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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

QUAYSHAUN XZANDER CLARK,

APPELLANT.

Appellate Case No. 2022-000962

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

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

J. ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

HON. S. RICK HUBBARD, III
Solicitor, Eleventh Judicial Circuit
205 East Main Street
Lexington, South Carolina 29072
(803) 785-8285

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether the trial court reversibly erred by failing to charge involuntary manslaughter as a lesser included offense where direct evidence indicated Appellant fired his gun without malice and in self-defense, but missed the target and inadvertently struck a bystander inside the mobile home behind the assailant?

II. Whether the trial court reversibly erred by failing to charge voluntary manslaughter as a lesser included offense under the doctrine of transferred intent where direct evidence indicated Appellant was being shot at when, under the sudden heat of passion, he obtained his own firearm and returned fire to stop the threat to himself and other family members present?

ALTERNATE QUESTIONS PRESENTED

I. Whether Judge McCaslin should be affirmed when she did not abuse her discretion in denying a request for a charge on involuntary manslaughter where the appellant was not entitled to an involuntary manslaughter charge under South Carolina law where he intentionally fired his AK pistol/rifle assault weapon 15 times in the direction of the home in which the victim was during a shootout between armed men and killed an 11-year old child hiding in that home?

II. Whether Judge McCaslin should be affirmed when she did not abuse her discretion in denying a request for a charge on voluntary manslaughter where under South Carolina law the appellant was not entitled to such a charge where the 11-year-old victim did not provoke appellant into shooting his assault weapon intentionally 15 times in her direction and appellant admitted he was not shooting to hurt anyone but to scare them?

STATEMENT OF THE CASE

On June 9, 2021, appellant Quashawn Clark ("Clark") murdered 11-year-old Ta'Shya ___ in the Batesburg-Leesville area of Lexington County. Clark was arrested 2 days later, on June 11, 2021, in Gilbert, S.C. Clark was indicted on June 13, 2022, by the Lexington County Grand Jury for Ta'Shya's murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime. (Indictment #s 2022-GS-32-1991 - 1994). Clark proceeded to a jury trial on June 27, 2022, before Circuit Court Judge Debra McCaslin. The State was represented by Deputy Solicitor Suzanne Mayes and Assistant Solicitor Rhonda Patterson. Clark was represented by Anna M. Williams and Robert "Theo" Williams, Esquires. At the conclusion of the trial, the jury found Clark guilty of murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime. Clark was sentenced to 48 years for murder, 10 years for discharging a firearm into a dwelling, and 5 years for possession of a weapon during a violent crime. The sentences were ordered to run concurrently. Clark appeals raising 2 issues. (IBOA, p. 1). This is the Initial Brief of Respondent. (Tr. pp. 1, 20-21, 878-79; 1449-72, Indictments & Sentencing Sheets).

RESPONDENT'S STATEMENT OF FACTS

Brief Statement of the Crime

On June 9, 2021, 11-year-old Ta'Shya ___ ("Ta'Shya") was murdered in the home of a friend, Comilla Jackson, who Ta'Shya considered her "auntie," while Ta'Shya was playing with her brand-new cell phone and with a friend, Jamiya, Comilla's daughter. Comilla lived in a mobile home on Lot 15 of the Rocky Lane Mobile Home Park in the Batesburg-Leesville area of Lexington County. Two (2) other small children, Akia and Princess, were also in the home playing at the time of the shooting. The victim's mother, Shandrika Jay ("the mother") was in the den of the home talking to Comilla, her close friend. An 18-year-old young man who had just graduated from high school was also in the home. Ta'Shya was killed by an AK/SKS bullet fired by appellant Quashawn Clark ("Clark") from the porch or backyard of home located on Lot 7 in the same mobile home park.[1] Clark fired at-least 15 shots with his AK-47 pistol/rifle, 1 of which struck Victim in the head killing her.[2] Clark owned the weapon, and 15 fired shell casings from his gun were found near the back porch of Lot 7 where Clark fired from. Clark owned another gun, a 9mm, that was also used in the shooting. (Tr. 548-64; 565-613; 615-18; 621-56; 657-89; 691-714; 714-44; 748-829; 830-46; 841-48; 849-77; 878-79; 880-97; 904-17; 925-44; 045-72; 973-91; 998-1052; 1059-60; 1060-88; 1092-1137; 1137-92; 1199-1219).

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[1] Clark is known by and referred in the transcript by various names including Quayshawn, Shawn, and Ace.

[2] The firearm is not really a pistol. It is an AK-47 type weapon with the rear stock removed from the gun. It looks like a rifle without the back end on it. The gun has a firing range of 400 yards (Tr. 830-46).

The State's Case

The State's evidence at trial proved beyond any doubt that Ta'Shya died as a result of a gun battle between 2 groups of armed men, 1 group at Lot 7 of Rocky Lane Mobile Home Park and another group located between Lot 15 and 16 of the same mobile home park.[3] Clark was part of the group of men at Lot 7 and it was 1 of the bullets he fired that struck Victim killing her. The gun battle erupted at 10:34 p.m. The conflict between the 2 groups of men that led to the gun battle had been brewing for most of the afternoon before the shooting and ended with the gunfight at the residential mobile home park where an innocent child, Ta'Shya, was murdered by Clark's gunfire from his assault weapon. The mobile home Ta'Shya was inside of, on Lot 15, which contained numerous children [4 in all] and 3 adults, was struck multiple times [8 in all] by the hail of gunfire from Lot 7, where 2 of Clark's guns were fired, including the AK pistol/rifle. At least 2 of the shots fired by Clark struck the mobile home where Ta'Shya was hiding including the 1 which struck and killed Ta'Shya. The assault weapon which killed Victim was owned and fired by Clark and a 9mm owned by Clark was fired by a friend and associate of Clark. A .40 caliber pistol was also fired from the front yard of Lot 7 in the direction of the mobile home located on Lot 15. Vehicles and other homes were also struck by stray bullets. (Tr. pp. 548-64; 565-613; 615-18; 621-56; 657-89; 691-714; 714-44; 748-829; 830-46; 841-48; 8849-77; 880-97; 904-17; 925-44; 945-991; 1046-52; 1060-88; 1092-1137; 1137-92; 1199-1219).

Rocky Lane Mobile Home Park (hereinafter "Rocky Lane") is located in the countryside of Lexington County near Batesburg-Leesville off of Madera Road, a paved road. The mobile home park consists of a gravel/grass/dirt type road, that runs off Madera Road, on which are located mobile homes on both sides of the gravel/grass/dirt road ("the road"). The mobile homes

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[3] The murder of Ta'Shya was gang related but reference to any gangs or gang membership was withheld from the jury so as not to unduly prejudice Clark by agreement of the parties.

sit perpendicular, not parallel to the road. After you enter the mobile home park, you will pass several mobile homes on both sides of the road and then you will pass Lot 15 and then Lot 16 on your left. Lot 15 is where Victim was located when murdered. As you continue into the mobile home park, the road makes a "Y" with roads going off to the right and left. If you take the road to the right, Lot 7 is the second mobile home on the right after the road makes the Y. Lot 7 is also perpendicular to the road. The back porch of Lot 7 faces back toward the entrance of the mobile home park and toward Lots 15 and 16, with Lot 16 being closer to Lot 7, but both mobile homes, Lots 15 and 16, are on the opposite side of the road from Lot 7. There are approximately 20 mobile homes in the mobile home park. At the time of Ta'shya's death, there was a high school graduation party going on between the mobile homes on Lots 15 and 16 and a birthday party going on at the mobile home on Lot 7. (Tr. 565-613; 615-18; 621-56; 657-89; 691-714; See also State's Ex. #s 12; 19; 85; 86; 87; 101; 176).

