STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL CHRISTIAN BARCLAY,

APPELLANT.

APPELLATE CASE NO. 2021-000976

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err by instructing the jury regarding accomplice liability where the evidence presented was Appellant alone fired the fatal shot?

III. Did the trial court err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter where evidence in the record required the instruction, including the solicitor's assertion during the co-defendant's guilty plea that such evidence existed and the judicial finding of a factual basis to support that the shooter acted upon the sudden heat of passion based upon sufficient legal provocation?

IV. Did the trial judge err by failing to instruct the jury that it may draw an adverse inference against the state where it was undisputed that the state destroyed video footage of the crime scene captured by the first responding officer in this weak circumstantial evidence case?

STATEMENT OF THE CASE

On April 4, 2019, a Florence County grand jury indicted Appellant, Jimmy Lee Hampton, Jr., and Demonta Kabora Hickson for murder. R. 568. After several pre-trial hearings, the state, represented by Edgar L. Clements, III, called Petitioner and Hickson to trial before the Honorable D. Craig Brown and a jury on August 23-26, 2021. R. 1. Christie Henderson represented Petitioner, and James Hoffmeyer represented Hickson. R. 1.

Immediately prior to the state resting its case, Hickson entered a guilty plea to voluntary manslaughter. Tr. 470, ll. 23-25. The state recommended a cap of fifteen years imprisonment as the sentence for Hickson. R. 473, ll. 3-6. Judge Brown then sentenced Hickson to fifteen years. R. 490, ll. 5-8.

After requesting to hear the testimony of three witnesses, the jury found Appellant guilty of murder. R. 558, l. 19 – R. 559, l. 2; R. 561-563. The state asked the judge to sentence Appellant to life. Judge Brown did as the state requested and sentenced Appellant to life imprisonment without the possibility of parole. R. 560, ll. 4-6; R. 570.

On August 31, 2021, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. In violation of Appellant's right to due process as explained in *Brady v. Maryland*, 373 U.S. 83 (1963), the trial judge erred by failing to dismiss the criminal charge against Appellant where the state engaged in a pattern of discovery abuses culminating in the destruction of in-camera video footage and body-worn camera footage of the crime scene immediately after the shooting because the evidence was material to Appellant's guilt.

Standard of review

"In criminal cases, an appellate court sits to review only errors of law." State v. Anderson, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014). The trial court "abuses its discretion when it commits a legal error in determining whether a Brady violation occurred; [the appellate courts] therefore review the district court's Brady ruling de novo." United States v. Parker, 790 F.3d 550, 558 (4th Cir. 2015). In conducting its de novo review, the appellate court reviews a trial judge's factual findings for clear error. Id.

Relevant facts

On March 19, 2021, Appellant's case was set to be called as the back-up case for trial during the week of May 24, 2021. May 11 R. 5, ll. 4-6. Although defense counsel believed she had all discovery, she met with the solicitor on March 29, 2021, to review the discovery pursuant to the solicitor's "open file policy." May 11 R. 5, ll. 7-12. During this meeting, defense counsel determined she was missing various pieces of discovery. May 11 R. 5, ll. 13-18.

After realizing she was missing discovery, on April 12, 2021, defense counsel filed a supplemental motion for discovery. R. 564. On April 22, 2021, the solicitor provided defense counsel with a compact disc containing voluminous discovery materials on it, which dated back to 2018 and 2019. May 11 R. 6, ll. 10-14. On April 30, 2021, defense counsel filed a motion to continue and to reconsider bond as the case had been set as a back-up trial for the week of May 24, 2021, but the supplemental discovery motion had not been answered completely. R. 5.

Defense counsel requested the case be struck from the May 24, 2021, trial list. R. 5. On May 5, 2021, defense counsel received even more information from the state. May 11 R. 6, ll. 21-24.

On May 11-12, 2021, the Honorable D. Craig Brown, heard argument on the two outstanding motions. R. 12 During the hearing, the solicitor expressed surprise because the discovery was "not even 50 pages" unless photographs were counted. May 11 R. 8, ll. 1-5. The solicitor noted that only a "handful" of photographs were ever even introduced during trial. May 11 R. 8, ll. 6-8. According to the solicitor, "[t]he only thing really of any impact that was missing was a bullet." May 11 R. 8, ll. 14-15.

Although assuring the judge that if defense counsel found something missing in discovery he would "find whatever [was] missing" and "get it," he later qualified that by stating that the worksheets of the forensic examinations conducted by SLED could be obtained by "anybody." May 11 R. 8, ll. 9-13; May 11 R. 10, ll. 18-22. He was forced to admit, however, that when defense counsel requested these very documents from SLED, she was informed that all requests had to "go through [the solicitor]." May 11 R. 11, ll. 1-5. He also later admitted that he would not obtain certain evidence for the defense because he "just wasn't going to do that extra work." May 11 R. 13, ll. 16-17.

At the conclusion of the hearing on May 12, 2021, in preparation for trial on May 24, 2021, as the solicitor had moved the case from back-up to the "front," defense counsel asked for assurance that she would not receive any more discovery materials prior to trial. May 11 R. 27, ll. 18-19; May 11 R. 37, ll. 20-24. The solicitor responded, "we've looked high and low. We will continue to look high and low." May 11 R. 37, ll. 1-13.

Shortly before the state intended to call the case to trial, it was revealed that the state had not disclosed the body camera footage from the former lead investigator on the case. In fact,

defense counsel learned of the existence of the body camera footage from *her* investigator on May 18, 2021. May 20 R. 47, ll. 18-24. She contacted the solicitor and current lead investigator on the case who confirmed the existence of the footage. May 20 R. 46, l. 25 – May 20 R. 48, l. 2. At 3:30 p.m., on May 19, 2021, she received six discs containing over three and a half hours of body camera footage from the night and next day surrounding this alleged shooting." May 20 R. 45, l. 23 – May 20 R. 46, l. 2. The footage was from the camera worn by the former lead investigator, and it showed "his response to the scene," "numerous witness interviews," and "an abundance of information." May 20 R. 46, ll. 3-8. Based on this delay in disclosure, defense counsel requested the case be dismissed. May 20 R. 46, ll. 9-22.

On May 20, 2021, *four* days before Appellant's trial was set to begin, Judge Brown convened another hearing to discuss delayed disclosures of evidence. R. 42. Defense counsel noted the importance of the footage as it showed the scene immediately after the shooting and included witness interviews. May 20 R. 49, ll. 6-10. Although numerous witnesses appeared on the footage, many were unidentified. May 20 R. 49, ll. 11-15. Further, the footage showed individuals on the scene whose names did not appear on the crime scene log. May 20 R. 49, ll. 16-24; May 20 R. 50, ll. 15-22.

Importantly the footage showed Jimmy Lee Hampton, Sr., a former police officer who was convicted of federal crimes related to drug trafficking, and his family members, one of whom was charged in this shooting, giving statements to a police officer. May 20 R. 51, l. 18 – May 20 R. 52, l. 12. The video showed a chummy relationship between the former police officer and the current officer investigating the case, which corroborated Appellant's claim that he was being set up by Hampton, Sr. May 20 R. 52, ll. 13-19.

The solicitor claimed that he learned of the body camera footage "the day before yesterday" when he was preparing witnesses at the Timmonsville Police Department. May 20 R. 55, l. 24 – May 20 R. 56, l. 6. Mark Strickland, the former lead investigator on the case, asked if the solicitor wanted the video from his body camera. May 20 R. 56, ll. 6-7. The solicitor claimed he was "flabbergasted." May 20 R. 56, ll. 8-9. He further claimed that he had asked Strickland numerous times for everything in his file, but the video footage had not been provided. May 20 R. 56, ll. 12-18. Thereafter, the solicitor provided a copy of the video to defense counsel's investigator. May 20 R. 57, ll. 7-13.

The solicitor volunteered that he had not looked at the video and he believed the judge should suppress it due to the late disclosure. May 20 R. 57, ll. 14-18. Although he claimed to having not looked at the video, the solicitor asserted that the video would not result in a "slam dunk not guilty," but "[i]t would be reasonable doubt." May 20 R. 58, ll. 5-10.

Defense counsel argued that the pattern of discovery violations by the solicitor violated Appellant's fundamental constitutional rights. May 20 R. 55, ll. 8-15. The solicitor opposed the request for dismissal. May 20 R. 59, ll. 1-2. Tellingly, however, the solicitor advised Judge Brown that although he claimed to have an "open file policy," what he disclosed really "depend[ed] on how [he] g[o]t treated." May 20 R. 59, ll. 21-22. He also "refer[red defense counsel] to read Rule 5(b)(2)" regarding disclosure of evidence. May 20 R. 81, ll. 8-12.

Judge Brown denied defense counsel's request to dismiss the charge. May 20 R. 77, ll. 2-4. Nevertheless, he did grant defense counsel's motion to continue the case and set the case for a date certain later in the year. May 20 R. 80, l. 1. Prior to trial, defense counsel renewed her motion to dismiss based upon the pattern of discovery abuses by the solicitor. R. 85, ll. 16-18. As a

companion to her motion to dismiss, defense counsel also renewed her motion for discovery. R. 85, ll. 18-21. She explained that she still needed the following evidence from the state:

> The Florence County Sheriff's Office Deputy Marlon Mack's in-car camera footage from the scene 8/25 to 8/26, 2018.
>
> South Carolina Highway Patrol Jordan Smith's body-worn camera footage, in-car camera footage, and any reports prepared in conjunction with his response to the scene on August 25th and August 26th, 2018.
>
> Timmonsville Police Department Officer Christopher Miles' body-worn camera footage and in-car camera footage from the scene August 25th to August 26th, 2018.
>
> Timmonsville Police Department Officer Mark Strickland's in-car camera footage from the scene August 25th to August 26th, 2018.
>
> Timmonsville Police Department Chief Billy Brown's body-worn camera footage, in-car camera footage, and any reports prepared from the incident.
>
> And any other in-car camera footage from any law enforcement vehicles present on the scene August 25th to August 26th, 2018.

