STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Marion County
The Hon. William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2022-000748

The State of South Carolina,

Respondent,

vs.

Stephen William Flood,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by failing to suppress video evidence depicting a birds-eye view of flooding in the area including and surrounding the incident location, and photographs of flooding of the van during appellant's rescue, where the images showed road and water conditions over an hour after appellant encountered them, and where the road and water conditions at the time appellant encountered those conditions were critical to the jury's determination of guilt.

II.

Whether the trial court erred by invading the province of the jury where, after the jury found appellant guilty of involuntary manslaughter and reckless homicide for both decedents, the trial court initially imposed consecutive sentences totaling eighteen (18) years, and only after being informed of one homicide-one punishment rule, the trial court unilaterally elected which homicide charges for which appellant would be found guilty solely to keep the eighteen (18) year punishment the court originally imposed.

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge properly exercise his broad discretion by admitting video and photographic evidence of the rescue attempt and surrounding area because it constituted evidence of the crime scene, because it constituted evidence of the diligent rescue efforts and because, in conjunction with other video and photographic evidence admitted in the trial, it constituted evidence of the water level and the rate it was rising throughout the day and, thus, it: (1) was relevant to multiple elements of the charged crimes; and (2) possessed a probative value that was not substantially outweighed by any danger of unfair prejudice or misleading the jury?

II.

Did the trial judge properly exercise his broad sentencing discretion when, after the jury found Appellant guilty on all charges and the judge determined that eighteen consecutive years was the appropriate prison term for Appellant's two homicides, the trial judge vacated the two involuntary manslaughter convictions as a component of the sentencing process to comply with State v. Greene and sentenced Appellant on the two reckless homicide convictions within the statutory limits?

STATEMENT OF THE CASE

On May 9, 2019, Appellant Stephen William Flood was indicted in Marion County on four charges arising from the homicides of Wendy Newton and Nicholette Green: two counts of involuntary manslaughter (S.C. Code Ann. § 16-3-60 (2015)), and two counts of reckless vehicular homicide (S.C. Code Ann. § 56-05-2910 (2018)).

On May 16, 2022, Appellant was tried before a jury in Marion County with the Hon. William H. Seals, Jr. presiding.

On May 19, 2022, at the conclusion of the four-day trial, the jury found Appellant guilty of all charges. Judge Seals sentenced Appellant to the statutory maximum of five years imprisonment on each of the involuntary manslaughter charges, and four years on each of the reckless homicide charges. All sentences were to run consecutively for a total sentence of eighteen years.

On May 20, 2022, Judge Seals vacated the two involuntary manslaughter convictions and amended the sentences on the remaining two reckless homicide convictions to nine years of imprisonment each, for a total sentence of eighteen years.

On May 31, 2022, the South Carolina Court of Appeals received timely notice of this appeal.

STATEMENT OF FACTS

On September 18, 2018, Appellant was employed as a transport deputy for the Horry County Sheriff's Office. (Tr. p. 91 lines 16-22). On that day, Appellant and a fellow officer, Mr. Bishop, were assigned to transport two mental health patients, Wendy Newton and Nicholette Green. (Tr. p. 91 lines 16-22, Indictment 2019-GS-33-00239). These two transportees were placed in the back of a transport van and secured in a cage, which was subdivided into two sections. (Tr. p. 109 line 12 – p. 110 line 16, p. 519 line 6 – p. 526 line 4). By design, Wendy Newton and Nicholette Green were unable to exit the back of the van unless released from this cage. (Tr. p. 519 line 6 – p. 526 line 4).

On this date, the entire local area was being inundated by water flowing down from North Carolina because of Hurricane Florence. (Tr. p. 89 line 20 – p. 95 line 3). This resulted in numerous road closures, as reflected on the SCDOT website. (Tr. p. 89 line 20 – p. 95 line 3). Before departing with his transportees, Appellant was present for a discussion of road conditions, and his supervisor indicated that one possible route using Highway 76 was barricaded and closed due to flooding and Appellant would need to take an alternate route. (Tr. p. 89 line 20 – p. 95 line 3).

Nevertheless, Appellant chose to attempt his normal route using Highway 76 – the very route that his supervisor had indicated was flooded and closed. Using Highway 9 to travel to Highway 76 at Nichols, Appellant and the transport van were stopped by barricades and a checkpoint. (Tr. p. 495 lines 1-20, p. 500 lines 2-8). After conversing with soldiers at a checkpoint Appellant drove around the barricades and down a road covered in water, which he recounted was initially "about one-half inch deep." (Tr. p. 502 lines 21-25). Later he drove slowly "because the water was right at the bottom of the houses [they] passed." (Tr. p. 495 line

21 – p. 496 line 19). After Appellant drove "about two miles" further down the flooded road, and without feeling a sudden drop in the road, the van began to float and the current pushed them against the guardrail. (Tr. p. 496 line 20 – p. 497 line 23, p. 504 lines 19-22). Water immediately rushed into the van and quickly caused it to lose power. (Tr. p. 497 lines 15-23). Appellant attempted to exit through the driver's side window but became stuck. Appellant's fellow officer attempted to free the transportees from the back of the van first with the keys, and then by shooting a lock off, but was unable to do so. Mr. Bishop did free Appellant from the window. (Tr. p. 504 line 23 – p. 506 line 15). About "one-half to three-quarters of an hour" after the van was incapacitated, Appellant's fellow officer made the first call for help by radio to the detention center, and also called 911. (Tr. p. 505 line 22 – p. 506 line 20).

The detention center received the call for help at approximately 5:49 p.m. (Tr. p. 426 lines 17-18). At approximately 6:50 p.m., a group of several responders, including Chief Alan Starnes of Tennessee Swift Water Rescue, reached the disabled van by boat and immediately began attempting to rescue the trapped women by cutting into the roof of the transport van with an axe. (Tr. p. 426 lines 20-24). The rescuers managed to cut a hole into the outer roof of the transport van, only to discover additional barriers between the roof and the trapped women. (Tr. p. 449 lines 1-9). They then began cutting into the cage. (Tr. p. 449 lines 1-9).

