with

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[4] 405 S.C. 317, 748 S.E.2d 194 (2013). *Cope* did address later crimes as opposed to prior crimes, but the distinction was in the character of the crimes – particularly, the distinctions between the child victim as compared to adult victims in other crimes; and, varied differences in completion of the crime, method of assault and entry. *See Id.* at 338, 748 S.E.2d at 205. When the crimes are in a distinctive pattern and closely connected, as they are here, Rule 404 allows admission. There is no limitation or qualification on admissibility based upon some distinction between prior as opposed to subsequent crimes. See Rule 404(b), SCRE.

a semi-automatic 9mm pistol, and shot the victim at gunpoint when the victim attempted to escape the armed robbery. The evidence largely mirrors the events with Bah – Timothy Buckley was set up by Bernithia and robbed by Hillary just as Bah was. The only difference being Timothy Buckley resisted and attempted to escape his truck, but Bah complied with the armed robbery. Both men's wallet and cell phones were stolen by Hillary. Both Buckley's stolen revolver and Bah's stolen credit cards were found in Hillary and Bernithia's townhome in Atlanta. (R. 579, 587, 589-90, 594-98; 612).

Because Hillary had murdered Buckley, Hillary had to dispose of Buckley's body and truck. Cell phone records show Hillary then drove the victim Buckley's body to a location near where Hillary had stayed earlier in September, and dumped the body in a secluded area where it would not be found for weeks until it was severely decomposed. (R. 517-534, 371-73, 265-68). During the drive to get rid of the body, Hillary stayed in constant contact with Bernithia Young by cell phone either calling or texting her. He then stayed in constant contact with her by cell phone as he returned to the City of Myrtle Beach in the victim's stolen truck. (See State's 187). He then met up with her at her motel and she followed him to the location where he dumped the victim's truck, staying in constant contact by phone. She waited nearby at an intersection as he dumped the truck in an apartment complex parking lot, where it would not be found for several days, and she picked him up in her white sedan, Hillary getting in the passenger side as he did in Summerville after robbing Bah, and the two, Bernithia and Hillary left the scene together in the same white Chevrolet Impala they left the crime scene in Summerville in, and they returned to the Ocean Plaza Hotel where they both were staying. (R. 324-26). She had registered Hillary under a false name ("Fernando Cannon") for that night, indicating they had pre-planned some criminal behavior. (R. 349, 358-59).

This evidence falls squarely within the requirement of having a logical connection and a close similarity and it was not error to admit it as a common scheme or plan.

Evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) identity; (4) the absence of mistake or accident; or (5) common scheme or plan. Rule 404(b), SCRE; *State v. Lyle,* 125 S.C. 406, 416-17; 118 S.E. 803, 807 (1923). Evidence of a bad act, if relevant, is admissible regardless if the act in question occurred prior or subsequent to the case for which a defendant is being tried. *State v. Atkins,* 309 S.C. 542, 424 S.E.2d 554 (Ct. App. 1992).

To be admissible, a prior or subsequent bad act need only be proven by clear and convincing evidence. *State v. Pierce,* 326 S.C. 176, 485 S.E.2d 913 (1997). The testimony of a witness, which is corroborated in some measure, will usually satisfy the clear and convincing requirement. *State v. Gilchrist*, 329 S.C. 621, 496 S.E.2d 424 (Ct App. 1998); *State v. Aiken,* 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996). Where a witness testimony is the sole evidence of a bad act, the determination of the witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate the witness's veracity. *State v. Kirton,* 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008); *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). Should the trial judge determine the witness testimony clearly and convincingly establishes that the bad act occurred, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *Id.* An appellate court will not conduct a *de novo* review of a trial judge's ruling on the admissibility of bad act evidence on the issue of whether the evidence rises to the level of clear and convincing evidence. *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). A trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence. *State v. Cheeseboro,*

346 S.C. 526, 552 S.E.2d 300 (2001); *State v. Wilson,* 345 S.C. 1, 545 S.E.2d 827 (2001); *State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004).