R. 86, l. 10 – R. 87, l. 4.

The solicitor clarified that the Miles' body worn camera footage and in-car camera footage were purged, and the other items did not exist to his knowledge. R. 87, ll. 7-10. Miles was the first responding officer. R. 452, ll. 13-20. The trial judge simply noted defense counsel's motion for the record. R. 87, ll. 11-12.

Discussion

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Essentially, the Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or

punishment. Id.; See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006).

Evidence is favorable to the accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. Importantly, the Supreme Court held that "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434. The "touchstone of materiality is a 'reasonable probability' of a different result." Id. (quoting Bagley, 473 U.S. at 678). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

In Kyles, 514 U.S. at 421, the Supreme Court held the duty "to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government, and ... the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." The Court granted a new trial to a defendant where the prosecutor failed to disclose potential impeachment evidence, including prior inconsistent

statements by eyewitnesses. Id. at 441-445. Additionally, the prosecution suppressed statements by a key witness, whom the defense alleged was the likely killer, wherein the key witness's "various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation." Id. at 445.

In Giglio v. United States, 405 U.S. 150, 150 (1972), the defendant was convicted of passing forged money orders. The prosecution relied upon the testimony of the defendant's co-conspirator, who worked at the bank. The co-conspirator provided the only evidence linking the defendant to the crime. Id. at 151. The co-conspirator testified against the defendant and claimed that he had received no promises for his testimony and believed that he may be prosecuted for his involvement. Id. at 151-152. However, the defendant discovered after the trial that a promise – the co-conspirator would not be prosecuted – was made to the co-conspirator by a member of the prosecutor's office, but not the person who prosecuted the defendant. Id. at 152. The Supreme Court made clear the Brady rule extended to include impeachment evidence. The Court stated, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general rule [of disclosure]." Id. at 154. Based upon the centrality of the co-conspirator's testimony to the defendant's prosecution and conviction, the Court reversed the defendant's conviction. Id. at 155.

In Bagley, 473 U.S. at 670-671, the government's two key witnesses were promised a sum of money for their cooperation. This information was withheld from the defense. Id. The Court made clear again that "[i]mpeachment evidence ... as well as exculpatory evidence falls within the Brady rule." Id. at 676. Impeachment evidence is favorable to the accused because "if disclosed and used effectively, it may make the difference between conviction and acquittal." Id. (citing Napue v.

Illinois, 360 U.S. 264, 269 (1959)). The Court held the possibility of a reward gave the two witnesses "a direct, personal stake" in the defendant's conviction. Id. at 683.

In Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), the South Carolina Supreme Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle's trial, a police officer interviewed a key witness in the case who provided a statement inconsistent with his previous statement. The prosecutor failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. Our Supreme Court disagreed, holding "[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires." As explained by the Court, "[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Id.

The South Carolina Supreme Court recently analyzed whether the state's failure to disclose the criminal history of one of its witnesses constituted a violation of Brady. State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020). The Court explained that "[a] Brady violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." Id. "Importantly, whether the prosecution acted in good or bad faith is irrelevant in determining whether a Brady violation occurred." Id. at 107, 844 S.E.2d at 54.

The state failed to disclose the criminal history of one of the state's witnesses. First, the Court held that "failure to provide information that could be obtained through a NCIC search is a Brady violation." Id. The Court held the state must be responsible for fulfilling its prosecutorial duties, including the duty to disclose under Brady, and requiring the defense to obtain information – even if readily available to the public – was "too slippery a slope." Id. at 109, 844 S.E.2d at 54-55. "Shifting

the burden to defense counsel lessens the state's duty to disclose exculpatory evidence and has the risk of adding an additional element to Brady." Id. at 109, 844 S.E.2d at 55. After holding the state was in possession of the witness's criminal background information and failed to disclose it, the Court held the evidence was not material. Id. at 110, 844 S.E.2d at 55. The Court noted the witness's criminal history included several convictions, but it determined most of them would not have been admissible due to their age. Id. Further, the Court held the evidence was not material because there was not a reasonable probability that the result of the proceedings would have been different due to the state presenting cumulative evidence of the defendant's guilt. Id.

Although the issue presented is one regarding due process of law, the South Carolina Rules of Criminal Procedure provide that when a party fails to comply with the requirements of the procedural rules governing disclosures, "the court ... enter such other order as it deems just under the circumstances." Rule 5, SCRCrimP. Thus, dismissal is a proper remedy for the state's failure to disclose. Furthermore, other jurisdictions have dismissed charges based upon discovery violations. See e.g., People v. Thurman, 787 P.2d 646, 655 (Colo. 1990) (affirming the dismissal of charges where the state failed to disclose a confidential informant's address and place of employment); State v. Schilling, 712 P.2d 1233, 1239 (Kan. 1986) (providing that "the trial court may dismiss a case where failure to abide by the discovery rules prevents a fair trial"); State v. Price, 620 P.2d 994, 996 (Wash. 1980) (explaining that a court may dismiss charges if the state fails to act with due diligence resulting in material facts being withheld from a defendant); State v. Quintal, 479 A.2d 117, 119 (R.I. 1984) (affirming dismissal where the state failed to comply with a discovery order).

Here, the state engaged in a series of discovery abuses that culminated in the destruction of in-car video footage and body-worn camera footage from one of the first responding officers.

Despite the solicitor's repeated claims that he had an "open file" policy, he revealed the true nature of his discovery practice when he revealed that he "wasn't going to do that extra work" and that his response to discovery requests really "depend[ed] on how [he] g[o]t treated." May 11 R. 13, ll. 16-17; May 20 R. 59, ll. 21-22. Not only did the state fail to disclose information in March 2021, but the state continued to disregard its disclosure duties up to the trial. A stark example of the solicitor's complete lack of diligence was the video from the body-worn camera of the former lead investigator, Mark Strickland. Although the solicitor claimed on May 12, 2021, to having "looked high and low" for evidence, somehow the solicitor was completely unaware that Strickland had video footage from his response to the scene and of his interviews of witnesses. See May 11 R. 37, ll. 1-13. Only days before trial when the solicitor was interviewing witnesses did the solicitor learn of the footage.

The solicitor admitted that Timmonsville Police Department Officer Christopher Miles' body-camera footage and in-car camera footage had been in the possession of the state prior to it being purged. Further, the state suppressed this evidence by destroying it prior to Appellant having an opportunity to review it. Thus, Appellant satisfied these Brady factors as the state possessed this specific footage before destroying it.

The more difficult hurdles for Appellant to cross are whether the evidence was favorable to the accused and material to his guilt. Although the footage obtained by Miles was likely different from the footage obtained by Strickland, there were likely similarities as both responded to the scene. Using that as a guide, this Court must conclude that the Miles footage was favorable and material based upon the solicitor's own words about the Strickland footage when he proclaimed the Strickland footage "would be reasonable doubt." See May 20 R. 58, ll. 5-10. Finally, the case against Appellant was a weak circumstantial evidence one. There were no

eyewitnesses who claimed Appellant fired any shots, much less the fatal shot. There was no physical evidence placing any gun – much less the murder weapon – in the hands of Appellant. The only evidence produced by the state was that Appellant was driving a red Charger and a single witness claimed someone got out of the red Charger and fired a gun. This was not a case of overwhelming evidence of guilt; instead, this was a desperate attempt by the state to prosecute someone – anyone – because a child had died senselessly. In conclusion, the state violated Appellant's right to due process by withholding and destroying Brady evidence, and the trial judge erred by failing to dismiss the charge based upon this violation, especially in light of the state's pattern of discovery abuses.

II. The trial judge erred by instructing the jury regarding accomplice liability where the evidence presented was Appellant alone fired the fatal shot.

Standard of review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421-422 (2011) (internal quotation omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Berberich v. State, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (internal citation omitted). "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." Id.

Relevant facts

In his opening statement, the solicitor told the jury that Appellant and others arrived at the corner of Byrd and Tanyard Streets where they "jumped out and said, 'Where's Boogie?' Bam, Bam, Bam." R. 89, ll. 3-6. Thereafter, he told the jurors that witnesses saw Hickson shoot. R. 89, ll. 7-11. The police found five spent shell casings of a .380 in the area where Hickson was

standing. R. 89, ll. 12-13. However, "there were bullets from another caliber gun retrieved from the walls of the trailer where they got shot there, and there was a bullet that did not match the .380. It was a 9mm that they retrieved from [the deceased] at her autopsy." R. 89, ll. 13-17.

Reaching his crescendo, the solicitor told the jurors: "And it doesn't matter if one bullet hit her from one gun and one didn't hit her from the other gun because, as the judge is going to tell you when he talks about the law, he's going to tell you about something called accomplice liability, and that is a fancy word of saying the hand of one is the hand of all." R. 91, ll. 6-11. He summed it up: "They went together and they shot and they opened fire and they sprayed bullets around, then they're both accountable." R. 91, ll. 17-19.