At 6:59 p.m., Mr. Bishop informed the detention center that he could no longer hear the women. (Tr. p. 425 lines 23-24).

At this point, Chief Starnes concluded that this no longer was a rescue operation, but a recovery operation because Wendy Newton and Nicholette Green had drowned. (p. 449 line 23 – p. 450 line 20). This judgment was based on the water level being "maybe two or three inches coming over the top" of the cage, they had only been able to make "maybe a one-foot square

hole in the top of [the cage]," and Chief Starnes not hearing any sound from the victims since arriving on the scene. (Tr. p. 449 line 11 – p. 450 line 20).

Much of this rescue attempt was recorded by an arial drone which law enforcement had been using to survey bridges in the area. (Tr. p. 400 line 10 – p. 410 line 23). Upon hearing that there was a van in distress, Captain Rice and David Dorio, officers for Horry County Fire & Rescue, drove to the edge of the water in Nichols and launched the drone. (Tr. p. 400 line 10 – p. 404 line 8). The drone was equipped with a camera and sent a real-time video feed to the drone operators. (Tr. p. 401 line 11 – p. 410 line 23). This allowed the drone operators to locate the van, monitor the ensuing rescue attempt, and survey the road leading to the van before the drone landed to recharge. (Tr. p. 401 line 11 – p. 410 line 23).

Following an investigation, Appellant was indicted for two counts of involuntary manslaughter and two counts of reckless homicide with death (i.e., reckless vehicular homicide, S.C. Code Ann. § 56-05-2910). (Indictment 2019-GS-33-00239). Appellant proceeded to trial on May 16, 2022. (Tr. p. 1, p. 5 lines 3-6).

During the trial, the State called several witnesses who testified to the rising water levels and road conditions on the day of the homicides, including Sandee Rogers, the Nichols town administrator. (Tr. p. 200 line 19 – p. 216 line 12). During Ms. Rogers' testimony, the State introduced without objection three photographs and a video depicting the water levels throughout the day of September 18, 2018. (Tr. p. 202 line 3 – p. 207 line 4, p. 214 line 3 – p. 215 line 23). These were State's Exhibit 4, a video depicting a flooded road viewed from the passenger road of a National Guard highwater vehicle, and State's Exhibits 5A, 5B, and 5C, which were photographs of roads covered in water. (Tr. p. 202 line 3 – p. 207 line 4, p. 214 line 3 – p. 215 line 23).

During the redirect examination of Dylan Oates, the State sought to introduce State's Exhibits 7A and 7B, which were photos of the roadway covered in water, and 7C and 7D, which were photos of the rescue responders standing on and around the flooded van. (Tr. p. 276 line 24 – p. 277 line 23). Defense counsel objected to all these photos on the basis that they exceeded the scope of cross examination. (Tr. p. 277 line 24 – p. 278 line 6). In response, the trial court admitted State's Exhibits 7A and 7B but excluded 7C and 7D as beyond the scope of cross. (Tr. p. 278 lines 7-24).

During the direct examination of Will Duncan, the State sought to introduce State's Exhibit 8A, which was a photo of a roadway covered in water, and 8B, 8C, and 8D, which were photos of the rescue responders standing on and around the flooded van. Defense counsel objected to the admission of 8B, 8C, and 8D "for the reason that it appears [they] were taken significantly after the . . . vehicle encountered the flood waters," and that they were "more prejudicial than probative." (Tr. p. 294 line 14 – p. 295 line 15). All four photographs were admitted into evidence. (Tr. p. 296 lines 9-13). Mr. Duncan testified, and defense counsel emphatically underscored on cross examination, that photos 8B, 8C, and 8D were taken during the rescue attempt and were not taken contemporaneous with the moment Appellant entered the water. (Tr. p. 298 line 24 – p. 299 line 2; Tr. p. 300 line 10 – p. 302 line 7).

During the direct examination of David Dorio, the State introduced State's Exhibit 10, the arial drone video of the rescue attempt and surrounding area, which was admitted over the objection of defense counsel. (Tr. p. 402 line 8 – p. 407 line 23). Prior to this testimony and out of the hearing of the jury, defense counsel argued that the video was irrelevant, would mislead the jury, and would "at least in part, [go] to the sympathy of the jury." (Tr. p. 393 line 8 – p. 398

line 23). While still out of the hearing of the jury, the trial judge ruled the video was admissible and explained:

> But I think it's allowable, and I think it's very relevant and very probative. There's no bodies, there's no gore, there's no blood. I mean, there's nothing to offend the jury. It just shows the water, the vehicle, and the massive flooding around it. So I'm going to allow it.

(Tr. p. 399 lines 18-23). Testimony by David Dorio laid the foundation for the admission of the evidence, including testimony that the drone was launched after receiving the call that Appellant stalled the van. (Tr. p. 402 lines 8-18).

During the direct examination of Chief Alan Starnes, the State sought to introduce Exhibits 9A and 9B, which were photos of the van nearly covered in water after the unsuccessful rescue attempt. (Tr. p. 451 line 10 – p. 452 line 8). The record reflects that defense counsel made the following objection: "I thought I heard him say that he didn't take these photos, so I object on that ground, but otherwise --." (Tr. p. 452 lines 9-25). This prompted a discussion between the trial court and counsel regarding the foundation laid for the photographs as reasonable and accurate depictions of the scene. (Tr. p. 452 lines 9-25). There was no reference to Rule 403 in the objection or discussion, nor was there any discussion of the probative value of the photographs or of any danger of unfair prejudice or misleading the jury. (Tr. p. 452 lines 9-25). Exhibits 9A and 9B were admitted over this objection. (Tr. p. 452 lines 22-23).