What led to the child's murder

Earlier that same day, June 9, 2021, in the late afternoon/early evening, appellant Clark's cousin, Donald Jackson ("D.J.") and a friend Nokia Tolen ("Tolen"), stopped at *Hartley's* convenience store. While inside the store, D.J. ran into to 2 men, Var Pugh and De Alewine. These men were enemies of D.J. and an altercation or dispute occurred inside the store, and Pugh and Alewine followed D.J. out of the store where threats were made or exchanged between D.J. and De Alewine. Tolen tried to calm the dispute, to no avail. Tolen and D.J. then drove to D.J.'s home in Tolen's car, where other friends or associates of D.J. were located. Pugh and Alewine eventually followed D.J. to his home where the dispute continued. More heated words were exchanged. Finally, the men agreed to resolve the dispute later at Rocky Lane. (Tr. pp. 748-829).

While these threats were being exchanged between De Alewine, Var Pugh, and D.J., and thereafter, D.J. was calling Clark on his cellphone. Clark's phone records showed 14 phone calls in this frantic sequence of events where D.J. was trying to reach Clark. D.J. also e-mailed Clark. Finally, D.J. and Clark spoke for approximately 55 seconds according to phone records. Clark was already at Lot 7 of Rocky Lane and armed with several firearms including the AK/SKS pistol/rifle and the 9mm later used in the shooting. (Tr. pp. 748-829; 830-46; 714-44; 661-67; 696-97; 976-80; 980-86; 1137-92; State's Ex. 21 & 22; 37, 84; & 163).

At D.J.'s home when the group of men agreed to resolve the dispute at Rocky Lane was Kaymonte "Kay" Norris [a male] (hereinafter "Norris") who was armed with a loaded .40 caliber semi-automatic pistol. Tolen [D.J.'s friend who drove him home from *Hartley's* store] also phoned Decarlos "Hugo" Chatman ("Hugo") to go to Lot 7 at Rocky Lane as well. Tolen drove himself, D.J. and Norris to Lot 7 and Hugo drove his own car. Hugo was known to carry a .22 revolver. Around 10:00 p.m., Tolen arrived at Lot No.7 of Rocky Lane Mobile Home Park with D.J. in the passenger seat and Norris in the back seat. As Tolen pulled into the mobile home park and passed Lot 15 on his left, he saw Var Pugh's [D.J.'s enemy's] car parked near Lot 16 between Lots 15 and 16. The testimony established De Alewine [also an enemy of D.J.] was also there between Lot 15 and 16 as well. Tolen briefly pulled into Lots 15 and 16 and told his young cousin, who had just graduated from high school, that he needed to leave the area now, something was about to happen, and Tolen told his young cousin that he did not want to be there when it occurred. There were more men now congregating between Lots 15 and 16. After warning his cousin of the impending danger, Tolen then drove to Lot 7 with D.J and Norris in the car. Hugo arrived next and was armed with the .22 revolver. (Tr. 748-829; 621-56; 657-89; 691-714).

As previously stated, Clark was already there at Lot 7 when this group of men [Tolen, D.J., Norris, and Hugo] arrived at Lot 7 and got out of their cars. Clark had previously backed his car in near the back porch of Lot 7 which faces the direction of Lots 15 and 16. In Clark's trunk was a tote bag that contained multiple firearms and ammunition for those weapons. In the bag there was the AK-47 pistol/rifle, similar to one on the TV show *Fortnight* known as a *Draco* chambered in 7.62 x 39mm ammunition. There was also a 9mm pistol, an F509 chambered in 9mm ammo, that was in the glove box. There was also another AR pistol chambered in .300 blackout kept in the trunk. At some point, Clark took the tote bag out of the trunk and put it in the passenger compartment of his car where he was seen handling the AK pistol/rifle before the shooting erupted. (Tr. 748-829; 657-89; 691-714; 714-44; 704-05; 849-877; 1199-1219; 967-70; 975-76; 1060-88;).[4]

The men at Lot 7 then began exchanging words with the men standing between Lot 15 and Lot 16. The men between Lots 15 and 16 included De Alewine, who was seen by Comilla Jackson in her yard, Lot 15, and Comilla told him to leave her yard. Var Pugh was also there. These were the same 2 men that D.J. had the altercation with earlier at *Hartley's* convenience store and who D.J. agreed to resolve the dispute with at Rocky Lane. (Tr. 657-891 691-714; 621-56; 748-829).

First, Norris, part of appellant Clark's group, walked from Lot 7 up to the area near Lots 15 and 16 and said something provocative to the men standing there, Norris showed them his firearm. According to witnesses, this enraged the men standing between Lots 15 and 16. Three (3) women from Lot 7 were in the same area and tried to calm the situation but to no avail. These

[4] There was a birthday party occurring at Lot 7 and a partygoer captured with her camera Clark's trunk open and seen inside the trunk is the soft black bag containing Clark's weapons. (Tr. 663-67). This bag was later recovered by police after the shooting, but the AR pistol/rifle and its ammo were missing from the bag, but it still contained 9mm ammo and the 9mm pistol used in the shooting. (Tr. 965-76).

women were in the area because they knew something was about to happen and decided to leave the party at Lot 7. Norris then walked back to Lot 7 with his gun out and visible. The heated exchange between the 2 groups of men continued with D.J. walking from Lot 7 *toward* the same men between Lots 15 and 16, but D.J. did not cross the road. D.J. started yelling things at the men between Lots 15 and 16. Then Hugo walked down toward the men between Lots 16 and 17 but did not cross the road and was still in the yard of Lot 7. Hugo was armed with his .22 revolver. (Tr. 657-89; 691-714).

While this was occurring, inside the mobile home located on Lot 15, Ta'Shya, her mother, her mother's small child, Comilla, and her 2 children were minding their own business. Ta'Shya's mother was talking with Comilla, and the children, including the 4 and 5-year-olds, were playing or talking in different parts of the home. The 18-year-old male who had just graduated entered the home and went to the back of the home. (Tr. 621-56).

Back outside the mobile home, Hugo was on the same side of the road as Lot 7 and pulled out his revolver. Hugo pointed the gun up in the air and fired multiple times into the air like a referee starting a race while yelling out: "Bust, N [word], bust."[5] Then gunfire erupted from both sides of the road, from the men at Lot 7 and the men between Lots 15 and 16. (Tr. 691-714; 657-89; See 728-849).