However, the evidence presented did not support the state's claims regarding the applicability of accomplice liability to Appellant. John "JJ" Hampton, Jr., had "a real bad memory." R. 101, ll. 22-24. Nevertheless, he recalled being at a party at Cassandra Simon's house. R. 101, l. 25 – R. 102, l. 2. He also recalled getting "into it with" Cedric "Boogie" Young. R. 102, ll. 3-9. Family members broke up the fight, and JJ went home. R. 102, ll. 15-25. He had no idea what happened after that.

Driving a white Challenger, Joshua Hampton, JJ's brother, went to his aunt's house on August 25, 2018. R. 105, ll. 14-17; R. 109, ll. 1-4; R. 109, ll. 17-18. He saw "a bunch of cars" driving off quickly. R. 109, ll. 8-16. He saw a blue Charger leaving his aunt's house on White Street. R. 109, ll. 19-21; R. 111, ll. 13-16. His cousin, Jimmy Hampton, Jr., drove a blue Charger. R. 109, l. 23 – R. 110, l. 5. He saw a red Challenger leaving the area as well, but he was unfamiliar with it. R. 110, ll. 9-19. Nevertheless, Joshua followed the blue Charger and red Challenger. R. 110, ll. 20-22. Joshua did not recall where he "almost" stopped, but he did not recall hearing gunshots that were coming from "[e]verywhere." R. 112, l. 7 – R. 113, l. 16. Joshua did not see

anyone get out of a car. R. 114, ll. 2-3. He could not tell if any of the shots were coming from the red car. R. 117, ll. 6-11. As soon as he heard the shots, he went home. R. 114, ll. 6-9.

Jimmy Lee Hampton, Jr., was related to Appellant. R. 332, ll. 304. He attended a party at Simon's house along with over a hundred other people. R. 333, ll. 2-9. While at the party, he heard someone had shot up his aunt's house. R. 336, ll. 12-14. Jimmy, Hickson, Appellant, and another cousin went to his aunt's house. R. 336, ll. 18-24. Jimmy was driving his blue Charger, while his cousin, Josh, was driving a white Dodge. R. 337, ll. 2-7. Hickson was riding with Jimmy. R. 338, ll. 5-6. Appellant was driving a red Challenger that Jimmy had rented for him to use to attend a funeral while Appellant was in the area. R. 337, ll. 8-9; R. 338, ll. 13-18. Jimmy was aware of Appellant being the only driver of the red car. R. 341, ll. 6-11.

As Jimmy and the others arrived at a house on the corner, Jimmy heard shots. R. 344, ll. 23-24. Later, Jimmy claimed he heard one shot at first and Hickson was in his car at the time. R. 357, ll. 1-3. Oddly, however, Hickson jumped out of the car as Jimmy was trying to leave. R. 345, ll. 4-7. When Hickson jumped out, Jimmy heard more shots. Tr. 399, ll. 18-21. Jimmy pulled away just as Hickson jumped in the backseat. R. 357, ll. 21-24. Jimmy never saw Hickson with a gun.

Fandando Jackson, Jr., lived with his grandparents on East Byrd Street. R. 120, ll. 11-21. His parents were in a car in the front yard as they anticipated picking up their daughter, Fantasia, who had attended the fair earlier in the evening with relatives. R. 122, ll. 7-23. He saw three cars pull up – a red car, a white car, and a blue car. R. 123, ll. 9-12. "[T]hey had asked where Boogie was at, a dude named Boogie [and b]efore anybody can tell them, they just start shooting." R. 123, ll. 16-19. At first, he claimed he did not know if anyone got out of the cars because he was not "really looking" and it was "dark," but he later changed his testimony to say that "all of them got

out of the car." R. 123, l. 20 – R. 124, l. 3. He believed more than one gun fired because there were different sounds. R. 125, ll. 1-7. During the gunfire, he ran into the house, but his sister, Fantasia, was shot as she was running in the house behind him. R. 124, ll. 4-15.

Previously, he had told the police about the white and blue cars, but he had not mentioned a red Challenger at all. R. 132, ll. 6-13. He also told police that as he was running into the house, he saw someone with dreads. R. 130, ll. 22-24. Although he claimed the person with dreads looked like Demonta Kabora "KB" Hickson, he was unable to identify Hickson in the courtroom. R. 142, l. 20 – R. 146, l. 11.

Another alleged witness to the shooting, James Jackson, initially claimed that "all these cars pulled up" and then "[p]ersons out the car got out shooting, two different guns." R. 159, ll. 1-9. "The main car that the person got out shooting was a blue Charger," however, he also saw a white Dodge, a burgundy truck, and a red Dodge. R. 160, ll. 14-15. Jackson claimed that his cousin, Hickson, got out of one of the cars. R. 160, l. 24 – R. 161, l. 9. However, when asked to identify his cousin, he identified Appellant, not Hickson. R. 161, ll. 12-22. Jackson identified Appellant as the shooter because "he the one that got charged for it first" and "the one they caught with the gun." R. 163, ll. 23-25. Nevertheless, he clarified that he saw a guy with dreads jump out of the blue car and start shooting, and it was undisputed that Appellant did not have dreads. R. 163, ll. 4-9.

Sha'Tyra Gee saw three cars arrive at the house where she was standing in the yard. R. 170, ll. 16-18. After the occupants asked where Young was and no one responded, "[t]hey just started shooting." R. 170, ll. 19-20. She saw "KB [get] out by the stop sign." R. 170, ll. 20-21. Unlike the other witnesses, Gee was able to identify Hickson as KB. R. 171, ll. 6-21. He was the only person she saw get out of a car. R. 171, ll. 22-23. According to Gee, she saw shooting coming

from the blue car, which was the car that Hickson exited. R. 174, ll. 23-25. She was unable to say if any shots were fired from the red Challenger. R. 175, ll. 6-8.

The state's critical witness against Appellant was George Dunn, who had attended the party earlier at Simon's house along with the deceased's parents. R. 191, ll. 1-13. After the party, he rode with the deceased's parents to the house on Byrd Street. R. 192, ll. 8-10. He got out of the car and stood near the road. R. 195, ll. 21-22. He saw a red car arrive. R. 196, ll. 13-16. The occupant "was asking about Boogie, and he started shooting." R. 196, ll. 198-21. Dunn claimed that this person "sounded like he was from up top, up north." R. 198, ll. 21-22. Regarding other cars, he only saw them "come through." R. 197, l. 1. After the shooting stopped, he went home. R. 198, ll. 10-15.

The police found five fired cartridge cases near the intersection of Byrd and Tanyard Streets. R. 296, ll. 14-23. The police also found two projectiles in the walls in the home. R. 1-5. SLED firearms examiner expert Michelle Eichenmiller testified that the five fired cartridge cases were fired by the same gun – a .380 auto. R. 236, l. 24 – R. 237, l. 6. She also examined the two fired bullets and determined that two different guns were used. R. 238, ll. 23-4. One was a .380 and one was a 9mm. R. 238, ll. 16-22. Regarding the projectile removed during the autopsy, Eichenmiller determined it was also a 9mm. R. 239, ll. 6-15. She was unable to say if the two 9mm were fired by the same gun due to the damage to the bullets. R. 239, l. 16 – R. 240, l. 5.

When Hickson decided to enter a guilty plea to voluntary manslaughter during the middle of trial, the state agreed. R. 472, ll. 23-25. The solicitor explained he was "pleading to a 15-year cap." R. 472, l. 25 – R. 473, l. 1. His sentence recommendation was based on the "pure unadulterated recklessness and criminal negligence" of the crime. R. 473, ll. 3-6. Judge Brown

asked the state to provide a factual basis to support the guilty plea. R. 480, ll. 13-17. Thereafter, the solicitor responded:

> Your Honor, the state's theory of this case is it arose out of a fight and then went to a drive-by shooting by another individual of family members of Mr. Hickson, and they checked that out and then they went looking for a guy named Boogie, and they stopped at XXX Byrd and Tanyard Street and they jumped out of the car. He was riding with Jimmy Lee Hampton, Jr.
>
> They jumped out of the car and shot. We're not sure if he was shooting in the air or where he was shooting, but the other car that a shooter in it that we know of we believe was [Appellant], who shot towards the trailer, and we believe he had a 9 millimeter and his shot killed [the deceased]. And Mr. Hickson had a .380. He shot and Mr. Hampton tried to leave, and he jumped in the backseat of the car and that was the end of it.

R. 480, l. 18 – R. 481, l. 7. Judge Brown then found there was a "substantial factual basis for this plea" to voluntary manslaughter. R. 481, ll. 17-18. The solicitor then added: "we submit to you that the shooting of the house at White Street, XXX White, was giving significant provocation that was legal and in the heat of passion they responded at Byrd and Tanyard." R. 481, l. 25 – R. 482, l. 3. Judge Brown then sentenced to Hickson to fifteen years in prison. R. 490, ll. 5-8.