Appellant exercised his Fifth Amendment rights and did not take the stand. (Tr. p. 554 lines 4-8). However, the State introduced Appellant's prior written statements setting out his version of events through the testimony of Lt. Stephen Howell, a SLED agent who investigated the homicides (Tr. p. 493 line 13 – p. 507 line 13). The gist of the statements was that Appellant chose to drive his standard route using Highway 9 to Highway 76 at Nichols; conversed with soldiers at a checkpoint; drove around the barricades and down a road covered in water for

"about two miles"; and did not feel a sudden drop in the road before the van began to float and the current pushed them against the guardrail. (Tr. p. 495 lines 1 – p. 497 line 23, p. 500 lines 2-8, p. 502 lines 21-25, p. 504 lines 19-22). Appellant became stuck in the driver's side window, and Mr. Bishop attempted to free the transportees from the back of the van before freeing Appellant. (Tr. p. 504 line 23 – p. 506 line 15). About "one-half to three-quarters of an hour" after the van was incapacitated, Mr. Bishop made the first call for help by radio to the detention center, and also called 911. (Tr. p. 505 line 22 – p. 506 line 20).

Following the presentation of this testimony and evidence, counsel for the parties presented their closing arguments to the jury and the trial judge instructed the jury on the law. (Tr. p. 612 line 3 – p. 623 line 20). The jury was charged on the elements of both involuntary manslaughter and reckless vehicular homicide, with no instruction that they must choose only one or the other. (Tr. p. 612 line 3 – p. 623 line 20). There were no objections to this jury charge. (Tr. 623, lines 22-25).

The jury deliberated for approximately three hours before unanimously finding Appellant guilty of all four charges. (Tr. p. 623 line 19 – p. 630 line 20). The trial court sentenced Appellant to the statutory maximum of five years imprisonment on each of the involuntary manslaughter charges, and four years on each of the reckless vehicular homicide charges. (Tr. p. 645 lines 4-10). All sentences were to run consecutively for a total sentence of eighteen years. (Tr. p. 645 lines 4-10).

The next day, proceedings in Appellant's trial resumed and counsel for the State pointed out that because there had only been two homicides, the law required that two of the four homicide convictions had to be vacated to follow the "one homicide, one homicide punishment" rule in the "fairly recent" case of State v. Greene. (Tr. II p. 3 lines 2-25). The State suggested to

the trial court vacate the two involuntary manslaughter charges and amend the sentences on the remaining two reckless vehicular homicide charges to conform to the ultimate sentence to eighteen (18) years as originally intended. (Tr. II p. 3 lines 13-25). In response, and without citation to authority, defense counsel sought to preserve an argument that the court did not have "authority to unilaterally pick which charge to vacate, [and] vacate the one with the higher maximum sentence." (Tr. II p. 4 lines 20-24). Without citation to any authority, defense counsel also requested that the court "vacate the conviction with the corresponding sentence . . . as opposed to reconfiguring it." (Tr. II p. 5 lines 3-8).

The trial judge adopted the suggestion of the State, *sua sponte* vacated the two involuntary manslaughter convictions, and amended the sentences on the remaining two reckless homicide convictions to nine years of imprisonment each, for a total of eighteen years. (Tr. II 5, lines 15-20). The trial court explained his ruling and reasoning on the record:

> In order to comply with the *Green* [sic] case, I'm going to vacate both involuntary manslaughter sentences and convictions. I'm going to modify both reckless homicide sentences to comply with my original intent, which was 18 years. Thus, I'm going to sentence on each reckless homicide conviction to nine years and run them both consecutive. In essence, there's no prejudice to the defendant because it's the exact same sentence. It's just done a little differently to comply with *Green* [sic].

(Tr. II 5, lines 12-20).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). With respect to evidence, trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on an evidentiary matter absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence.").

Similarly, with respect to sentencing, "[a] trial judge generally has wide discretion in determining what sentence to impose." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). Furthermore, appellate courts in South Carolina have "no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the [sentencing] judge, and is not the result of partiality, prejudice, oppression or corrupt motive." State v. Scates, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948).

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I.

The trial judge properly exercised his broad discretion by admitting video and photographic evidence of the rescue attempt and surrounding area because it constituted evidence of the crime scene, because it constituted evidence of the diligent rescue efforts and because, in conjunction with other video and photographic evidence admitted in the trial, it constituted evidence of the water level and the rate it was rising throughout the day and, thus, it: (1) was relevant to multiple elements of the charged crimes; and (2) possessed a probative value that was not substantially outweighed by any danger of unfair prejudice or misleading the jury.

Photos 8B, 8C, 8D, 9A, and 9B, and the drone video each depict the crime scene and corroborate many points of witness testimony, including that the roads were impassable, that the conditions were life-threatening, and that the rescue attempt by boat was diligent but ultimately unsuccessful. (State's Ex. # 8B, 8C, 8D, 9A, 9B (Van Photos), State's Ex. # 10 (Drone Video)). As discussed more fully below, the photos and videos here are highly relevant and material to the State's case, highly probative of Appellant's guilt, and not substantially outweighed by any danger of unfair prejudice or misleading the jury. The trial judge diligently performed his gatekeeping function by excluding other photographs at trial, while properly admitting the video and photographs at issue here. (Tr. p. 278 lines 7-24).

Under the South Carolina Rules of Evidence, "[a]ll relevant evidence is admissible" unless barred by another provision of law. Rule 402, SCRE. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Relevant evidence nevertheless "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . . ." Rule 403, SCRE.

> "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to

> corroborate testimony, it is not an abuse of discretion to admit it." Id. "When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App. 2008).

State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27–28 (2014). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 178, 460 S.E.2d 368, 370 (1995) (affirming admission of video and photos of a crime scene that included "the victim's nude body . . . with her face and body visibly swollen from the beating" and "blood smeared on the walls and floor.").

> A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.

State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001) (citations omitted), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

A. There Was No Preserved Rule 403 Objection to State's Exhibits 9A and 9B

Appellant focuses his arguments on State's Exhibit 10, the drone video of the rescue attempt and surrounding area, and State's Exhibits 8B, 8C, and 8D, which are still photographs of the rescue attempt taken by Agent Duncan. (State's Ex. # 8B, 8C, 8D (Van Photos), State's Ex. # 10 (Drone Video)). He also makes general references on appeal to "photographs of the rescue scene," which could be construed to include State's Exhibits 9A and 9B – photos of the van after the unsuccessful rescue attempt. (State's Ex. # 9A, 9B).