Before the gunfire erupted, D.J. and appellant Clark had gone into the mobile home on Lot 7. Before the gunfire erupted, appellant Clark was seen *coming out of the back door of the mobile home on Lot 7* with a "[a]ssault rifle" not a pistol in his hand and *standing on the back porch* which faces Lots 15 and 16. Clark came out of the mobile home behind D.J. With Clark was also Tolen. Clark began firing his AK weapon at the men between Lots 15 and 16 and into Comilla's mobile

[5] "Bust" in street slang means to fire your weapon. (199-1219).

home [on Lot 15] seconds after Hugo fired up into the air and yelled: "Bust, N [Word] bust."[6] Clark fired his AK pistol/rifle at least 15 times. Fifteen (15) fired SKS 7.62 shell casings were recovered in an area near or around the back porch of the mobile home on Lot 7 after the shooting.[7] Clark's AK weapon had a firing range of 400 yards. One (1) particular bullet fired by Clark entered the mobile home on Lot 15 going through 2 walls and a refrigerator and fragmenting and struck Victim in the side of her head killing her. Victim was struck while kneeling near the refrigerator trying to protect herself from the gunfire from the 2 gangs of men which Hugo started. Lot 15 was struck at least 8 times from gunfire from Lot 7. At least 2 bullets fired by Clark entered the mobile home on Lot 15 including the 1 which killed Ta'Shya. Fired .40 caliber and 9mm caliber shell casings were also recovered in the yard of Lot 7 near the 15 fired AK/SKS casings fired by Clark. These are believed to have been fired by D.J., using the FN 9mm from the glove box of Clark's car, and Norris firing the .40 caliber pistol he brought with him. During the shooting, D.J. tried to re-enter the mobile home on Lot 7 where he was seen trying to unjam a semi-automatic weapon, but he was pushed out of the home. There were numerous fired shell casings also recovered between Lot 15 and 16 and at a front corner of Lot 15. These included 9mm, .380, and .40 fired casings. There were no fired AK/SKS shell casings found near Lots 15 or 16. Later police recovered two (2) 9mm fired shell casings from Clark's girlfriend's purse at another location and another fired shell casing was recovered from the top of a car, that had been at Lot 7 and fled the scene. A total of 39 fired shell casings were recovered from the yards of Lots 7, 15, and 16. Forty-eight (48) shots were counted on a nearby home's door bell camera. (Tr. pp. 748-829; 657-89; 691-

[6] Tolen testified he could not see Hugo shoot his weapon in the air multiple times because of where he was standing, but immediately after the shots were fired in front of them from the area where they were at, Lot 7, appellant Clark began firing with his assault rifle. (Tr. 764-67).

[7] Clark probably moved off the porch after firing his initial shots as the SKS shell casings were scattered in an area of the back yard of Lot 7. (State's Ex. 101 & 176)

714; 621-56; 714-44; 830-40; 841-48; 849-77; 880-97; 904-17; 925-44; 945-91; 1046-52; 1060-88; 1092-1137; 1137-92).

S.L.E.D.'s firearms examiner determined the 9mm shell casings found in the yard of Lot 7 and the 2 found in Clark's girlfriend's purse were all fired by Clark's 9mm semi-automatic pistol that came out of his glove box.[8] As previously stated, this gun was believed to have been fired by D.J. The .40 caliber shell casings found in the yard of Lot 7 were all fired by the same gun believed to have been fired by Norris. All 15 of the AK/SKS fired shell casings were fired by the same gun, the gun Clark later admitted he was shooting. Clark had purchased the gun and the ammo several months before the shooting, which was proven by paperwork from the gun store. It was determined there were at least 3 shooters firing from Lot 7 toward Lots 15 and 16. And, there were at least 3 shooters shooting from the area of Lots 15 and 16 toward Lot 7. The bullet that killed Ta'Shya came from an AK or SKS assault rifle. (Tr. pp. 1060-1088; 849-877; 830-46; 904-17; 987-88; 714-44; 841-48; 1119-1126).

Immediately after the shooting, Clark fled the area in his car with his cousin Nash Smith ("Nash") who was also there at Lot 7 at the time of the shooting and was holding a .380 pistol. The other men fled in Tolen's and Hugo's vehicles. Only Tolen returned to the scene to check on his young cousin who lived at Lots 15 and 16. There Tolen confronted De Alewine, who had not fled the scene, and the 2 men almost got into a physical fight in front of a police officer. Tolen was also informed at this time by Ta'Shyra's mother that the child had been killed. Tolen stayed and cooperated with police including being interviewed twice at the scene. He also gave police

[8] Respondent has counted a total of 41 shell casings were recovered in all. More shell casings may have left the scene on top of cars. Additionally, Hugo was shooting a revolver.

the .380 pistol that he took off of Nash at Lot 7 immediately after the shooting. This gun did not fire any of the casings at the scene. Tolen also testified at trial. (Tr. 748-829; 1150; 1060-80).

Sometime after fleeing, Clark got rid of the murder weapon, the AK pistol/rifle and the ammo for that weapon. Even though police searched, neither the gun nor the ammo for the AK were ever found. Clark also deleted all phone calls *and* a text message from his cell phone that came from his cousin D.J. leading up to the murder. Police had to obtain the Clark's phone records themselves to show the 14 calls and the text message between D.J. and Clark that occurred that night before the murder. There were 13 missed calls and 1 call lasting over 50 seconds. There was also the 1 text from D.J. to Clark before D.J. arrived at Lot 7. In Clark's phone were found the phone numbers for D.J., Hugo, and Norris proving they were associates before the shooting. (Tr. 964-66; 967-70; 976-980; 1137-92; State's Ex. 208-09; 34; 84; 163).

The day following the murder, Clark and his girlfriend purchased brand new cell phones for themselves. Clark and his girlfriend deleted 25 phone calls that occurred between each other in the hours after the shooting. Police had to obtain phone records to introduce the timing and length of each of these phone calls between Clark and his girlfriend. Police arrested both Clark and his girlfriend and confiscated all 4 of their cell phones, both the 2 old phones and the 2 new phones. It was discovered, that after the murder of Ta'Shya, Clark and/or his girlfriend had researched on-line among other things; how to get rid of gunshot residue (GSR), why the first 48 hours were the most important in a murder investigation, facts about the murder investigation, and what to do if you were accused of shooting someone. It was also learned through phone records that Clark made phone calls from his old phone to his cousin Wanda Lites ("Lites"), the woman who he left the soft bag containing the ammunition for his 9mm used in the shooting *and* the 9mm

pistol itself. These calls were the morning after Ta'Shya's murder. (Tr. pp. 976-80; 1137-1192; 1199-1219; State's Ex. 208-09; 34; 84; 163).

Clark dumped his car at his Uncle Marvin Lite's home. He also got rid of his car keys. He gave the 9mm used in the shooting to his cousin, Wanda Lites, and the bag containing the FN nine-millimeter ammo. He also fled his rental home where he and his girlfriend lived and instead stayed with his cousin Nash who was also with him at Lot 7 at the time of the shooting. Police arrested Clark and his girlfriend there, at Nash's home, in Gilbert, S.C. (Tr. pp. 878-89; 967-70; 975-76).