During the charge conference, the trial judge indicated he was going to instruct the jury on "[h]and of one/hand of all." R. 500, l. 13. Defense counsel objected, arguing the evidence did not support the instruction. R. 500, ll. 14-16. Specifically, defense counsel argued:

> MS. HENDERSON: Yes, sir. It is my understanding – and I would direct this Court to the State v. Martin case, 340 S.C. 597. The state must provide substantial circumstantial evidence that places the defendant at the scene and shows his participation in killing the victim. The state should charge a defendant with conspiracy and murder if the identity of the trigger man is in question in order to be able to make the argument of the hand of one is the hand of all.
>
> Judge, I do not think that the state has met its burden in establishing a hand of one/hand of all defense. By merely stating that this individual allegedly was present on scene at the time that this shooting occurred I do not believe rises to the level necessary to charge the jury with hand of one/hand of all.
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> MS. HENDERSON: I don't think we've heard any indication or reliable indication that these individuals set out together, that each took part in assigned or agreed-upon unlawful act. Excuse me. Let me rephrase that, Judge. I don't believe that we've heard any indication of some sort of concert, some sort of conspiracy, some sort of conspiring together to allow a hand of one/hand of all charge.

R. 500, l. 18 – R. 501, l. 14.

The state responded that "if this is not a hand of one is the hand of all case," he did not "know where one will be found." R. 501, ll. 19-21. He argued, "They were acting in concert. They were traveling down the road together in a line. They were - - they were all responding to the same stimulus that started this, and that was the shooting of the house on White - - XXX White Street, and they all went together to check that out and they all went to together to Byrd and Tanyard. They were all acting in concert with each other." R. 501, l. 21 – R. 502, l. 2. Defense counsel agreed that the testimony placed the co-defendants together, but she explained the testimony established Appellant "was only merely present on the scene" and there was "no indication that he was connected to the charged crime." R. 502, ll. 6-11.

The judge overruled defense counsel's objection and instructed the jury regarding accomplice liability. Specifically, the judge instructed the jury as follows:

> Now, ladies and gentlemen, if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose.
> For example, two people can be guilty of killing another person when only one of the two had a gun, there was only one bullet, and only one of the two fired the shot that caused the death. If two or more people are together acting together assisting each other in committing the offense, the act of one is the act of all or, as it is sometimes said, the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal.

> Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal.
>
> The state must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. The principal in a crime is one who either actually commits the crime or who is present aiding, abetting or assisting in committing the crime.
>
> When a person does and act in the presence of and with the assistance of another, the act is done by both. Where two or more are acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime.
>
> Intent is also a necessary element for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The state must prove these elements beyond a reasonable doubt.

R. 520, l. 19 – R. 522, l. 14.

In light of the state's theory that Appellant was the shooter and Hickson's guilty plea, the solicitor changed his strategy in his closing argument. The solicitor emphasized the testimony from George Dunn who "said they started shooting at him and he had a voice like he was from up north and he asked him where's Boogie, but he didn't give any time to answer or anything." R. 527, ll. 6-9. Based upon Dunn's testimony, the solicitor claimed Appellant "just fired, with a complete and total disregard for human life, with a complete and total disregard for that 12-year-old girl that died there on her mama's - - on her grandmama's porch at the front door." R. 527, ll. 10-13. According to the solicitor, Appellant acted "[j]ust totally cold, malice in the heart. If that's not malice, I don't know what is to drive up on a yard full of children and decide you're just going to spray bullets around. Terrible." R. 527, ll. 13-16.

The solicitor reminded the jurors of the expert testimony from a SLED analyst that "two different kinds of guns" were used. R. 527, ll. 23-25. This corroborated the lay testimony regarding hearing gunshots from more than one gun based on the different sounds. R. 527, ll. 21-23. Regarding these guns, the solicitor argued that Hickson "was the one shooting the .380" based upon where the shell casings were found, which was where witnesses said Hickson was standing when he was firing his gun. R. 528, ll. 1-4; R. 528, ll. 8-9. Importantly, the solicitor argued that Appellant shot the 9mm, which was the gun that fired the fatal shot. R. 528, ll. 5-7; R. 528, ll. 9-10. The solicitor asked the jurors to "turn him loose" if the jurors did not believe Appellant committed the murder, but the solicitor himself was "convicted by the evidence that he did." R. 533, ll. 9-10.

Discussion

"'The law to be charged must be determined from the evidence presented at trial.'" State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (quoting State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). There must be some evidence in the record to support the charge to the jury. Id. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999)). According to the South Carolina Supreme Court, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Langley, 334 S.C. at 648, 515 S.E.2d at 101.

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" Id. at 648-649, 515 S.E.2d at 1010 (quoting State

v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). Mere association with admitted members of a conspiracy or an admitted perpetrator of a crime is insufficient to constitute the guilt of the defendant on trial. See State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Mouzon, 326 S.C. 191, 485 S.E.2d 918 (1997). Further, "[p]rior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime." Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995); see also State v. Thompson, 347 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) Rather, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal." State v. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977).

Recently, the South Carolina Supreme Court held a trial judge erred by instructing a jury regarding accomplice liability where there was no evidence that anyone other than the defendant shot the decedent. State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020). On August 25, 2013, a large crowd, including the decedent, Washington, and Washington's uncle, gathered at a nightclub. Id. at 398, 848 S.E.2d at 781. The deceased told multiple people at the club that Washington and his uncle were following him around the club. Id. The deceased even told the bartender that the uncle was going to shoot him and "they" were going to kill him. Id.

At closing time, there was a fight in the parking lot of the club. Id. One witness claimed he heard gunshots near the end of the fight and saw the decedent on the ground. Id. The witness saw Washington with a small silver revolver in his right hand and firing toward the decedent. Id. The witness "was 100% sure" Washington shot the decedent. Id. Another witness also placed a gun in

Washington's hand during the melee. Id. The state also introduced evidence of the uncle telling his brother during a telephone call that Washington shot the decedent. Id. On cross-examination, the uncle denied admitting that he shot the decedent or telling anyone else he had shot the decedent. Id. at 399, 848 S.E.2d at 782.

A witness called by Washington testified that Washington was not involved in the fight and he never had a gun. Id. This witness also testified to seeing Washington run as shots were fired. Id. at 401, 848 S.E.2d at 782. Another witness for Washington testified that Washington was "nowhere near where any of the shots were fired." Id.

Over objection, the trial judge instructed the jury on the hand of one is the hand of all. Id. at 406, 848 S.E.2d at 785. The Supreme Court held this was error. Id. The Court explained: "For an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon on which it could rely to find the existence or nonexistence of that fact.'" Id. at 407, 848 S.E.2d at 786 (quoting Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (alterations in original). According to the Court, "there was evidence [Washington] was the shooter," and "[t]here was also evidence [Washington] was not the shooter." Id. The question for the Court was "whether there was equivocal evidence the shooter, if not [Washington], was an accomplice of [Washington]." Id. The uncle was the only possible person who could fall into the category of accomplice for Washington. Id. The Court then scoured the record for any evidence the uncle was the shooter. Id.

The decedent's statements to the bartender that the uncle was going to shoot him was not evidence that the uncle ultimately did shoot him. Id. The testimony of the eyewitnesses that Washington was running from the scene as shots were fired did not create any inference that uncle was the shooter; rather, the only inference from this testimony was that Washington was not the

shooter. Id. The Court also rejected the state's assertion that Washington's cross-examination of the uncle constituted evidence that the uncle was the shooter because uncle denied the accusations. Id. at 408, 848 S.E.2d at 786.

The Court explained that there was evidence that uncle and Washington acted in concert in following the decedent around the club and giving him dirty looks, there was evidence that Washington and uncle fought with the decedent, and there was evidence that Washington shot the decedent. Id. at 409, 848 S.E.2d at 787. However, in order for the accomplice liability instruction to be proper, there must have been some evidence that uncle shot the decedent. Id. The Court held there was "no evidence" that uncle was armed with a firearm and "no evidence" uncle shot the decedent. Id. Although the jury may not have believed uncle's denials that he shot the decedent, the Court emphasized that "an alternate theory of liability may not be charged to the jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236, 712 S.E.2d 438).

Finally, the Court held the accomplice liability instruction prejudiced Washington. Id. at 411, 848 S.E.2d at 788. The Court explained that the evidence against Washington was not overwhelming, particularly, in light of several witnesses testifying Washington was not even armed or in the immediate area when the shooting occurred. Id. The Court explained: "The insertion of the accomplice liability charge into the case invited the jury to speculate whether [uncle] – the only possible accomplice of [Washington] – shot [the decedent], when there was no evidence [uncle] was the shooter." Id.

This Court affirmed a grant of post-conviction relief where appellate counsel failed to raise on appeal the trial judge's error in instructing the jury on accomplice liability and mere presence where the evidence failed to support the charge. Wilds v. State, 407 S.C. 432, 435, 756 S.E.2d 387,

388 (Ct. App. 2014). On the afternoon of March 29, 1999, Wilds was walking down the street with two companions when they saw Rumph approaching them. Wilds commented to the others that he thought Rumph had some money. Id. Wilds stopped to talk to Rumph while his companions continued walking. Id. at 436, 756 S.E.2d at 388. Wilds unexpectedly pulled out a pistol. Rumph handed over his wallet. Id. at 436, 756 S.E.2d at 389. Wilds ordered his companions to hit Rumph and they complied. Wilds' companions took items from Rumph, including a cigarette lighter and change. Wilds then shot Rumph. Id. After the shooting, Wilds and his companions ran. When the stopped, Wilds gave the companions money from Rumph's wallet and told them to stay quiet. Id. One of the companions told Wilds to get rid of the gun. Id.

Wilds was charged with armed robbery and murder of Rumph. During the deliberations, the jury sent a note asking if the jury found Wilds guilty of murder, would that be a finding that Wilds alone pulled the trigger. Id. at 437, 756 S.E.2d at 389. Over Wilds' objection, the judge instructed the jury on accomplice liability, but refused to instruct the jury concerning mere presence. Id.