To the extent that Appellant is now challenging the admission of State's Exhibits 9A and 9B based on Rule 403, SCRE, that argument is unpreserved for this Court's review.

> In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct.App.1999). Furthermore, a party may not argue one ground at trial and an alternate ground on appeal. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000).

State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

The record reflects that when the State sought to introduce Exhibits 9A and 9B, defense counsel made the following objection: "I thought I heard him say that he didn't take these photos, so I object *on that ground, but otherwise* --." (Tr. p. 452 lines 9-25) (emphasis added). This prompted a discussion between the trial court and counsel regarding the foundation laid for the photographs as reasonable and accurate depictions of the scene. (Tr. p. 452 lines 9-25). There was no reference to Rule 403 in the objection or discussion, nor was there any discussion of the probative value of the photographs or of any danger of unfair prejudice or misleading the jury. (Tr. p. 452 lines 9-25).

In summary, while there was a timely objection by the defense to the admission of 9A and 9B, the record reflects that the defense objection had nothing to do with Rule 403. Therefore, this argument is unpreserved, and Appellant cannot properly appeal the admission of State's Exhibits 9A and 9B based on Rule 403. See Prioleau, 345 S.C. at 411, 548 S.E.2d at 216 ("[A] a party may not argue one ground at trial and an alternate ground on appeal.").

B. The Admitted Evidence Was Relevant and Material

In South Carolina, the offense of reckless vehicular homicide occurs when "the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others." S.C. Code Ann. § 56-5-2910(A) (2018). Similarly, involuntary manslaughter is a codified common law offense and as relevant here is defined as "the unintentional killing of another without malice while engaged in . . . the doing of

a lawful act with a reckless disregard for the safety of others." State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014); see also S.C. Code Ann. § 16-3-60 (2015). While these statutes are not identical, they do overlap in that they each require the State to prove that there was a homicide resulting from the defendant acting with "reckless disregard of the safety of others."

First, the video and photographic evidence of the water level was relevant because it helped prove the *mens rea* element of the charged offenses, in conjunction with other evidence presented. The State introduced without objection a video and photos taken by the town administrator earlier in the day which showed the water levels well before the victims drowned. (Tr. p. 205 line 1 – Tr. p. 207 line 4). Conversely, the video evidence and photographs at issue here documented a rescue attempt which occurred within approximately one hour of Appellant's decision to enter the water. (Tr. p. 424 lines 2-14). Based on the testimony of the detention center radio controller, it appears that the photos and the drone video were nearly contemporaneous with the drowning. (Tr. p. 421 line 23 – p. 425 line 24). This timing is consistent with the position of the water level relative to the top of the van, in the drone video and photos. (State's Ex. # 8B, 8C, 8D, 9A, 9B (Van Photos), State's Ex. # 10 (Drone Video)). By introducing all these videos and photos taken at different points throughout the day, the State presented evidence of the water levels around the crime scene *both before and after* Appellant made the decision to drive into them. This allowed the jury to make a common-sense determination that the water level was rising steadily, and that Appellant acted with reckless disregard of the safety of his vulnerable transport charges when he drove into the water.

Appellant has argued that the photos and videos should not have been admitted essentially because they were not taken contemporaneously with the very moment that he chose to enter the waters, and therefore are not relevant. Indeed, the trial court observed in a bench

conference with counsel that "the whole fact that's in dispute in this case" was "how deep the water was, how fast it was moving, and was he prudent or not in trying to go through it." (Tr. 296, lines 2-4).

Appellant observes that "witnesses consistently testified that the water and road conditions were rapidly changing during that day." (Initial Brief of Appellant p. 12). This is correct, and more accurately, the changes only happened in one direction: the water level steadily increased, and the road conditions steadily deteriorated. (Tr. p. 266 line 4 – p. 267 line 10; p. 306 lines 16-21). It is not essential in this case that there must have been a precise measurement of the water level and speed at the very moment that Appellant first drove into the water, and at every moment he *continued* driving into the water even as it became deeper. The crucial fact here was that the water Appellant drove into was high, was rising, was moving, and was deepening as he continued down the road. ((Tr. p. 266 line 4 – p. 267 line 10; p. 296, lines 2-4). The drone video and rescue photos simply corroborated the witness testimony on this point, and thus the evidence was highly relevant to and probative of Appellant's recklessness and was admissible for that reason. See State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.").

In particular, the drone video was highly relevant to aid the jury in understanding how recklessly Appellant acted, in that the last two minutes of the video allowed the jury to better understand the road that Appellant traveled to the site of the drownings. (State's Ex. # 10 (Drone Video)). It allowed the jury to see that the road was either straight or curved gently, meaning that when Appellant approached the flooded road, he had a long line of sight, and he could see water stretching far ahead of him before he chose to proceed. (State's Ex. # 10 (Drone Video)). It

allowed the jury to see that the grade of the road appears to descend slowly but steadily, meaning that Appellant had ample time to realize there was danger and simply stop. (State's Ex. # 10 (Drone Video)). It allowed the jury to see that Appellant would have seen the dividing yellow line of the road in very shallow water when he first drove in but would have lost sight of the road as he continued driving and the water became deeper. (State's Ex. # 10 (Drone Video)). It allowed the jury to see the location of the houses that he tried not to flood further by causing a wake while driving through the deepening waters. (State's Ex. # 10 (Drone Video)).

Perhaps most importantly, the last two minutes of the video allowed the jury to visualize just how far Appellant must have *chosen to continue* driving through the floodwaters before he finally drove into water deep enough to stall the vehicle near the Little Pee Dee River. (State's Ex. # 10 (Drone Video)). It is one thing to hear that SCDOT has listed a road as closed on its website; it is another thing to see first-hand that water is covering a road that descends at a grade, and nevertheless to choose to continue driving forward while in custody of persons secured in a vulnerable position. All of these were important and relevant considerations for the jury to use in its common-sense determination that the State had met its burden of proving that Appellant's actions were more than merely an unfortunate accident, and instead that he drove into ever-deepening water with "reckless disregard of the safety of others." Cf. S.C. Code Ann. § 56-5-2910(A) (2018).