After his arrest, Clark was interviewed by police and an FBI polygraph examiner. Clark gave 3 different statements. Each statement that Clark gave was false and attempted to misdirect police. His first statement was he was at Lot 7, but he did not shoot at all, and he did not know who did the shooting. Clark then claimed in his second statement that he only fired *the FN 9mm.* Then in his last statement, he admitted he fired *an AK* which he claimed he found on the ground and picked up and fired 10-12 times and then left it at the scene. He denied he owned the weapon or got it out of his own car. He drew a diagram, State's Ex. 5, claiming shooters came across the road from Lots 15 and 16, and Clark claimed that all of the threats to him came from Clark's side of the road. No shell casings were recovered in this area after the murder. No independent witness saw anyone cross the road from Lots 15 and 16 to the side of the road where Lot 7 was located. (Tr. 714-44; 657-89; 691-714; 748-829; 1051-52).

The Defense Case

Clark testified in his own defense. He testified he went to the birthday party of his cousin, Wanda Lites, on the afternoon of June 6, 2021, at Lot 7 of the Rocky Lane. He drove his Mercury Grand Marquis and enjoyed the party with friends and relatives. At some point, he even tried to play music from the speakers recently installed in his trunk; however, after the speaker system

failed, he and his cousin Nash attempted to fix them. He admitted he possessed several firearms in a bag located in the trunk of his car, which he eventually moved to the interior of the car while the speakers were being worked on. Clark admitted he owned 3 firearms, an AR pistol chambered in .300 blackout ammo; a 9mm kept in his glovebox chambered in 9mm ammo; and, finally, an AK "pistol" chambered in SKS 7.62 x 39mm ammo. Clark claimed that his cousin D.J. was avoided by the family because of some previous altercation with a family member. Clark claimed when D.J. called him complaining about De Alewine and Var Pugh, Clark ignored D.J.s rants. Clark claimed he was still at his car at Lot 7 when D.J. texted him once and repeatedly tried to call him earlier in the night before the shooting. When D.J. finally got through on a 55 second call, Clark indicated he simply put his phone down because D.J. was yelling and Clark did not want to hear it. (Tr. 1248-60).

Clark claimed things changed later in the night when it was getting dark. Everybody was getting louder, but he brushed it off because he was at a birthday party. Then while sitting in his car, which was facing Lots 15 and 16, he heard gunshots coming from somewhere in front of his vehicle, which was also facing where Hugo first fired his shots in the air. Clark claimed he was *unaware of Hugo shooting* until after the night of the murder. Clark claimed when he heard the gunshots he ducked down, got out of his car while shots were still being fired, and ran to the back of the vehicle. He then ran to the side of the mobile home at Lot 7 and hid, and then ran back to his car to get 1 of his guns. Although he heard gunshots from everywhere, when he looked up, he saw a black male, possibly with dreadlocks, coming at him from across the street and shooting a handgun at him. Even though it was dark, he saw the muzzle flash coming out of the man's handgun. Clark said he was scared and lost this train of thought, almost like everything around just kind of ...Like just kind of like a blur." Clark admitted he fired what he thought may have

been 10 to 12 times from his AK pistol at the man. He claimed he fired the AK gun until it was empty because he wanted him to stop shooting at us. Clark further indicated he did not want to injure anyone, and he was afraid. Even after he ran out of ammo, he still heard shooting and ran back to his car again. He tried to return to the side of the trailer, but heard more shots coming from that side, and again ran back to his car. He acknowledged that all 15 shell casings of 7.62 x. 39mm found at the scene were his and were fired by him. After the shooting stopped, Clark heard cars leaving the area. He got back into his car and threw the AK into the back seat and left with Nash to go to the home of his uncle Marvin Lites. Clark then spoke with Wanda Lites on his phone, and she picked Clark and Nash up in his vehicle and Clark left his car at Marvin's home. According to Clark, they drove around together while Clark tried to calm down. He eventually ended up at the home of Nash's girlfriend in Gilbert, S.C., where he was arrested on June 11, 2021. (Tr. 1260-1304).

The Defense also called Kirsten Webster who executed a search warrant on Tolen's cousin's car. The car had been shot during the shootout and windows were shot out as well. Webster testified no one interviewed Tolen's cousin who owned the car. On cross-examination, Webster admitted the car appeared to have been involved in a shootout and based on her reading the incident report, other cars at the scene were also shot, including cars at both Lots 15 & 16 and at Lot 7. (Tr. 1234-47).

The Defense also called Carleisha Gilliam who was the lead detective who testified they developed numerous suspects from both groups of men involved in the shootout at Rock Lane. She named some of them. She was questioned about deficiencies in the investigation including that no DNA testing was done of samples taken and other suspects were not pursued. (Tr. pp. 1323-1338). On cross-examination, she testified to Clark's incriminating statements introduced in the

State's case. The State brought out that *in his statement to police* Clark claimed he did not see anyone shooting or shooting up into the air. Again, it was brought out that Clark initially claimed he shot the 9mm. And, he later admitted he fired the AK pistol/rifle, but picked it up off the ground. Gilliam also testified to how and why evidence is submitted to SLED and the thoroughness of her investigation. Finally, she testified the investigation was not closed, but remained open, and other suspects were being pursued and she named several. She also testified on re-direct that Comilla Jackson was afraid of Var Pugh, and Hugo was a suspect along with another individual. (Tr. 1338-50).

ARGUMENT I.

Judge McCaslin did not abuse her discretion where Clark was not entitled to a jury instruction on involuntary manslaughter where he admitted he intentionally fired his AK/SKS weapon 15 times.

What occurred below

At the conclusion of the trial, Judge McCaslin charged the jury on the crimes of; murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime. Based on Clark's testimony, Judge McCaslin charged the jury on self-defense, and that the State had the burden to disprove self-defense. After the jury charge, Clark objected to Judge McCaslin's refusal to charge the jury on involuntary manslaughter and voluntary manslaughter.[9] Clark now asserts on appeal that Judge McCaslin committed reversible error by not charging involuntary manslaughter and voluntary manslaughter. Specifically, as to involuntary manslaughter, Clark asserts that the second version of involuntary manslaughter was warranted because Clark was acting lawfully in self-defense, but essentially with a reckless disregard for the safety of others in

[9] A jury charge conference was held before jury instruction, but objections were withheld until after closing arguments and instructions given by Judge McCaslin. (Tr 1356, ll 2-3; Tr. 1405; l.6 – Tr. 1407, l. 6).

his handling and shooting of his firearm. The State argued no evidence supported an involuntary manslaughter instruction because "at no point did the defendant testify he accidentally discharged the gun, at no point did the defendant testify he was engaged in a struggle with anyone else and that the gun accidentally went off." Judge McCaslin ruled that she "didn't hear any evidence to support an involuntary charge. In fact, just the opposite. . . There was not any testimony about any accident or [that] it was unintentional or none of that, so the Court declined the charge of involuntary manslaughter. Judge McCaslin correctly overruled the objection where Clark admitted he intentionally fired his AK/SKS weapon 15 times. (BOA, p. 8, Tr. 1428, l. 24-Tr. 1430, l. 18).

Standard of Review

An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011). "To warrant a reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 270, 721 S.E.2d at 422. If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). "The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). In determining whether the evidence requires a charge of manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). However, "[a]n instruction should not be given unless it is justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "Only the law applicable to the case should be charged to the jury." State v.

Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury." Id. When the record contains no evidence to support a lesser included offense, a charge on the lesser included offense should not be given. *See* State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005), *referencing* State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000). A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error for a judge to refuse to charge a lesser included offense unless there is evidence tending to show the defendant was guilty of the lesser offense. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The presence of evidence to sustain a crime of a lesser degree determines whether it should be submitted to the jury and a defendant's mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). The trial court should refuse to charge a lesser included offense where there is no evidence the defendant committed the lesser, rather than the greater offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Due process requires that a lesser offense be charged when the evidence warrants it, but only if the evidence would permit a jury to rationally find the defendant guilty of the lesser offense. Patterson, 337 S.C. 215, 522 S.E.2d 845. In 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 evidence. State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987). In determining the issues to be submitted to the jury, all of the testimony, both for the State and the defense must be considered. State v. Knoten, 347 S.C. 296, 309, 555 S.E.2d 391, 398 (2001).

Analysis

In a murder prosecution, the jury must be instructed on involuntary manslaughter only if there is evidence indicating the appellant was guilty of only the lesser offense. State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(issue preservation). At the same time, a trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). The determining factor is whether the defendant has introduced any evidence [or there is any evidence in the record] that, if believed, would result in a conviction of the lesser charge. *McInich, Fairey, Caggiola,* The Criminal Law of South Carolina, S.C. Bar (2013), p. 226)(cleaned up). Self-defense and involuntary manslaughter are not mutually exclusive, **as long as there is evidence to support each charge**. State v. Light, 378 S.C. 641, 664 S.E.2d 4365 (2008)(defendant claimed self-defense in disarming girlfriend and then gun accidentally discharged); *See also* State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010). However, even considering all of the evidence in this case including both the State's evidence and the Defense' evidence, there was no evidence supporting an involuntary manslaughter instruction. Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998).

The State's case

Under the State's version of what occurred, Clark is guilty of murder. Clark was part of a group of armed men at Lot 7 who had a dispute with a group of armed men between Lots 15 and 17 and the 2 groups of men agreed to resolve the dispute by gunfire in a crowded mobile home park. Clark, who was already at Lot 7 when the rest of his group arrived, joined his group armed with an AK pistol/rifle, which was fully loaded. He provided another shooter with his 9mm semi-

automatic pistol. Prior to any shots being fired, Clark armed himself with the AK pistol/rifle. Prior to any shots being fired, Clark was seen coming out of the mobile home on Lot 7 onto the back porch armed with an assault rifle. When a member of Clark's group, Hugo, fired up into the air as if starting a race and yelled out "Bust, N___bust," Clark began firing his AK weapon at the armed group of men across the road. He did this while others in his group were firing their guns at the group of men across the road, including 1 member of Clark's group firing Clark's 9mm pistol that came out of Clark's car's glove compartment, and they continued to fire at the group of men across the road. Clark intentionally fired his AK weapon, which had a range of 400 yards, 15 times, including striking the mobile home located on Lot 15 at least 2 times, with 1 shot killing an innocent child who was trying to protect herself from the gunfire from Lot 7. Clark and his fellow group members shot the mobile home on Lot 15 at least 8 times. Bullets traveled through the mobile home. The mobile home was crowded with adults and children when the group of men at Lot 7 shot up the mobile home on Lot 15. Under the State's evidence, Clark is guilty of murder.

The Defense' case

Clark claims that he was entitled to an involuntary manslaughter instruction under the facts as he testified to at trial and certain other select evidence, including that he offered in addition to his own testimony, and some select evidence from the State's case. Clark is wrong. Clark admitted he intentionally shot his weapon 15 times. He did not accidentally shoot the AK pistol/rifle nor did the gun discharge during the struggle over a weapon. He was not entitled to an instruction on involuntary manslaughter. Douglas v. State, 332 S.C. 7, 504 S.E.2d 307 (1998); State v. Crosby, 355 S.C. 47, 52-53, 584 S.E.2d 110, 112 (2003); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Even considering all of the evidence, both the States' evidence and Clark's combined, Clark is not entitled to an instruction on involuntary manslaughter where he intentionally fired his

assault weapon 15 times. Douglas, 332 S.C. 7, 504 S.E.2d 307; Crosby, 355 S.C. at 52-53, 584 S.E.2d at 112; Pickens, 320 S.C. 528, 466 S.E.2d 364.[10]

"One who intentionally shoots into a crowd is not entitled to an instruction on involuntary manslaughter." *McInich, Fairey, Caggiola*, The Criminal Law of South Carolina, S.C. Bar (2013), p. 227, *citing* Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998). *See also* Id. at p. 619. "However, if a defendant testifies he armed himself in self-defense, mishandled the weapon and *an unintentional discharge resulted*, involuntary manslaughter should be charged, even if there is other evidence contradicting the defendant's statements." *McInich, et al*, The Criminal Law of South Carolina, pp. 227 (emphasis added), discussing Crosby, 355 S.C. at 52-53, 584 S.E.2d at 112. *See also* Id. at p. 619 discussing Pickens, 320 S.C. 528, 466 S.E.2d 364; State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) and State v. Mekler, 379 S.C. 12, 664 S.E.2d 477, 479 (2008).

In both State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) and State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991), the murder convictions were sustained because there was evidence indicating the defendant had acted intentionally in using a deadly weapon. *See also* State v. Dobson, 281 S.C. 36, 314 S.E2d 310 (1984)(conviction of reckless homicide reversed); State v. Cox, 279 S.C. 205, 305 S.E.2d 76 (1983)(conviction of involuntary manslaughter reversed). *See* Pickens, 320 S.C. 528, 4666 S.E.2d 364 (because self-defense is intentional and involuntary manslaughter is unintentional, a defendant is not often entitled to an instruction on involuntary manslaughter and self-defense).

[10] In State v. Light, the Court distinguished but did not overrule Pickens, holding that where there is evidence the defendant intentionally fired his weapon and evidence he unintentionally fired his weapon, the defendant is entitled to a self-defense charge and an involuntary manslaughter charge. State v. Light, 378 S.C. 641, 651, 664 S.E.2d 465, 470 (2008). That did not occur here.

The evidence in this case did not entitle Clark to an instruction on involuntary manslaughter under South Carolina law. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009); State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E2d 802 (2009); State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004)(finding defendant is not entitled to a charge on involuntary manslaughter where no evidence exists to support the charge). Under South Carolina law, involuntary manslaughter is the unintentional killing of another without malice and while engaged in either: (1) *an unlawful act* not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with *reckless disregard* for the safety of others. State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). There is nothing in the record which would have entitled Clark to an instruction on involuntary manslaughter because he does not fit in either of these 2 categories. *See also* State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995)("no error in refusal to charge involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head"); Harris v. State, 354 S.C. 382, 581 S.E.2d 154 (2003)(PCR Court erred in granting relief because defendant was not entitled to involuntary manslaughter instruction where he admitted he intentionally fired gun, but meant to only fire warning shots); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (involuntary manslaughter charge not warranted where defendant intentionally fired his shotgun but claimed he meant to shoot over the victim's head); Douglas v. State, 322 S.C. 67, 74, 504 S.E.2d 307, 310 (1998)(involuntary manslaughter charge not warranted where defendant admitted he intentionally fired gun into a crowd in self-defense despite testimony that defendant had been rushed by a group of people during a fight).