This Court explained that "no evidence ... indicated anyone other than Wilds was the shooter." Id. at 439, 756 S.E.2d at 390. "The only evidence presented was that Wilds was the shooter, and [his companions] joined in the robbery after Wilds pulled the gun on Rumph." Id. This Court recognized that the jury may have had doubts about the companions' testimony; however, those doubts failed to support a charge on the alternate theory of liability, such as accomplice liability. An alternative theory "'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011)). This Court found prejudice to Wilds "[b]ecause the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled

the trigger, and because the jury returned guilty verdicts after receiving the instruction." Id. at 439, 756 S.E.2d at 390-391.

On the other hand, in Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011), the Supreme Court examined the propriety of an accomplice liability charge. The Court explained that "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011). Resolving the issue of whether the "hand of one" charge was correct, the Court asked whether there was any evidence that another co-conspirator was the shooter and the defendant was acting with him when the robbery took place. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 295-296, 534 S.E.2d 268, 269 (2000)); see also State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). The evidence showed the robbers were clothed in black and wrapped shirts around their heads, that the defendant was involved in the planning and execution of the robbery, and that one of the robbers other than the defendant may have been the shooter. Barber, 393 S.C. at 237, 712 S.E.2d at 439. Thus, the evidence supported the accomplice liability instruction. Id.

This Court concluded the trial judge correctly charged the jury concerning "the hand of one is the hand of all" where the evidence revealed the defendant and his co-defendant were with a large group of people during a confrontation, the co-defendant used language indicating the two were acting together, the defendant and co-defendant got into a truck that chased after an individual in a car, and witnesses claimed the defendant shot his gun toward the car. State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007). This evidence supported the theory that the defendant and his co-defendant joined together to accomplish an illegal purpose. Id.

Here, the trial judge erred by instructing the jury on accomplice liability under the hand of one is the hand of all theory. Like the evidence presented in Washington, there was no evidence in the record that anyone other than Appellant fired the fatal shot. While there was evidence that Hickson fired five rounds, the indisputable evidence was that none of Hickson's rounds were fatal. In fact, the state theorized – during the guilty plea hearing – that Hickson may have fired into the air. The state presented evidence that Appellant was driving the red car and that Appellant drove from the aunt's house to the house on the corner of Tanyard and Byrd Streets. There was also evidence presented that someone with a northern accent called for Boogie and then began firing from the area of the red car. This was the circumstantial evidence – weak as it was – pointing to Appellant's guilt as the principal. There was no evidence pointing to Appellant's guilt as an accomplice as he was either the shooter or he was not. The state simply failed to present evidence that another accomplice may have fired the fatal shot.

The accomplice liability instruction was prejudicial to Appellant because it "invited the jury to speculate" whether someone other than Appellant shot the deceased where there was no evidence that someone else was the shooter. See Washington, 431 S.C. at 411, 848 S.E.2d at 788. The state presented a weak circumstantial evidence case against Appellant. Not a single eyewitness claimed Appellant was driving the red car at the time of the shooting. Not a single eyewitness claimed to identify Appellant as the shooter. Not a single eyewitness claimed to provide any direct evidence whatsoever that Appellant was the shooter. For these reasons, the jury instruction constituted reversible error.

III. The trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter where evidence in the record required the instruction, including the solicitor's assertion during the co-defendant's guilty plea that such evidence existed and the judicial finding of a factual basis to support that the shooter acted upon the sudden heat of passion based upon sufficient legal provocation.

Standard of review

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 570, 647 S.E.2d at 166–67.

Relevant facts

In addition to the relevant facts discussed in Issue II, supra, the state presented evidence that the shooting on the corner of Tanyard and Byrd Streets was for retaliation of an earlier shooting. This theme began in the solicitor's opening statement, continued throughout the presentation of the state's case-in-chief, and culminated in the solicitor's closing argument.

In his opening statement, the solicitor explained that Boogie and JJ Hampton fought while at Simon's party. R. 88, ll. 16-19. Thereafter, individuals believed that Boogie "shot up Aunt Dot's house" in retaliation for the fight at the party. R. 88, ll. 19-22. Individuals, including Appellant and Hickson, who were concerned about the shooting at Aunt Dot's house, jumped in their cars to check it out. R. 88, ll. 23-25. After confirming a shooting had occurred at Aunt Dot's house, the individuals drove to the house on the corner of Tanyard and Byrd Streets searching for Boogie. When they arrived, "they ... jumped out and said, 'Where's Boogie?' Bam, bam, bam." R. 89, ll. 3-6. The solicitor described the individuals as "a rolling firing squad [who] were going

there and they were going to take care of things." R. 90, ll. 1-4. Although Boogie was the target, a young girl was killed. R. 90, ll. 5-11.

Witnesses confirmed what the solicitor claimed in his opening - there was a fight between Boogie and JJ Hampton at Simon's party. R. 102, ll. 3-9; R. 334, ll. 3-24; R. 386, ll. 3-5. Witnesses also described individuals leaving the party and going to Aunt Dot's house because it had been shot up by someone, presumably Boogie. R. 109, l. 3 – R. 111, l. 5; R. 335, l. 2 – R. 336, l. 24. Witnesses described cars arriving at the house on the corner, and at least one individual asking where Boogie was. R. 123, ll. 9-19; R. 170, ll. 17-21; R. 196, ll. 9-23; R. 198, ll. 16-24; R. 386, ll. 23-24. Although Boogie was at the house on the corner, he was not shot. R. 151, l. 25; R. 155, ll. 4-10; R. 169, ll. 9-12; R. 175, ll. 9-10; R. 205, ll. 1-4; R. 205, l. 25 – R. 206, l. 5. Boogie bragged about shooting up someone's house. R. 205, ll. 1-4.

While the police were investigating the shooting at the house on the corner, they learned of a shooting at a house on White Street, where Aunt Dot lived. R. 251, ll. 2-8; R. 259, l. 20 – R. 260, l. 1. That evening, Boogie's aunt called the police because she overheard Boogie say he may have shot a twelve-year old girl. R. 258, l. 6 – R. 259, l. 5. She explained that Boogie said he had been jumped and he shot in retaliation for being jumped, but he feared one of his bullets killed a twelve-year old girl. R. 258, l. 6 – R. 259, l. 5; R. 281, ll. 22-25. The police ultimately arrested Boogie for shooting Aunt Dot's house. R. 259, ll. 6-12; R. 268, ll. 10-12; R. 412, ll. 5-17. At the time of his arrest, Boogie was belligerent and threatened to kill the police officer who was questioning him. R. 260, ll. 2-5; R. 311, ll. 10-19. Boogie was not charged with the shooting of the deceased, the twelve-year old girl.

Subsequent to the police searching the house on the corner, the homeowner informed the police of a bullet hole over the doorway where the deceased's body was found. R. 280, ll. 3-4; R.

445, l. 1 – R. 446, l. 10. The police took no action upon receipt of this information. No projectile was removed from the hole and no testing was conducted. R. 280, ll. 3-4; R. 315, ll. 2-10; R. 446, ll. 5-25.

In his closing argument, the solicitor continued his theme that the shooting at the house on the corner was in retaliation for Boogie shooting Aunt Dot's house. He was clear, the motive was retaliation as "[i]t all started with a fight between Boogie and JJ Hampton." R. 526, ll. 3-8. After learning that Boogie shot up Aunt Dot's house, individuals went looking for Boogie. R. 526, ll. 9-16. The solicitor claimed Appellant was "going to pay somebody back." R. 536, l. 10. Defense counsel's closing argument also reminded the jury of the importance of Boogie's role. She explained that Boogie shot up Aunt Dot's house on White Street, and that he was present when the deceased was shot. R. 546, ll. 18-22. She further reminded the jurors that Boogie's aunt overheard him say he was jumped and shot at the guys who jumped him, but he may have shot a little girl. R. 546, l. 24 – R. 547, l. 4.

As discussed in Issue II, supra, Hickson, Appellant's co-defendant, decided to enter a guilty plea to voluntary manslaughter during the middle of trial, and the state agreed. R. 472, ll. 23-25. In fact, the solicitor explained he was "pleading to a 15-year cap." R. 472, l. 25 – R. 473, l. 1. According to the solicitor, the crime involved "pure unadulterated recklessness and criminal negligence." R. 473, ll. 3-6. The solicitor provided the presiding judge with the factual basis of the guilty plea as described supra. Importantly, the solicitor informed the judge that the facts established that Hickson acted in the heat of passion based upon sufficient legal provocation. Specifically, the solicitor stated: "we submit to you that the shooting of the house at White Street, XXX White, was giving significant provocation that was legal and in the heat of passion they

responded at Byrd and Tanyard." R. 481, l. 25 – R. 482, l. 3. Judge Brown found there was a "substantial factual basis for this plea" to voluntary manslaughter.

The following morning, Judge Brown indicated that he was not going to charge the jury deciding Appellant's fate with voluntary manslaughter because there was no evidence to support the lesser-included offense. Defense counsel thanked the judge for his ruling, implying that she had made an off-the-record request for the instruction. R. 490, l. 24. Later, the judge engaged the parties in a charge conference, asking for the positions of the parties on the instruction for voluntary manslaughter. Tr. 545, ll. 1-6. The state did not oppose the request, but indicated the law was unsettled as it concerned transferred intent. R. 497, ll. 7-12; R. 497, l. 23 – R. 498, l. 9. Defense counsel merely noted that it was in the judge's discretion. R. 497, ll. 17-18.