Second, the video and photographs demonstrate the diligence of the rescue efforts, which was highly relevant to the element of proximate cause in this case. Appellant could only be found guilty of reckless vehicular homicide if the State proved the deaths were a "proximate result" of his reckless driving. S.C. Code Ann. § 56-5-2910(A) (2018). At trial defense counsel pointed to the time delay between the initial 911 call and the arrival of the rescuers, implying that

the victims may not have died if the rescuers had been more effective. (Tr. p. 478 line 13 – p. 483 line 15). The video and photographs here corroborate the testimony recounting that the rescue efforts were nothing short of heroic but were doomed to failure because of the position of the vehicle in the rising water. (State's Ex. # 8B, 8C, 8D (Van Photos), State's Ex. # 10 (Drone Video)); see State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."). This evidence was highly relevant to and probative of the proximate cause element of the reckless vehicular homicide charge and was admissible for that reason. See S.C. Code Ann. § 56-5-2910(A) (2018).

C. There Was No Danger of Unfair Prejudice or Misleading the Jury

In addition to being relevant and highly probative as discussed above, the photos and video at issue did not unfairly prejudice Appellant or mislead the jury in the broader context of all the evidence presented. The State laid an extensive foundation for the introduction of the evidence which established that the video and photographs were taken only after the call went out about a van in the water. (Tr. P. 402 lines 8-12). In addition to this evidence, the State also introduced other videos and photos taken at different points throughout the day showing high water levels around Town of Nichols. (State's Ex. # 4, 5A, 5B, 5C, 7A, 7B). Numerous witnesses testified regarding the water level throughout the day, and the State also introduced Appellant's previous statements setting out his version of events through the testimony of Lt. Stephen Howell. (Tr. p. 494 line 15 – p. 506 line 20); see also State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.").

Will Duncan testified at trial, and defense counsel emphatically underscored on cross examination, that State's Exhibits 8B, 8C, and 8D (the van photos) were taken contemporaneous with the rescue, not the moment Appellant entered the water. (Tr. p. 298 line 24 – p. 299 line 2; Tr. p. 300 line 10 – p. 302 line 7). Similarly, David Dorio testified that State's Exhibit 10 (the drone video) started only after Appellant stalled the van. (Tr. p. 402 lines 8-18). It was well within the common sense of the jury to deduce from all this evidence and testimony that when Appellant drove into the water, it must have been dangerously high, but not quite as high as when the rescue was attempted. In this context, there was no danger of unfair prejudice or misleading the jury, and the evidence was properly admitted. See State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) ("When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.").

While the images do depict a crime scene, their introduction was calculated to inform, not enflame. (State's Ex. # 8B, 8C, 8D (Van Photos), State's Ex. # 10 (Drone Video)). Although the crime charged was a homicide, the photos and video at issue never show any bodies of the victims. Id. Neither does the video contain audio of sirens, elevated voices, or any other audio for that matter. (State's Ex. # 10 (Drone Video)). The video is not, for instance, a body-worn camera view of Appellant talking to the victims while the waters rise, or even the first-person view of one of the rescuers attempting to hack into the van. Out of the hearing of the jury, the trial judge ruled the video explained:

> But I think it's allowable, and I think it's very relevant and very probative. There's no bodies, there's no gore, there's no blood. I mean, there's nothing to offend the jury. It just shows the water, the vehicle, and the massive flooding around it. So I'm going to allow it.

(Tr. p. 399 lines 18-23).

Instead, the challenged evidence here is only still photographs of water nearly covering the transport van, and an arial video of the rescue attempt and the road that Appellant chose to drive before he stalled the vehicle. (State's Ex. # 8B, 8C, 8D (Van Photos), State's Ex. # 10 (Drone Video)). It is difficult to imagine how photographs and a video of a homicide crime scene could be any more anodyne. Cf. State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) (plurality opinions discussing admission of gruesome photos of a fatal dog attack) & State v. Kelley, 319 S.C. 173, 178, 460 S.E.2d 368, 370 (1995) (affirming admission of video and photos of a crime scene that included "the victim's nude body . . . with her face and body visibly swollen from the beating" and "blood smeared on the walls and floor."). The jury simply saw what every other person on the ground saw that day, including Appellant: water everywhere. (Tr. P. 410 lines 19-22). On appeal, Appellant points out that the arial view of the flooding was "a perspective that [he] did not have," but it was well within the common sense of the jury to use that evidence to understand what Appellant *must have seen* when he drove into and through the water.

Finally, the trial judge below diligently performed his gatekeeping function by excluding other photographs at trial, while properly admitting the video and photographs at issue here. The record reflects that, during the redirect examination of Dylan Oates, the State sought to introduce State's Exhibits 7A, 7B, 7C, and 7D into evidence. (Tr. p. 276 line 24 – p. 277 line 23). Defense counsel objected on the basis that they exceeded the scope of cross. (Tr. p. 277 line 24 – p. 278 line 6). In response, the trial court admitted State's Exhibits 7A and 7B but excluded 7C and 7D. (Tr. p. 278 lines 7-24). This demonstrates that the trial judge carefully considered the objections of defense counsel and sustained them when meritorious.

In summary, the photos and video at issue here were relevant, material, and highly probative of Appellant's recklessness. These photos and video were not unfairly prejudicial to

Appellant and did not mislead the jury. Instead, the trial judge properly admitted this evidence to aid the jury in their commonsense determination of what Appellant must have seen and known from the time that he drove into water until the moment that he stalled the transport vehicle. For these reasons the admission of this evidence should be affirmed.

II.

The trial judge properly exercised his broad sentencing discretion when, after the jury found Appellant guilty on all charges and the judge determined that eighteen consecutive years was the appropriate prison term for Appellant's two homicides, the trial judge vacated the two involuntary manslaughter convictions as a component of the sentencing process to comply with State v. Greene and sentenced Appellant on the two reckless homicide convictions within the statutory limits.