Here the evidence of the subsequent bad act was clear and convincing. Mr. Bah testified under oath to planning a sexual encounter with Bernithia Young by phone. He testified they met up and she drove him to a hotel in her car while she was texting someone. Once there, appellant Hillary approached the car from around the corner of the hotel and robbed him at gun point. Phone records of Hillary and Young introduced in evidence established Bernithia Young and Hillary were working together to set up and rob Bah at the motel and then did so. Bah identified both Bernithia and Hillary from separate photographic line-ups. Finally, Mr. Bah's stolen credit cards and i.d. were found in Hillary and Bernithia's townhome in Atlanta. There was more than clear and convincing evidence of the bad act. *State v. Gilchrist,* 329 S.C. 621, 496 S.E.2d 424 (Ct App. 1998); *State v. Aiken,* 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996). *See also State v. Ford,* 334 S.C. 59, 512 S.E.2d 500 (1999) (testimony by victim that he was previously robbed by the defendant, which was partially corroborated by a detective, was deemed clear and convincing evidence of the prior bad act). Consequently, the trial judge did not abuse his discretion.[5]

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[5] Further, any error in admission of some portion of the Bah testimony was harmless. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). The record here would support that any error would be insubstantial. First, the evidence of items taken from Bah would be admissible because those items, along with others, were found in the Atlanta townhome where Buckley's gun was found. Second, Bah could place the 9mm gun in Hillary's hand which shows access to a gun other than the one taken from Buckley. Third, the evidence from cell phones, from video, from hotel management, and from Bernithia's cell phone all show a concerted effort to act together for the instant crime of murder, and even in the disposal of the victim's body. And fourth, the Bah evidence was limited to necessary facts to show the connection. *See State v. Gillian,* 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007) ("conclude[ing] the admission of the extraneous evidence was harmless given that petitioner's guilt has been proven by competent evidence such that no other rational conclusion can be reached"). But the Bah evidence, with its distinctive plan to lure men for purposes of robbery, not only explains the evidence obtained in the

III.

The Supreme Court of South Carolina does not allow plain error review. Because Hillary raised no objection to his sentence for kidnapping, and because the narrow *Johnston* exception is inapplicable, this Court may not reach the unpreserved error.

Standard of Review

"In criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e., the issue has been raised to and ruled on by the trial court." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). An appellate court has no standard of review to apply on an unpreserved issue. *See, e.g., State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

What Occurred Below

At the conclusion of the trial, Hillary was found guilty of murder, kidnapping, armed robbery, and possession of a weapon during a violent crime. The trial court sentenced Hillary to life imprisonment for murder, a concurrent sentence of thirty years for kidnapping, a concurrent sentence of thirty years for armed robbery, and five years on the weapon charge. (R. 769-70). No objection was raised to any part of the sentencing.

Law / Analysis

"[T]he plain error rule does not apply in South Carolina state courts." *State v. Sheppard,* 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (citing *Jackson v. Speed,* 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997)). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston,* 333 S.C. 459, 462, 510 S.E.2d 423, 425

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search of the townhome, it is strongly probative of intent. Given that Hillary eventually conceded to being in the truck (after he saw pictures of himself), he did not concede the malice aforethought. Again, the clear and convincing evidence specifically addressed that motive. The trial judge did not abuse his discretion in admitting the evidence in these circumstances.

(1999). In *Johnston*, though, our Supreme Court recognized a narrow, extremely limited exception to the general preservation rule – an exception to allow swiftly addressing a sentencing error where "there [was] the real threat" Johnston "w[ould] remain incarcerated beyond the legal sentence due to the additional time it will take to pursue" post-conviction relief. *Id.*, 333 S.C. at 464, 510 S.E.2d at 425. The *Johnston* exception does not apply where there is no danger of serving time beyond the maximum imposed. In fact, the Supreme Court expressly set out in the *Johnston* opinion: "Our holding today ***is not intended to disrupt our settled rules on issue preservation and PCR applications***. The facts here are ***unique and demand an expedited result***.") (emphasis added)). *Johnston,* 333 S.C. at 464 n. 3, 510 S.E.2d at 425 n.3.