The trial judge denied the request for an instruction on voluntary manslaughter, determining the evidence in the record did not support the instruction. The judge stated:

> THE COURT: All right. Based upon in looking at the voluntary manslaughter charge, the law states to prove voluntary manslaughter, the state must demonstrate beyond a reasonable doubt the defendant unlawfully killed another without malice in sudden heat of passion on sufficient legal provocation.
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> In jumping to sufficient legal provocation, it says the provocation must come from some act of or related to the victim, which is not the case here. It goes on to say the provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituting the highest degree of exasperation, rage, anger, sudden resentment, of terror, rendering the mind incapable of cool reflection. It goes on in the charge as it talks about heat of passion in considering all of the surrounding circumstances and conditions that should be taken into consideration, including previous relations, of which there's none here.
>
> In further looking at whether or not there's sudden heat of passion, it says the killing must occur during the heat of passion roused by adequate provocation and before the passion has cooled or has had time to cool. Even if sufficient legal provocation has aroused the defendant's passion, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing is not voluntary manslaughter.

> In this case, the facts as presented during the course of the trial was that there was a shooting at a residence located on White Street, and at some point in time thereafter the shooting occurred on Byrd Street resulting in the death of this child. Having said all of that, I do not believe that voluntary manslaughter would be appropriate lesser-included charge in this case and, therefore, I am not going to charge it. So what will go to the jury is the charge of murder, of which carries 30 to life, and I will add in there the doctrine of transferred intent, which I think is appropriate under the circumstances of this case.

R. 498, l. 12 – R. 499, l. 25.

Subsequent to the charge conference, Appellant indicated his desire to enter a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). R. 504, l. 23 – R. 505, l. 2. The solicitor explained that he had extended an offer to allow Appellant to enter a guilty plea to voluntary manslaughter in exchange for a recommended sentencing cap of fifteen years. R. 505, ll. 5-8; R. 506, ll. 12-14. However, during the plea colloquy, Appellant moved to withdraw his plea, and the judge allowed him to do so. R. 507, ll. 13-16. Thereafter, the jury trial resumed. R. 507, ll. 15-16.

Discussion

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson,

337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts." A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Frasier v. State, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)).

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). "To warrant the court eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original) (holding that in murder cases, trial courts should charge manslaughter unless "there is no evidence whatsoever tending to reduce the crime from murder to manslaughter").

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as "the unlawful killing of another without malice, express or implied." S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). The South Carolina Supreme Court made it clear that both of these elements must be present in order to warrant a voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). Thus, "[w]hether a voluntary manslaughter charge is warranted turns on the facts."

Starnes, 388 S.C. at 597, 698 S.E.2d at 608; see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) ("The law to be charged must be determined from the evidence presented at trial.").

Quoting a trial judge's jury instruction, the Supreme Court explained voluntary manslaughter as follows:

> The law recognizes the frailties of human nature, and appreciates the fact that there may be occasions in one's life when he may lose control of himself temporarily, be swept off his feet, to act upon the spur of the moment rather from premeditation or design. And, if under those circumstances one slays his fellow man, the law will not excuse him entirely, but will not visit upon him the extreme penalty it would have if the act had been accompanied by malice. ... [T]he provocation which the law recognizes as being one sufficient to reduce the homicide from murder to manslaughter must be such as to involve some indignity to throw a man in sudden heat and passion. ... So, also by way of illustration, if he should meet another on the street and that one should pull his nose, or spit in his face, and on the spur of the moment he should slay him, he would be guilty, not of murder, but of manslaughter. ... [W]ords, however opprobrious, could never be sufficient to reduce a homicide from murder to manslaughter.

State v. Cleland, 148 S.C. 86, 86, 145 S.E. 628, 629 (1928) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

"Sudden heat of passion upon sufficient legal provocation" mitigating felonious killing to manslaughter "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)) (quotations omitted). Sudden heat of passion and sufficient legal provocation do not have to be so strong as to "entirely dethrone reason" or "shut out knowledge and destroy volition." State v. Davis, 50 S.C. 405, 423–24, 27 S.E. 905, 911 (1897). Thus, the underlying facts taken as a whole, are only required to be such as would "naturally disturb the sway of reason, and render the mind of an

ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Id.; see also State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951) ("In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing").

"The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence." Cooley, 342 S.C. at 67, 536 S.E.2d at 668. "A legal provocation is some act which, either alone or in connection with words or circumstances is calculated to throw one into a passion." State v. Gadsden, 314 S.C. 229, 232, 442 S.E.2d 594, 596 (1994). "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation and cause the defendant to lose control and create an uncontrollable impulse to do violence." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). "[A]n overt, threatening act or a physical encounter may constitute sufficient legal provocation." Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (citing State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)). However, evidence of a struggle during an armed robbery is not sufficient legal provocation. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984); see also State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

"[F]ear resulting from an attack can constitute a basis for voluntary manslaughter." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed "the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of

passion." Id. One's mind may be rendered incapable of cool reflection by "exasperation, rage, anger, sudden resentment, or terror." State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992).

If, on the other hand, "passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled," manslaughter is not an appropriate instruction. State v. Hughey, 339 S.C. 439, 451, 529 S.E.2d 721, 728 (2000). In determining whether a reasonable time for cooling off had elapsed, all the circumstances surrounding the event are relevant: "the nature of the provocation, the prisoner's physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits (not of themselves voluntary preparations for crime), his conduct, [and] manner and conversation throughout the transaction." State v. Goodson, 140 S.C. 357, 362, 138 S.E. 816, 818 (1927) (quoting State v. McCants, 28 S.C.L. 384, 391 (1843)).

Recently, this Court undertook a painstaking examination of voluntary manslaughter in South Carolina. State v. Payne, 434 S.C. 121, 862 S.E.2d 81 (Ct. App. 2021). After carefully considering the case law, this Court held the trial court erred in refusing Payne's request to charge the lesser-included offense of voluntary manslaughter. Id. at 153, 862 S.E.2d at 97. The state conceded the evidence showed sufficient legal provocation because a witness testified the decedent pulled out a handgun; thus, the question before this Court was whether there was any evidence that Payne acted in the sudden heat of passion. Id. at 154, 862 S.E.2d at 98. This Court held the evidence that Payne acted in the sudden heat of passion was the undisputed evidence that he and the decedent argued immediately prior to the shooting. Id. at 154-155, 862 S.E.2d at 98-99. See also State v. Oates, 421 S.C. 1, 26-29, 803 S.E.2d 911, 924-926 (Ct. App. 2017) (affirming a trial court's instruction on voluntary manslaughter where "the jury could have reasonably inferred from

the evidence that when [Oates] shot Victim six times, he was acting under 'an uncontrollable impulse to do violence'" where the evidence showed the two were yelling, Oates was scared and nervous, and the six shots were in rapid succession).

The South Carolina Supreme Court reversed a murder conviction and remanded for a new trial where a trial judge refused to charge the jury on voluntary manslaughter where the evidence required such an instruction. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). Lowry and the deceased were "arguing and 'bumped chests'" during an altercation near a grocery store. Id. at 398, 434 S.E.2d at 273. Lowry aimed his pistol at the deceased and pulled the trigger; however, the pistol was not loaded. Id. Lowry's friend broke up the fight, and the deceased entered the grocery store. Id. Lowry then loaded his pistol, fired a single shot, and entered the grocery store as well. Id. The men "began arguing and shouting at each other again." Id.

The state's witnesses claimed the deceased told Lowry he was unarmed and refused to "take it outside" as Lowry suggested. Id. The deceased also spread his arms away from his body purportedly to show he was unarmed. Id. However, Lowry's witnesses claimed the deceased denigrated Lowry by saying, "You think you are a big man because you got a gun." Id. Then, the deceased "moved toward Lowry in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him." Id. All witnesses agreed that after the deceased raised his arms, Lowry shot him in the chest. Id. The witnesses agreed that after the deceased fell, Lowry cursed him and shot him in the head. Id.

The Court held the trial judge erred by refusing to instruct the jury regarding voluntary manslaughter. Id. at 399, 434 S.E.2d at 274. The Court explained there was "testimony which, if believed, tend[ed] to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred." Id. Because it

did not "very clearly appear that there [was] no evidence whatsoever tending to reduce the crime from murder to manslaughter," the judge erred in failing to so instruct the jury. Id.

The Supreme Court concluded a trial judge correctly instructed a jury on voluntary manslaughter where "there [was] evidence in the record which [tended] to show [Wiggins] acted in sudden heat of passion upon sufficient legal provocation" because it was undisputed Wiggins was in a "heated argument" with the deceased and the deceased's sister and the deceased "physically threatened him." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 496 (1998).

In another case, the Supreme Court held the evidence supported a jury instruction on voluntary manslaughter. State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988). Believing that his former girlfriend's lover wanted to see him, Gilliam went to the lover's place of business. Gilliam, 296 S.C. at 396, 373 S.E.2d at 597. The two men argued and the lover "made threatening statements" to Gilliam. Id. Gilliam claimed the lover "took a gun from his pocket and shot at" Gilliam. Id. Gilliam then shot back at the lover, killing him. Id. After confirming that self-defense and voluntary manslaughter are not mutually exclusive, the Court held that "the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter." Id. at 397, 373 S.E.2d at 597. According to the Court, Gilliam's "testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion." Id.