After the jury found Appellant guilty of all four homicide charges arising from the two homicides and had been dismissed, the trial judge initially sentenced Appellant to a combination of consecutive sentences totaling eighteen years on all four homicide convictions. (Tr. 645, lines 4-10). However, both trial counsel and the court quickly realized that two of the four convictions had to be vacated to follow the "one homicide, one homicide punishment" rule in State v. Greene, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018). (Tr. II p. 3 lines 5-25). The question of *which* convictions to vacate was within the broad discretion of the trial judge as a component of the sentencing process. See id at 284, 814 S.E.2d at 507 (vacating the defendant's involuntary manslaughter conviction while retaining the much more serious homicide by child abuse conviction); cf. Ball v. United States, 470 U.S. 856, 865, (1985) (remanding the case "with instructions to have the District Court *exercise its discretion* to vacate one of the convictions." (emphasis added)). Where the trial judge had already determined that eighteen consecutive years was the appropriate prison term for Appellant's two homicides, and where that result was within the statutory range for two reckless vehicular homicide convictions, there was no error in reaching that result with the reckless vehicular homicide sentences and *reducing* Appellant's total punishment by vacating the two involuntary manslaughter convictions. Id.; see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose.").

Appellant contends on appeal that this exercise of the judge's discretion was an improper invasion of the fact-finding role of the jury, arguing that "the Trial Court's imposition of any sentence without knowing specifically which charge the jury would have chosen it its domain as the sole judge of Appellant's guilt requires reversal and remand."[1] On appeal, Appellant relies heavily on the 1960 decision of the Supreme Court in State v. Cavers, 236 S.C. 305, 114 S.E.2d 401 (1960). This decision and the decision of the Supreme Court in State v. Greene are at the core of this appeal, and both are discussed at length herein.

A. Discussion of State v. Greene

State v. Greene is a relatively recent decision of the South Carolina Supreme Court which established the "one homicide, one homicide punishment" rule in our State. State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). As relevant here, the defendant in Greene appealed her convictions for both homicide by child abuse and involuntary manslaughter, arguing that she could not stand convicted of both charges. 423 S.C. at 279, 814 SE.2d at 504. The Court agreed, holding:

> While the South Carolina legislature has manifestly authorized multiple homicide charges for a single homicide, we find no expression of legislative intent authorizing multiple homicide punishments for a single homicide committed by a single defendant. As a result, absent legislative intent to the

[1] In effect, this argument adopts the post-hoc contention of defense counsel at the trial level that the jury should have been charged that they could find Appellant guilty of either involuntary manslaughter or reckless homicide (or neither), but not both charges. To the extent that is the case, the record reflects that the jury was charged without objection by defense counsel, and any possible defect in the charge was noted by defense counsel for the first time on the day after the jury found Appellant guilty and was dismissed, and then only obliquely and without citation to authority. Therefore, any argument that the charge was improper is unpreserved. See State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Moreover, such a charge would be an error of law under Greene, where our Supreme Court expressly states that "a jury may properly return a guilty verdict on more than one homicide charge" where a homicide "properly fall[s] within multiple homicide statutes." State v. Greene, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018).

> contrary, we follow the prevailing rule—one homicide is limited to one homicide punishment per defendant.

423 S.C. at 280, 814 SE.2d at 505.

Moreover, the Supreme Court in Greene held that it was not enough simply to sentence a defendant on only one redundant homicide conviction while allowing the remaining convictions to stand without any additional sentence, because "the conviction itself is considered a punishment and that, too, must be vacated." 423 S.C. at 283, 814 S.E.2d at 507 (citing Ball v. United States, 470 U.S. 856, 864–65 (1985) (discussed infra)). As a component of its holding, the Court in Greene also provided express guidance which anticipated this very appeal:

> The situation here should be contrasted with a homicide that would properly fall within multiple homicide statutes. In that situation, a jury may properly return a guilty verdict on more than one homicide charge. In State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), this Court affirmed convictions and sentences for two homicide charges—felony driving under the influence causing death and reckless homicide—arising out of a motor vehicle accident that killed one person and seriously injured another. The evidence and theory of criminal liability satisfied the elements of both homicide statutes. Easler, however, went further and affirmed multiple punishments for the single homicide committed by one defendant, and this was error. We overrule Easler to the extent it authorizes multiple homicide punishments involving only one homicide. . . .

423 S.C. at 283, 814 S.E.2d at 507. This guidance is useful not only for the rule of "one homicide, one homicide punishment," but also for the remedy: vacating a redundant homicide conviction as a component of imposing that punishment. See id; cf. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose.").

In deciding State v. Greene, our State's highest Court relied upon and quoted from the decision of the United States Supreme Court in Ball v. United States, 470 U.S. 856 (1985). Id. The essential question for the United States Supreme Court in Ball was whether, when a felon received and possessed a single firearm, they could be convicted and punished for two separate

federal crimes for that one action: "under 18 U.S.C. § 922(h)(1), for receiving that firearm, and under 18 U.S.C.App. § 1202(a)(1) for possessing the same weapon."470 U.S. at 857, 105 S.Ct. at 1669. The Court in Ball held that while a person could be charged, tried, and found guilty by the jury of both statutes, only one conviction could stand:

> Having concluded that Congress did not intend petitioner's conduct to be punishable under both §§ 922(h) and 1202(a), the only remedy consistent with the congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. . . .
>
> We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a) involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment. If, upon the trial, the district judge is satisfied that there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense. Should the jury return guilty verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses.

470 U.S. at 864-65. (emphasis added). Accordingly, the Supreme Court in Ball remanded the case not for a new trial, but for the District Court to "exercise its discretion to vacate one of the convictions." 470 U.S. at 865, cf. Greene, 423 S.C. at 283, 814 S.E.2d at 507 (2018) (holding that a redundant homicide "conviction . . . is considered a punishment and . . . must be vacated.").

B. Discussion of State v. Cavers

Appellant has offered the case of State v. Cavers, 236 S.C. 305, 114 S.E.2d 401 (1960), for the proposition that it was the province of the jury to choose to impose convictions on either the charge of involuntary manslaughter or of reckless homicide, but not both. However, Appellant's reliance is misplaced, because the elements of involuntary manslaughter with a vehicle have changed in the sixty-three years since Cavers was decided. See discussion infra & State v. Greene, 423 S.C. 263, 281, 814 S.E.2d 496, 506 (2018) (observing that involuntary manslaughter is "now [a] codified common law offense").