Clark admitted he intentionally fired his AK/SKS weapon 15 times. Clark admitted the weapon did not fire accidentally or automatically. The trigger was pulled each time to make it fire. Pickens, 320 S.C. 528, 466 S.E.2d 364 (holding where defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter charge was not warranted); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(defendant not entitled to involuntary manslaughter instruction where after altercation with his grandfather he obtained shotgun, returned to his grandparents room and shot them, even though he claimed involuntary intoxication from Zoloft); Cabrera-Pena, 361 S.C. at 381, 605 S.E.2d at 526 (involuntary manslaughter instruction not warranted where accused was "engaged in unlawful, felonious and harmful conduct" at the time of the incident); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)(trial court did not err in refusing to instruct on involuntary manslaughter **where defendant wielded knife in an intentional manner, because the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence**); Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992)(no evidence of mere criminal negligence in use of a dangerous instrumentality because the defendant intentionally fired his weapon);[11] Gibson v. State, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010)("the essence of involuntary manslaughter is the involuntary nature of the killing" and because co-defendant admitted he voluntarily and intentionally fired his weapon, the trial court properly denied the instruction on involuntary manslaughter to accomplice defendant); State v. Morris, 307 S.C. 480, 483-84, 415 S.E.2d 819, 821-22 (Ct. App. 1991)(noting that under involuntary manslaughter, the act must be unintentional

[11]A deadly weapon is generally defined as any article, instrument, or substance which is likely to produce death or great bodily harm. State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007); State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997). An AK assault rifle/pistol is definitely a deadly weapon or dangerous instrumentality. *See* State v. Smith, 315 S.C. 647, 446 S.E.2d 411 (1994).

and defendant intentionally shot his gun though he claimed self-defense); Light, 378 S.C. 641, 664 S.E.2d 465 (finding defendant had lawfully armed himself in self-defense and was entitled to instruction on involuntary manslaughter where there was evidence the gun *unintentionally* discharged); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010)(although unlawful to point and present a firearm, when defendant lawfully armed himself in self-defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting gun *accidentally* discharged was sufficient to warrant instruction on involuntary manslaughter). *See also* State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002)("An unintentional killing resulting from an unlawful assault and battery, **not of a character of itself to cause death**, is involuntary manslaughter...") *quoting* State v. Chatman, 336 S.C. 149, 152-53, 519 S.E.2d 100, 101 (1999), *citing* 40 C.J.S. *Homicide* Section 40 (1991), *other citations omitted* (emphasis added).[12] State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007)(defendant not entitled to involuntary manslaughter charge where striking someone in the head with a 5-pound sledgehammer would naturally tend to cause death or great bodily injury *and* there was no evidence defendant handled sledgehammer with reckless disregard for the safety of others but *intentionally struck the victim on the head* with it). Under the evidence, Clark was not entitled to an instruction on involuntary manslaughter.

Clark argues the jury could have determined he acted recklessly while in self-defense; and, as a result, he alleges he was entitled to an involuntary manslaughter instruction. As shown in the citations above, he is wrong. Pickens, 320 S.C. 528, 466 S.E.2d 364 (holding where defendant

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[12]*See also* Smith v. Padula, 444 F.Supp. 531 (D.S.C. 2006)(habeas corpus petitioner failed to show S.C. Supreme Court unreasonably applied U.S. Supreme Court precedent in reversing PCR Court's grant of relief on ineffective assistance of counsel for failing to preserve trial judge's refusal to charge involuntary manslaughter where S.C. Supreme Court determined Petitioner was not entitled to involuntary manslaughter instruction under S.C. law).

admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter charge was not warranted); Douglas v. State, 332 S.C. 67, 75 n. 4, 504 S.E.2d 307, 311 n. 4 (1998). Our Supreme Court faced a nearly identical argument, and found it was tantamount to imperfect self-defense, which South Carolina has not recognized, and has no application to involuntary manslaughter. State v. Sams, 410 S.C. 303, 764 S.E.2d 511(2014), *referencing* State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982)(imperfect self-defense is not the law in South Carolina), *and citing* Douglas v. State, 332 S.C. 67, 75 n. 4, 504 S.E.2d 307, 311 n. 4. In addition, under this precedent the most Clark would be entitled to receive, *even if* South Carolina were to recognize imperfect self-defense, which it has not, was an instruction on voluntary manslaughter, not involuntary manslaughter. Id., *citing* Roy Moreland, The Law of Homicide 93 (1952); 40 C.J.S. *Homicide* Section 110 (2006), *also referencing* State v. Falkner, 301 Md. 482, 483 A.2d 759 (1984).[13] In fact, in Sams, the Court cited approvingly the Court of Appeals opinion, State v. Scott, 408 S.C. 21, 757 S.E.2d 533 (Ct. App. 2014):

> Similarly the Court of Appeals recently considered a defendant's assertion that "the trial court erred by not charging involuntary manslaughter because under his version of the facts, he unintentionally caused [the victim's]death when he lawfully but recklessly performed a martial arts move in self defense." State v. Scott, 408 S.C. 21, 22, 757 S.E.2d 533, 534 (Ct. App. 2014). The Court of Appeals found "no basis to conclude Scott acted recklessly in defending himself because the circumstances Scott alleges to be reckless are the same circumstances that justified his use of force." Id.

Sams, *supra*. As a result, this issue has no merit and must be denied.

Clark was simply not entitled to an instruction on involuntary manslaughter in this case. It is undisputed the child victim was shot in the head by Clark with a AK/SKS rifle/pistol. Clark

[13] As will be shown under Appellate Issue II., Clark was not entitled to a voluntary manslaughter instruction either.

admitted he fired the AK weapon intentionally each of the 15 times it was fired. There is no question the victim was shot in the head by a bullet fired intentionally by Clark. While Clark claimed he accidentally shot the victim, this does not entitle him to an involuntary manslaughter instruction. Clark pulled the trigger 15 times intentionally, shooting the victim 1 time in the head killing her. *See* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)(court properly refused charge of simple assault and battery on ABHAN indictment, where there was a difference in size and sex of the defendant and victim, a gun was held to the victim's head, and victim was pregnant and was dragged up a flight of steps on her stomach in the victim's home); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999)(court properly refused charge of simple assault and battery on ABHAN indictment, where there the aggravating circumstance was resisting a lawful authority, i.e., a police officer. Thus, even if the defendant had committed a simple assault in the usual sense, he would be guilty of ABHAN under these circumstances).

Furthermore, the evidence was admittedly inconsistent with a tussle or struggle over a gun and would not entitle Clark to an involuntary manslaughter instruction. Clark admitted he was not struggling with someone over a gun and the gun discharged. There was no struggle. The victim was found on the floor of the interior of her home. She had a gunshot wound to the head.[14] This was from a firearm that was fired intentionally by pulling the trigger at least 15 times. Clark was simply not entitled to an instruction on involuntary manslaughter. Judge McCaslin did not abuse her discretion in declining to charge involuntary manslaughter.

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[14] Clark cites to some cases in his brief which eventually held the appellant in that case was entitled to an instruction on involuntary manslaughter where the defendant alleged he and the victim had struggled over a weapon. However, Clark has not cited any case in which the victim was shot after the defendant fired intentionally 15 times in the victim's direction with an assault rifle/pistol with a range of 400 yards. Clark is simply not entitled to an involuntary manslaughter instruction under the facts and evidence of this case.