The South Carolina Supreme Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon one of the defendant's statements to law enforcement indicating the decedent had cut the defendant prior to the defendant striking the final blow. State v. Knoten, 347 S.C. 296, 305-306, 555 S.E.2d 391, 396 (2001). In the second statement, Knoten told police that the decedent cut him, then chased Knoten out of the apartment. Id. at 305, 555

S.E.2d at 396. Outside, Knoten went to his car and got a metal pipe. Id. Thereafter, Knoten reentered the apartment and killed the decedent after she cut him again. Id. The Court explained that if the jury were to believe the facts presented in Knoten's second statement, then the jury could conclude Knoten and the decedent were in a heated encounter and the decedent had twice cut him with a knife when he struck her with a pipe; thus, "it follow[ed] that a charge on voluntary manslaughter was required." Id. at 306, 555 S.E.2d at 396.

The trial judge erred here by failing to instruct the jury regarding voluntary manslaughter where the evidence supported the instruction. This is particularly true where the state informed the judge that the evidence supported voluntary manslaughter when Hickson entered his guilty plea, and the judge made a judicial finding that a factual basis existed to support the guilty plea to voluntary manslaughter. See State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975) (holding that before a guilty plea may be accepted, the court must be certain the record shows a factual basis for the plea). Of course, the South Carolina Supreme Court has held that "so long as there was a sufficient factual basis to support the crime for which the defendant was indicted, a plea to any lesser included offense is sufficient." Anderson v. State, 342 S.C. 54, 57-58, 535 S.E.2d 649, 651 (2000). Specifically, the Court found "the decision to accept a plea to voluntary manslaughter notwithstanding the lack of any provocation was simply a tactical maneuver to avoid the real possibility that the jury might come back with a verdict of murder." Id. at 58, 535 S.E.2d at 651. Thus, the Court held Anderson's guilty plea to voluntary manslaughter was knowingly and voluntarily entered. Id.

Yet, Appellant's case is easily distinguished from Anderson. The state affirmatively argued to the trial judge that evidence existed to show sudden heat of passion based upon sufficient legal provocation during Hickson's plea. This was not a case of Hickson accepting the plea based

upon a tactical maneuver of avoiding a murder conviction; rather, this was a case of the solicitor affirmatively assuring the judge that the evidence showed the shooting occurred during the sudden heat of passion based upon sufficient legal provocation. Presumably, the prosecutor would not knowingly make a false statement of fact or law to the judge. See Rule 3.3, RPC, Rule 407, SCACR. Additionally, the prosecutor would refrain, as he must, "from prosecuting a charge that the prosecutor knows is not supported by probable cause." See Rule 3.8(a), RPC, Rule 407, SCACR. Further, this case involved an affirmative finding by the judge of those elements when he accepted the state's argument. This was not simply a matter of a defendant making a strategic decision to enter a guilty plea to a lesser offense to avoid a guilty verdict of a greater offense. Additionally, it must be noted, and included in the analysis that the state offered to allow Appellant to plead guilty to voluntary manslaughter just prior to closing arguments. The state's position during Hickson's guilty plea must not be ignored: the prosecutor assured the trial judge that the factual basis supported a conviction for voluntary manslaughter.

The Iowa Supreme Court addressed a complaint that a city prosecutor violated his ethical violations by allowing defendants to plead guilty to charges for which no probable cause existed. Iowa Supreme Court Attorney Disciplinary Bd v. Howe, 706 N.W. 360 (Iowa 2005). For years, the city prosecutor successfully moved to amend 174 citations that originally charged violations of a city ordinance to allege violations of the cowl-lamp statute. Id. at 367. The cowl-lamp statute provided that a car could not be equipped with more than two side cowl or fender lamps. *Id.* Cars had not been equipped with such lamps for many years prior to the plea bargains at issue in the case. Id. "The amendments were made as part of plea bargains with the defendants" to avoid an adverse impact on the defendants' license or auto insurance. Id.

The city prosecutor "admitted he knew there was no probable cause to believe this offense had been committed by the 174 persons charged with violating this law." Id. There was no dispute that the cowl-lamp charges were not supported by probable cause. Id. at 368. The Iowa Supreme Court explained that "[t]he fact that the *original* traffic citations may have been supported by probable cause is beside the point because [the city prosecutor] is not being disciplined for instituting the *original* charges." Id. (emphasis in original). "His ethical violation arises from the *amended* charges alleging cowl-lamp violations, which clearly lacked probable-cause support." Id. (emphasis in original). The Court explained that it was also irrelevant that the rules of criminal procedure permitted plea bargains to lesser or related charges because the ethical violation was filing an amended charge that was not supported by probable cause. Id. Authorizing guilty pleas to lesser-included offenses did not nullify the probable cause requirement of the ethics rules. Id.

Additionally, the Iowa Supreme Court noted an ethics decision issued by its Board of Professional Ethics and Conduct that concluded it was improper for a prosecuting lawyer and for a defendant's lawyer to enter into a plea agreement under which a prosecutor files charges that are not supported by underlying facts. Id. at 369. The Court rejected the prosecutor's argument that the ethical requirement was intended to ensure a prosecutor does not use improper or overreaching methods to obtain a conviction. Id. at 370. The Court accepted the prosecutor's proposition that there was no overreaching in the 174 cases because the defendants agreed to the filing of the charges; however, the Court explained "the improper use of prosecutorial discretion is just as possible in plea bargaining as it is in the initial charging decision." Id. "Filing charges that are blatantly bogus – even when defendants are willing to plead guilty to them – does not promote confidence in the integrity of the judicial process." Id. at 371. Thus, the ethical rules provided no exception to the probable-cause requirement for charges resulting from plea bargains. Id. The

Court made clear that "prosecutors have the authority to negotiate plea bargains, and may ethically reduce a charge in exchange for a defendant's guilty plea to the reduced charge. The only restriction placed on this process by [the ethical rules] is the requirement that any charge – original or reduced – be supported by probable cause." Id. See also Iowa Supreme Court Attorney Disciplinary Bd. v. Zenor, 707 N.W.2d 176 (Iowa 2005); Iowa Supreme Court Attorney Disciplinary Bd. v. Borth, 728 N.W. 2d 205 (Iowa 2007).

Prosecutors are ministers of justice and not merely advocates. State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (citing Rule 3.8, cmt. RPC, Rule 407, SCACR). "A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics." Id. The prosecutor's duty is to see that justice is done. In re Richland County Magistrate, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010) (internal quotation omitted). "He must see that no conviction takes place except in strict conformity with the law, and that the accused is not deprived of any constitutional rights or privileges." Id. (internal quotation omitted). "The South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands." Id. Thus, "[t]he importance to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised with the highest degree of integrity and impartiality, and with the appearance thereof, cannot be easily overstated." Id. at 411-412, 699 S.E.2d at 163 (internal quotations omitted).

Additionally, this case involves an unresolved legal issue in this state, i.e., transferred intent in the manslaughter context. The deceased was not the person who fought with JJ earlier in the evening, and she was not the person who shot up Aunt Dot's house. She had not provoked the sudden heat of passion of Appellant. Thus, the issue specifically left open in State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009), "the applicability of the doctrine of transferred

intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina," is presented here.

While this is an open issue, a number of cases support the applicability of transferred intent in such cases. See e.g., State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (holding that it is a "well-settled principle of law" that, when a defendant intends to kill or seriously injure one person, but kills another, he may be found guilty of either murder or manslaughter); see also State v. Fennell, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000) (finding that in a homicide case, the law is concerned with the killer's state of mind, not with the identity of the victim); State v. Childers, 373 S.C. 367, 377, 645 S.E.2d 233, 238 (2007), (Pleicones, J., dissenting) (reasoning that the jury could have found heat of passion in the defendant's testimony (i.e. that he was only shooting back at the brother-in-law out of fear that he would be shot at again but killing a third party)).

Several cases from other jurisdictions support Appellant's position. In Coker v. State, 433 S.E.2d 637 (Ga. Ct. App. 1993), a defendant lost a bet and drove, with a friend, to the winner's home to demand, at gunpoint, the return of his money. Id. at 638. Shots were exchanged between the defendant and his friend on one hand and the winner and his friends on the other. Id. Ultimately, a shot fired by someone other than the defendant strayed and killed an innocent bystander. Id. The appellate court found that these circumstances warranted treating the homicide as voluntary manslaughter. Id.

In State v. Solomon, 421 N.E.2d 139 (Ohio 1981), the defendant inadvertently shot the wife of a man with whom he had been in a daylong dispute. Throughout the day, the two men had engaged in a physical altercation, gone to their respective homes to retrieve guns, and re-emerged

to confront one another. Id. at 140. The defendant was found guilty of aggravated murder. Id. The Supreme Court of Ohio held that the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter where the state's evidence was ambiguous regarding the issue of prior calculation and design and where it was possible to determine from the evidence that the defendant appeared to have panicked at the time of the killing so as to suggest that he was under extreme emotional distress reasonably sufficient to incite him to use deadly force. Id. at 144.

These cases support Appellant's contention that under circumstances where an individual intends to kill or seriously injure one person, but kills another, he may be found guilty of either murder or manslaughter. See Williams, 189 S.C. at 24, 199 S.E. at 908. The trial judge erred in not giving Appellant's jury the option to do so.