State v. Cavers is a 1960 decision of the South Carolina Supreme Court in a vehicular homicide case. State v. Cavers, 236 S.C. 305, 308, 114 S.E.2d 401, 402 (1960). In Cavers, the defendant motorist struck and killed a person with his vehicle and was charged with both murder and reckless homicide. Id. "Upon trial involuntary manslaughter was submitted to the jury under the first count, as was reckless homicide under the second." Id. The trial judge instructed the jury that they could not find the defendant guilty of both involuntary manslaughter and reckless homicide. 236 S.C. at 312-13, 114 S.E.2d at 404. A brief examination of the history of vehicular homicide law in South Carolina reveals this was a correct charge in 1960 but would not be today. See discussion infra. We turn now to that history.

Crucially, while the crimes charged in State v. Cavers bear the same *names* as the crimes Appellant was convicted of in this case, the *elements* of involuntary manslaughter with a vehicle were materially different in 1960 than they are today. The Court in Cavers relied on the case of State v. Barnett, a 1951 South Carolina Supreme Court decision which observed that involuntary manslaughter at that time was a common law offense, without a statutory definition of the *mens rea*. State v. Barnett, 218 S.C. 415, 424, 63 S.E.2d 57, 59 (1951); cf. S.C. Code 1952 §16-55 (setting out the punishment for involuntary manslaughter but not the unique elements). The Supreme Court in Barnett went on to hold that a driver could be convicted of involuntary manslaughter if they were simply negligent in causing death with a motor vehicle. 218 S.C. at 427, 63 S.E.2d at 61. Conversely, the Court in Barnett also observed that the General Assembly had codified the offense of reckless homicide, and the *mens rea* required was "reckless disregard of the safety of others." Id.; accord State v. Phillips, 226 S.C. 297, 300, 84 S.E.2d 855, 856 (1954) ("In order to sustain a conviction of involuntary manslaughter, the State need show only

simple negligence, but something more than the mere failure to exercise due care is required to sustain a charge of reckless homicide.").

In 1968, eight years after the decision in Cavers, the General Assembly defined by statute the requisite *mens rea* for involuntary manslaughter as "reckless disregard of the safety of others." Act No. 1130, 1968 S.C. Acts 2626. This conformed it, verbatim, to the *men rea* of the reckless vehicular homicide statute, and this conformance was preserved through subsequent statutory amendments. Cf. S.C. Code 1962 §46-341 &, e.g., Act No. 184, 1993 S.C. Acts 3329, 3351 (amending the involuntary manslaughter statute to add a sentencing provision while preserving the *mens rea* language).

In South Carolina law today, the offense of reckless vehicular homicide occurs when "the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in *reckless disregard of the safety of others*." S.C. Code Ann. § 56-5-2910(A) (2018) (emphasis added). Similarly, involuntary manslaughter as relevant here is defined as "the unintentional killing of another without malice while engaged in . . . the doing of a lawful act with a *reckless disregard for the safety of others*." State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) (emphasis added); see also S.C. Code Ann. § 16-3-60 (2015); State v. Greene, 423 S.C. 263, 281, 814 S.E.2d 496, 506 (2018) (observing that involuntary manslaughter is "now [a] codified common law offense"). While these statutes are not identical, they do overlap in that they both require the State to prove that there was a homicide resulting from the defendant acting with "reckless disregard of the safety of others." Involuntary manslaughter is punishable by up to five years in prison, and reckless vehicular homicide is punishable by up to ten years. S.C. Code Ann. § 16-1-90(F) (2015) (Involuntary manslaughter a Class F felony), § 56-5-2910(A) (Reckless vehicular homicide statute).

With this history in mind, we turn back to the proceedings in Cavers. The full quotation of the relevant portion of Supreme Court decision in Cavers is this:

> Without citation of authority, appellant contends in his third question that *the State should have been required to elect between involuntary manslaughter and reckless homicide*. It is not supported by logic. It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither; if negligent, it would have supported a verdict of guilty of manslaughter, the court having eliminated murder and voluntary manslaughter; if reckless, it sustains the verdict of guilty of reckless homicide, and that finding by the jury is implicit in the verdict. State v. Barnett, 218 S.C. 415, 63 S.E.2d 57, State v. Phillips, supra, 226 S.C. 297, 84 S.E.2d 855. The jury were instructed that they could not find appellant guilty on both counts. To sustain this point of appellant would require the court, instead of the jury, to determine whether his conduct was negligent or reckless, if either, which, under the evidence in this case, would be an invasion by the court of the province of the jury. *The State cannot be required to elect between counts in an indictment when they charge offenses of the same character and refer to the same transaction, whether or not one charges a common law offense and another a statutory offense*.

State v. Cavers, 236 S.C. 305, 312-13, 114 S.E.2d 401, 404 (1960) (emphasis added) (additional citations omitted). Thus, when read in context of the surrounding text and the law at the time, it becomes clear that the alleged error in Cavers was the decision of the trial court to allow the State to present several possible charges to the jury, including involuntary manslaughter and reckless homicide. See id.

Furthermore, that decision was affirmed on appeal because of the different *mens rea* requirements in 1960. See 236 S.C. at 312-13, 114 S.E.2d at 404. The trial judge in Cavers correctly allowed the State to present both involuntary manslaughter and reckless homicide to the jury and instructed them to pick one because, at that time, one offense required only a finding of negligence, while the other required a finding of reckless disregard of the safety of others. Id.

In summary, State v. Cavers was and remains a case about electing between multiple charges with *different mens rea* elements *before* submitting them to the jury for a determination, not about electing between multiple convictions with *identical mens rea* elements *after* they are

found by the jury beyond a reasonable doubt. 236 S.C. at 312-13, 114 S.E.2d at 404. Moreover, while the underlying offenses charged in Cavers have changed in the last six decades, the ultimate holding of *Cavers* has not – as cited the Supreme Court in State v. Greene: "[m]ultiple offenses, including multiple homicide offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense." State v. Greene, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018).