The cases Clark cites in his brief (See IBOA) do not entitle him to an involuntary manslaughter charge on the facts of this case under South Carolina law. Wharton, 381 S.C. 209, 672 S.E.2d 786; Reese, 370 S.C. at 36, 633 S.E.2d at 900-01; Cabrera-Pena, 361 S.C. at 381, 605 S.E.2d at 526-27. *See* Knoten, 347 S.C. at 309, 535 S.E.2d at 398 (defendant not entitled to involuntary manslaughter); State v. Burriss, 344 S.C. 256, 259, 513 S.E.2d 194, 106 (1999)(defendant entitled to both accident and involuntary manslaughter); Wiggington v. State, 413 S.C. 578, 776 S.E.2d 407 (Ct. App. 2015)(only discussing the fact that the trial judge charged the defense of accident at trial indicated he found some evidence defendant was acting lawfully when he armed himself and ultimately finding based on the facts defendant was entitled to involuntary manslaughter charge); State v. Chatman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999)(defendant not entitled to accident charge but was entitled to involuntary manslaughter charge); State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 14, 15 (2011)(defendant was not entitled to either accident or involuntary manslaughter charge). Additionally, the facts of Knoten, Burriss, Wiggington, Chatman and Smith are completely different from the facts of this case where the victim was an innocent child who was minding her own business inside a friend's home and was killed after Clark intentionally fired his AK/SKS assault rifle/pistol 15 times in the direction of a crowd of men and in the direction of the victim's home which was clearly visible to Clark. A jury instruction must be supported by evidence in the record. Here the evidence does not support a charge of involuntary manslaughter. Judge McCaslin did not abuse her discretion in declining to charge involuntary manslaughter.

Harmless error

Further, even assuming *arguendo* Clark was somehow entitled to an involuntary manslaughter instruction on this record, the failure to do so was harmless under the particular facts

of this case. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding harmless error analysis is appropriate for the failure to charge a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(same). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous **and** prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" Middleton, *supra*, *quoting* State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). An erroneous instruction will be deemed a harmless error if, based on all of the evidence presented to the jury, it did not contribute to the verdict. Tate v. State, 351 S.C. 418, 570 S.E.2d 522(2002); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Middleton. "Thus, whether or not the error was harmless is a fact intensive inquiry." Id. A fact intensive inquiry shows Judge McCaslin's not charging involuntary manslaughter did not contribute to the verdict in this case.

The overwhelming evidence showed the child victim's death was the result of a shoot-out between 2 armed gangs of men, 1 of which included Clark, who decided to settle a dispute at a crowded mobile home park in the view of everyone in attendance at 2 different parties. Clark was in communication with his cousin D.J. prior to the armed conflict, and D.J. brought some of the other men in their group to Clark after talking over the phone with Clark. After Hugo fired his revolver up in the air and yelled: "Bust, n____ bust", the two opposing groups opened fire on each other. Clark intentionally fired his assault rifle/pistol from the Lot 7 mobile home's back porch and backyard 15 times. The gun had a range of 400 yards. Clark struck the mobile home on Lot

15 two (2) times with 1 bullet killing the child victim. Clark's 9mm was used to shoot at the group of men between Lots 15 and 16 as well. And, another associate of Clark, fired a .40 caliber pistol multiple times from Lot 7. The mobile home in which the victim was located was shot a total of 8 times. Clark's version of the events and where he was located during the shooting is not supported by the physical evidence or testimony After the shootout ended, Clark fled and deleted all of the phone calls and the text message from D.J. occurring before the murder. The destruction of evidence is evidence of guilt. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999)(the destruction or attempted destruction of evidence is evidence of guilt) *abrogated on other grounds* State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). Clark and his girlfriend also deleted phone calls from each other and purchased new phones. Clark also made phone calls to his cousin who hid the 9mm pistol for him. Clark also disposed of the murder weapon and the ammunition for the AK pistol. Id. Clark was apprehended hiding at the home of a cousin in Gilbert, S.C. and when questioned denied owning an assault weapon; however, business records proved the murder weapon was purchased by him.

Given the evidence *in this particular case*, it is clear the failure to charge involuntary manslaughter, if error, was harmless beyond a reasonable doubt. Middleton, 407 S.C. 312, 755 S.E.2d 432 (finding failure to charge lesser included offense was harmless after a fact specific inquiry). As a result, this appellate ground has no merit and must be denied. *See* Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)(judge's incorrect instruction was harmless, where instruction did not contribute to verdict, where there was overwhelming evidence of malice).

ARGUMENT II.

Judge McCaslin did not abuse her discretion in declining to instruct the jury on voluntary manslaughter where the victim, an innocent third party, did not provoke Clark and South Carolina has not extended the doctrine of transferred intent to voluntary manslaughter; regardless, Clark's own testimony did not establish voluntary manslaughter where he testified he had no intent to harm anyone when shooting his assault rifle.

What occurred below

As previously discussed, at the charge conference, Clark also requested the court instruct the jury on voluntary manslaughter. Judge McCaslin declined. Clark renewed his objection after the jury instruction. The State argued the provocation did not come from the victim, which is required under South Carolina law to have voluntary manslaughter, and South Carolina has not extended transferred intent to voluntary manslaughter, and regardless, "there was not sufficient evidence on the record to support a voluntary manslaughter charge regardless of the transferred intent issue." (Tr. 1434, l. 20 -Tr. 1435, l. 7). Judge McCaslin correctly declined to instruct the jury on voluntary manslaughter stating as follows:

> I read the Childers, the Wharton, and also the Williams case that was supplied by the defendant, and the law as it stands today in this State is our Court has not applied the doctrine of transferred intent to voluntary manslaughter. This Court does not believe the evidence even supports a voluntary manslaughter [instruction] in this case, nor was there any overt act by the victim to indicate any provocation by the victim.
>
> There's ---again, I have to turn back to the defendant arming himself. As a matter of fact, he goes to the back of his car, to the back of the trailer, he goes back to the car, arms himself. There was no testimony or evidence that I heard about a heat of passion or uncontrollable impulse to do violence, so I declined to charge the voluntary manslaughter.

(Tr. 1435, ln. 15 – Tr. 1436, ln. 5).

The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. Knoten, 347 S.C. at 302, 555 S.E2d at 394.