IV. The trial judge erred by failing to instruct the jury that it may draw an adverse inference against the state where it was undisputed that the state destroyed video footage of the crime scene captured by the first responding officer in this weak circumstantial evidence case.

Standard of review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

Relevant facts

As mentioned supra, the solicitor admitted the body worn camera footage and in-car camera footage for Timmonsville Police Department Officer Christopher Miles from August 25th

to August 26th of 2018 was "purged." R. 87, ll. 8-10. Additionally, Miles was the first responding officer. R. 452, ll. 13-20.

At the conclusion of the trial, defense counsel requested a jury instruction on the spoliation of evidence. R. 495, ll. 19-20. The trial judge denied the request. Citing State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), the trial judge explained that "to establish a due process violation, the defendant must demonstrate, one, that the state destroyed the evidence in bad faith, which there's been no such evidence in this case, or, two, that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." R. 495, l. 20 – R. 496, l. 10. The judge ruled there was no evidence that the body worn camera footage or in-car camera footage possessed any exculpatory value that was apparent before the evidence was destroyed. R. 496, ll. 11-17. Thus, he concluded the two prongs of the due process analysis in Cheeseboro had not been satisfied, and as such, he would not instruct the jury on spoliation. R. 496, ll. 15-20.

Discussion

As an initial matter, the trial judge erred by analyzing the request for an instruction on spoliation of evidence pursuant to Cheeseboro. The issue presented in Cheeseboro was not whether the judge should have instructed the jury on the spoliation of evidence; rather, the issue presented was whether the evidence concerning the destroyed evidence should have been suppressed or the charges dismissed due to the destruction of the evidence. State v. Cheeseboro, 346 S.C. 526, 537, 552 S.E.2d 300, 306 (2001). Specifically, the police destroyed a gun that was allegedly connected to the crimes for which Cheeseboro was charged. Id. at 538, 552 S.E.2d at 306. The Court held there was no error in suppressing evidence related to the gun or in denying the request to dismiss the charges. Id. at 538, 552 S.E.2d at 307. The Court explained that "[t]he

state does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." Id. Further, the Court held that "[t]o establish a due process violation, a defendant must demonstrate (1) that the state destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." Id. at 538-539, 552 S.E.2d at 307.

The issue squarely presented in Cheeseboro was one involving a due process violation necessitating suppression or dismissal. That was not the issue presented to the trial judge when defense counsel requested an instruction on spoilation of evidence. The judge erred in treating the request for the jury instruction as one requesting suppression or dismissal pursuant to Cheeseboro.

Turning to the merits of the request, without question, South Carolina permits jury instructions on spoliation of evidence in civil cases. Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006). The South Carolina upheld a jury instruction advising the jury that "when evidence is lost of destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Kershaw County Bd. Of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). This Court explained in Stokes that a jury may accept the party's explanation for why evidence is not available, but that it is within the province of the jury "to draw a negative inference" from the party's failure to produce those pieces of evidence. Stokes, 368 S.C. at 521, 629 S.E.2d at 679. While South Carolina requires no specific language for a spoliation of evidence charge, the general language that has been approved by the appellate courts includes instructing the jury that it *may* draw an adverse inference from the failure of a party to preserve

evidence. Id. at 522, 629 S.E.2d at 679. In other words, the instruction informs the jury that a *permissive* adverse inference is allowed.

What is less clear in South Carolina is whether a spoliation of evidence charge is proper in criminal cases. A recent decision from this Court appears to foreclose the giving of a spoliation of evidence jury instruction in a criminal case. State v. McBride, 416 S.C. 379, 389-390, 786 S.E.2d 435, 440 (Ct. App. 2016). Law enforcement lost the complaining witness's shirt, which allegedly had some evidence on it to support or dispel the complaining witness's allegations. Id. at 386-387, 786 S.E.2d at 438-439. McBride requested the trial judge instruct the jury that it may infer the lost evidence would have been adverse to the state. Id. at 389, 786 S.E.2d at 440. The judge refused the request, and McBride raised the failure to so instruct on appeal. Id.

Affirming the trial judge's refusal to give a spoliation of evidence of trial, this Court explained that a "trial judge's refusal to give a requested charge must be both erroneous and prejudicial." Id. After describing the requested charge as one that permitted the jury to infer the lost evidence was adverse to the state, this Court stated that "[a]dverse inference charges are rarely permitted in criminal cases." Id. Thereafter, this Court found no error by the trial court in denying the request for the spoliation of evidence charge. Id. at 390, 786 S.E.2d at 440.

In arriving this conclusion, this Court cited two cases: State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015), and State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (Ct. App. 1973). In Reaves, the South Carolina Supreme Court examined whether a defendant was deprived of a fair trial as a result of potentially exculpatory evidence lost by police. Reaves, 414 S.C. at 125, 777 S.E.2d at 216. Although the trial judge refused to dismiss the charge against Reaves, the judge permitted Reaves' attorney to cross-examine the police on the deficiencies and charged the jury on a permissive adverse inference on the lost evidence. Id. at 128, 777 S.E.2d at 218. Regarding

that jury instruction, the Court stated "the propriety of this charge under state evidence law is not before the Court, but that [h]eretofore, an adverse inference based on missing evidence, sometimes referred to as a spoliation of evidence charge, has been limited to civil cases in South Carolina." Id. at 128 n. 5, 777 S.E.2d at 218 n. 5.

In Batson, the Court addressed what is commonly referred to as the missing witness jury instruction. Batson, 261 S.C. at 136-137, 198 S.E.2d at 521. Specifically, Batson requested the trial judge charge the jury that when "the state had witnesses known only to it and under its peculiar control and did not produce them, that their testimony would be presumed to be against the state." Id. The Court explained that "[i]n quite a number of civil cases we have stated and/or applied the rule that if a party, without explanation, fails to produce the testimony of an available, material witness who is within some degree of control of the party, it may be inferred that the testimony of such witness, if presented, would be adverse to the party who failed to call the witness." Id. at 137, 198 S.E.2d at 521. However, in criminal cases, the Court has held repeatedly, the state is not required to produce all available witnesses. Id. at 137, 198 S.E.2d at 522. After reviewing the pertinent case law, the Court expressed "grave doubt as to the propriety, in a criminal case, of the adverse inference from the failure to produce a material witness." Id. at 138, 198 S.E.2d at 522. Nevertheless, the Court acknowledged that "a charge of this proposition to a jury on a behalf of either the state or the defense is not warranted except under most unusual circumstances." Id.

In another case, State v. Breeze, 379 S.C. 538, 548, 665 S.E.2d 247, 252 (Ct. App. 2008), this Court noted that it is an open question in South Carolina whether a spoliation of evidence jury instruction is proper in a criminal case. The police destroyed the marijuana that formed the basis for the charge of possession of marijuana with intent to distribute. Id. at 545, 665 S.E.2d at 251. "[D]uring the jury charge conference, Breeze requested the jury be charged that an adverse

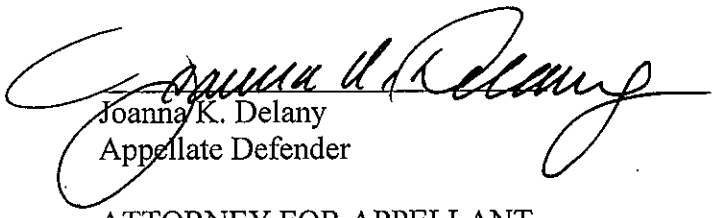
inference could be drawn against the state for failing to produce the marijuana." Id. at 547, 665 S.E.2d at 252. The trial judge denied the request. Id. Affirming the trial judge's refusal, this Court explained the case cited by Breeze in support of his request was a civil case and "therefore, clearly distinguishable on that ground to this criminal case." Id. at 548, 665 S.E.2d at 252. Without deciding whether a charge is proper in a criminal case, this Court held that even if the failure to give the instruction was erroneous, no prejudice resulted from the failure to give it. Id.

Many jurisdictions permit a spoliation instruction – allowing an adverse inference when evidence is lost or destroyed – in criminal cases. See e.g., Cost v. State, 10 A.3d 184, 196-197, 381-382 (Md. 2010). See also United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010); State v. Willits, 393 P.2d 274, 279 (Ariz. 1964); State v. Ish, 461 P.3d 774, 797-798 (Idaho 2020); State v. Hartsfield, 681 N.W.2d 626, 630-631 (Iowa 2004); Washington v. State, 478 So.2d 1028, 1032 (Miss. 1985). The Court of Appeals of Maryland explained "that an instruction which informs a jury that it may consider a particular inference runs the risk of creating the danger that the jury may give the inference undue weight ... [or of] overemphasizing just one of the many proper inferences that a jury may draw." Cost, 10 A.3d at 197. Nevertheless, the court held the instruction was necessary as it would aid the jury in clearly understanding the case, providing guidance to the jury, and help the jury arrive at the correct verdict. Id.

Here, it was undisputed that the state destroyed the video footage captured by the first responding officer to the crime scene. The record contained an abundance of evidence showing the negligence and recklessness of the state in handling the case. In fact, Strickland was demoted due to his recklessness in withholding material evidence. The trial judge erred in failing to instruct the jury that it was permitted to draw an adverse inference based upon the missing evidence.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court dismiss the charge against him based upon the state's repeated discovery violations, which culminated in the destruction of evidence. Regarding Issues II, III, and IV, Appellant respectfully requests this Court reverse his conviction and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of May, 2023.