C. The Trial Judge Below Followed Both State v. Greene & State v. Cavers

Turning to the appeal before this Court, the very nature of Appellant's appeal here was contemplated in by the South Carolina Supreme Court in State v. Greene and discussed in reference to State v. Easler and Ball v. United States: this was a homicide that "properly [fell] within multiple homicide statutes," and the jury "properly return[ed] a guilty verdict on more than one homicide charge." State v. Greene, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018) (partially overruling State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997)). For purposes of this discussion, it is useful to consider the sequence of the trial as it played out.

Appellant was tried for two counts each of two criminal offenses: involuntary manslaughter and reckless vehicular homicide. On Appeal, Appellant points out that "the State's theory for [Appellant's] criminal liability" was that his "decision to continue driving from Nichols to Mauldin was criminally negligent and reckless due to the life-threatening conditions at that time." (Initial Brief of Appellant p. 12). If proven at trial, this theory of liability would support verdicts of guilty for both involuntary manslaughter and reckless vehicular homicide because the jury would find that the homicides resulted from the Appellant acting with "reckless disregard of the safety of others" when he drove into the water. *See discussion of elements of*

each offense, supra. Therefore, these homicides "properly [fell] within multiple homicide statutes" as contemplated in State v. Greene, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018).

After closing arguments, the trial court properly submitted the multiple homicide offenses set out in the indictment to the jury for a verdict, consistent with State v. Cavers, 236 S.C. 305, 312-13, 114 S.E.2d 401, 404 (1960). The jury was charged without objection on the elements of both offenses, with no instruction that they must choose only one or the other. (Tr. p. 612 line 3 – p. 623 line 25). This charge was proper, and it would have been an error of law under State v. Greene to charge the jury that they could only return a conviction on one homicide offense, when the charges of involuntary manslaughter and reckless vehicular homicide have the same *mens rea* and the elements are not mutually exclusive in this case. See State v. Greene, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018) ("In that situation, a jury may properly return a guilty verdict on more than one homicide charge."). In these circumstances, a "choose only one" charge effectively would have required the jury to nullify their own verdict that the State had proved all elements of all offenses.

The jury then in fact did "return a guilty verdict on more than one homicide charge" as contemplated in State v. Greene, 423 S.C. at 283, 814 S.E.2d at 507, finding Appellant guilty of both involuntary manslaughter and reckless vehicular homicide for both homicides. (Tr. 629 line 23 – Tr. 630, line 17). Here the role of the jury concluded, and it fell to the trial judge to determine an appropriate sentence. After hearing the arguments of counsel and statements of Appellant and the victims' families on the record, the trial judge sentenced Appellant to a combination of consecutive sentences totaling eighteen years. (Tr. p. 645, lines 4-10).

The next day, proceedings in Appellant's trial resumed after counsel pointed out that because there had only been two homicides, the law required that two of the four homicide

convictions had to be vacated to follow the "one homicide, one homicide punishment" rule in the "recent" case of State v. Greene, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018). The jury had properly returned four verdicts, but only two convictions could stand – because even if no prison term had been imposed for *any* of the convictions, the mere existence of the redundant homicide convictions themselves were punishments that would have violated State v. Greene. 423 S.C. at 283, 814 S.E.2d at 507 (2018).

At this point in the proceedings, the question of *which* convictions to vacate were an integral component of the sentencing process. The decision to vacate two convictions and allow two other convictions to stand was nothing more or less than a decision about which punishments Appellant should bear. See State v. Greene, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018). Consistent with this law, the trial judge properly exercised his discretion and vacated the two involuntary manslaughter convictions and sentenced Appellant on the remaining two reckless homicide convictions to ensure that Appellant received an appropriate punishment within the bounds of the law. See id.; cf. Pepper v. United States, 562 U.S. 476, 507 (2011) ("A criminal sentence is a *package of sanctions* that the district court utilizes to effectuate its sentencing intent.") (emphasis added) (quoting United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996)). Where Appellant initially was sentenced to a combination of consecutive sentences totaling eighteen years on four homicide convictions, the trial court applied State v. Greene such that Appellant ultimately was sentenced to a combination of consecutive sentences totaling eighteen years on only two convictions for the two homicides. (Tr. II 5, lines 15-20). In these circumstances, vacating two convictions only *reduced* Appellant's total punishment while preserving the intended sentence within the statutory limits and, as observed by the trial judge, there was no prejudice to him. (Tr. II 5, lines 17-20).

Appellant argues on appeal that this exercise of discretion to elect which convictions to vacate was an invasion of the role of the jury. This is the fatal flaw in Appellant's argument: while the jury decides whether a defendant has *committed* a crime, it is the judge who decides how to *punish* for that crime, and at the sentencing stage that punishment decision included which convictions to vacate. See Greene, 423 S.C. at 284, 814 S.E.2d at 507 (vacating the defendant's involuntary manslaughter conviction while retaining the much more serious homicide by child abuse conviction); cf. Ball v. United States, 470 U.S. 856, 865 (1985) (remanding the case "with instructions to have the District Court *exercise its discretion* to vacate one of the convictions." (emphasis added)); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose."). Where the trial judge had already determined that eighteen consecutive years was the appropriate prison term for Appellant's two homicides, and where that result was within the statutory range for two reckless vehicular homicide convictions, there was no error in reaching that result with the reckless vehicular homicide sentences and *reducing* Appellant's total punishment by vacating the two involuntary manslaughter convictions. See id. & S.C. Code Ann. § 56-5-2910(A) (2018).

In summary, the trial judge in this case properly submitted the case to the jury pursuant to State v. Cavers, 236 S.C. 305, 114 S.E.2d 401 (1960), complied with the "one homicide, one homicide punishment" rule set out in State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018), avoided the double conviction problem that resulted in the partial overruling of State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), and properly exercised his broad discretion at the sentencing stage in the model of Ball v. United States, 470 U.S. 856 (1985). There was no error in these actions of the trial court, and the convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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