In *State v. Passmore,* 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005), this Court considered whether the *Johnston* exception applied to an unpreserved challenged to an already expired contempt sentence and found:

> ... the exceptional circumstance carefully carved out by the *Johnston* court is not present here. Appellant has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. *Johnston* does not control.

363 S.C. at 585–86, 611 S.E.2d at 282–83.

This Court resolved, "Appellant will be forced to seek redress through the avenue of post-conviction relief." *Id.*, at 586, 611 S.E.2d at 283. *Passmore* properly applied the Supreme Court's precedent as this Court is required to do. *See* S.C. Const., art. V. § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *Daniels v. City of Goose Creek,* 314 S.C. 494, 498, 431 S.E.2d 256, 260 (Ct.App. 2003) ("any modification or limiting" of supreme court case law "must be done by the Supreme Court."). However, since *Passmore*, this Court has been inconsistent in adherence to the Court's precedent to unpreserved sentencing issues.

For example, this Court unilaterally expanded the *Johnston* exception in *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009), when it addressed Vick's unpreserved challenge to his sentence for kidnapping noting: 1) the State conceded that the sentence was improper; 2) referencing "judicial economy"; and, 3) referencing that the same issue would likely be addressed in a later post-conviction relief action.[6] *Id.* at 203, 682 S.E.2d at 282. Critically, though, the Supreme Court precedent which binds this Court has not changed. The only exception recognized does not apply to Hillary. Hillary is presently serving a sentence of life imprisonment for murder. He will be in prison under this sentence regardless of the concurrent sentence. Moreover, the Supreme Court has not recognized any danger in merely having the sentence on record. In fact, in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), in note 2, added right after reference to the "thirty years concurrent [sentence] for kidnapping," our Supreme Court found the sentence simply "ineffective in light of appellant's sentence under S.C. Code Ann. § 16–3–20 (1985). S.C. Code Ann. 16–3–910 (1985)." Ineffective is defined as "[n]ot producing an intended effect." *The American Heritage College Dictionary* 694 (3rd ed. 2000).

Hillary's reference to *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462 (1998), (FBOA, p. 21), simply does not help him. It is inapposite. First, *Owens* is a post-conviction relief appeal and there was no suggestion that the issue could not be addressed in post-conviction relief. Second,

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[6] A general "judicial economy" component is not part of the *Johnston* case, and would appear particularly at odds with other Supreme Court precedent. In *State v. Torrence*, 305 S.C. 45, 66–67, 406 S.E.2d 315, 327 (1991) (Toal, JJ, concurring) (writing for the majority "for the purpose of expressing our abolition of the outdated doctrine of *in favorem vitae*"), the Supreme Court wrote that the "contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured." Thus, had the sentencing issue here been raised below in accordance with the contemporaneous objection rule, it would have been addressed below and corrected below. Consequently, faithful adherence to true "judicial economy" bolsters enforcement of the contemporaneous objection rule. It surely does not support its routine avoidance.

Owens' posture in post-conviction implicitly recognizes the value of our two-tier review system – direct appeal and post-conviction relief. Both are vital in review, and both have designated matters for scope of the remedy. It is not clear how Hillary's acknowledging that post-conviction relief is available for such issues helps him in his request to this Court to depart from our Supreme Court's precedent setting out the preservation rules to be followed.

At any rate, though, Hillary does not fall under the recognized exception established by our Supreme Court and can identify no harm in having the concurrent, ineffective sentence imposed. Thus, he is not entitled to any relief on direct appeal. If any relief will eventually be granted, the issue should be raised in post-conviction relief.[7]

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[7] Hillary could not credibly argue it is somehow unfair to require him to raise his patently unpreserved sentencing issue in a subsequent post-conviction relief action. It is where all similarly unpreserved claims are normally required to go. *See Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) ("At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal," further, he could only "raise such issue on Post-Conviction" through "an allegation of ineffective assistance of counsel.").

CONCLUSION

For the above stated reasons, this Court should affirm.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

February 2, 2021.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHNATHAN LAMAR HILLARY,

Appellant.

Appellate Case No. 2019-001048

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 2nd day of February, 2021.

s/ *J. Anthony Mabry*
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