Clark bases his request for voluntary manslaughter on his testimony given at trial and other evidence. Clark was not entitled to a voluntary manslaughter instruction for several reasons. First, in order to be entitled to a voluntary manslaughter instruction, the victim must provoke the killing, not a third party. State v. Locklair, 341S.C. 352, 362-63, 535 S.E.2d 420, 425-26 (2000). Ta'Shya, the 11-year-old child did nothing to provoke Clark into shooting her. As was stated by the South Carolina Supreme Court in State v. Locklair:

> Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). "The provocation *of the deceased* must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection." State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758 (Ct.App.1993), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (emphasis added). Locklair argues that the jury could find voluntary manslaughter in this case because Williams, Bridges' mother, threw a cigarette case at Locklair prior to the shootings. First, the evidence shows that Williams threw the cigarette case at Locklair *after* he grabbed the gun to kill Bridges. According to Locklair's written statement: "After she got smart with me & started to walk off, I grabbed the gun. Her mom threw a cig. case at me, her dad was trying to stop me & Allen also." Second, this overt act was made by a third party, not the deceased, and South Carolina has not recognized sufficient legal provocation from a third party that can be transferred to the victim.[2]
>
> 2. Locklair cites the Texas case, Sattiewhite v. Texas, 786 S.W.2d 271 (Tex.Crim.App.1989), for the proposition that provocation on the part of the deceased or a third party acting in concert with the deceased will support a manslaughter verdict. However, a Texas statute specifically defines sudden passion as "passion directly

> caused by and arising out of provocation by *the individual killer or another acting with the person killed* which passion arises at the time of the offense and is not solely the result of former provocation." Id. at 287 (citing Tex. Code Ann. § 1904(b)) (emphasis added). South Carolina does not have a comparable statute.
>
> Locklair also relies on the South Carolina case, State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) for the proposition that provocation by a third party would support a voluntary manslaughter verdict. In Wyatt, the appellant hit his wife at a race track and then was confronted by an angry crowd as he tried to leave. The appellant shot two men who tried to prevent him from leaving. The appellant's theory in Wyatt was self-defense. Therefore, under the facts in Wyatt, the provocation derived from the victims' actions, not his wife's, who was merely a third party to the incident.

State v. Locklair, 341 S.C. 352, 362–63, 535 S.E.2d 420, 425–26 (2000).[15] The Court reiterated this holding in State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001).

> Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998). Both heat of passion and sufficient legal provocation must be present at the time of killing to constitute voluntary manslaughter. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) *cert. denied,* 531 U.S. 1093, 121 S.Ct. 817, 148 L.Ed.2d 701 (2001). Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation. Id.

Shuler, 344 S.C. at 632, 545 S.E.2d at 819. More recently, the Court of Appeals recognized this requirement from Locklair and Shuler holding as follows:

> Although Petitioner's testimony established the main provocation on the night of the shooting came from Ingram, Tisdale accompanied Ingram in following Petitioner and both were clearly part of the

[15] State v. Franklin, mentioned in Locklair was also overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)(Belcher charge).

> approaching, threatening westside group. *See* State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) (**"Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to *the victim* in order to constitute sufficient legal provocation."** (emphasis added)); *id.* (**"The provocation *of the deceased* must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or *terror*, rendering the mind incapable of cool reflection."** (second emphasis added) (quoting State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1993))).

Leggette v. State, 440 S.C. 590, 604, 892 S.E.2d 153, 161 (Ct. App. 2023), reh'g denied (Sept. 21, 2023)(emphasis added, italics in original). The Court found the victim did provoke the attack by accompanying Ingram and chasing the victim and Ingram reaching for a weapon; therefore, counsel was not ineffective for failing to object to a voluntary manslaughter charge. Id. Here, there is no provocation by the 11-year-old child victim who was minding her business in a friend's home playing with another child and her new cell phone and then hiding from gunfire at the base of a refrigerator. The trial court could not have abused its discretion in declining to charge voluntary manslaughter based on the law.

The State of Virginia agrees with South Carolina and requires the provocation to come from the victim:

> Moreover, where it is not the victim of the crime who provoked the defendant's heat of passion, the evidence will not support a finding of heat of passion. Arnold v. Commonwealth, 37 Va.App. 781, 789, 560 S.E.2d 915, 919 (2002) (citing Peeples v. Commonwealth, 30 Va.App. 626, 634, 519 S.E.2d 382, 386 (1999) (en banc) (concluding defendant's "version of events did not support a claim that he acted in heat of passion upon reasonable provocation" because "the perceived threat did not come from the victim")).[2]

Williams v. Commonwealth, 64 Va. App. 240, 249, 767 S.E.2d 252, 257 (2015). The Virginia Supreme Court noted that other states also agree:

> We note that courts in other jurisdictions have likewise concluded that the defendant's heat of passion must be provoked by the victim. *See, e.g.*, MacKool v. State, 363 Ark. 295, 301, 213 S.W.3d 618, 622 (2005)(observing that Arkansas has "previously declined to recognize provocation by a third party as sufficient to require instructions on manslaughter" and holding that "manslaughter instruction was not appropriate in the absence of any proof of provocation from [the victim] herself"); State v. Follin, 263 Kan. 28, 39–40, 947 P.2d 8, 16–17 (1997) (concluding "the trial court was under no obligation to instruct the jury on the lesser offense of voluntary manslaughter" where "the murderous actions were directed against persons innocent of any responsibility for provoking defendant"); Commonwealth v. LeClair, 445 Mass. 734, 740, 840 N.E.2d 510, 515 (2006) (rejecting the American Law Institute's Model Penal Code § 210.3 (1980) and reaffirming Massachusetts's "well-established rule that evidence of provocation by a third party, rather than the victim of a homicide, is insufficient to warrant a voluntary manslaughter instruction")[16]; State v. Vinso, 171 Mo. 576, 590, 71 S.W. 1034, 1038 (1903) (rejecting heat of passion argument where victim "was in no manner responsible by word or act for the assumed violent passion"); State v. Bautista, 193 Neb. 476, 480, 227 N.W.2d 835, 839 (1975) (holding trial court did not err "in refusing to instruct the jury further regarding reasonable provocation because there [was] no evidence in the record that the defendant was reasonably provoked by the victim"); State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) (**"Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation."**); State v. Tilson, 503 S.W.2d 921, 924 (Tenn.1974) (refusing to expand voluntary manslaughter to include victim who was a "noncombatant by-stander" but " 'on the side' of the one actually provoking the fight"); State v. Turgeon, 165 Vt. 28, 33, 676 A.2d 339, 342 (1996) (refusing to find reasonable provocation where defendant killed police officer after alleged provocation by wife).[17]

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[16] Commonwealth v. LeClair, was abrogated on other grounds. Commonwealth v. Ronchi, 491 Mass. 284, 202 N.E.3d 499 (2023)(oral discovery of adultery is no longer sufficient provocation).

[17] State v. Turgeon was overruled on other grounds. State v. Brillon, 955 A.2d 1108, 1111 (2008)(speedy trial), *rev'd and remanded*, 556 U.S. 81(2009).

> Furthermore, in unpublished opinions we have previously relied on our holding in *Arnold* that heat of passion requires reasonable provocation by the victim. *See, e.g.,* Commonwealth v. Smith, No. 0985–12–3, 2012 WL 5866517, 2012 Va.App. LEXIS 372 (Va.Ct.App. Nov. 20, 2012); Monroe v. Commonwealth, No. 2993–07–2, 2009 WL 668752, 2009 Va.App. LEXIS 111 (Va.Ct.App. Mar. 17, 2009); Smith v. Commonwealth, No. 2992–02–3, 2004 WL 941248, 2004 Va.App. LEXIS 213 (Va.Ct.App. May 4, 2004).

Williams, 767 S.E.2d 252, 257, n. 2, 260 (VA 2015)(emphasis added).

Further, Clark was not entitled to voluntary manslaughter based on his own testimony. Clark testified he did not intend to shoot anyone or injure anyone when he shot his AK pistol/rifle. He specifically testified he was only trying to make the shooter stop shooting at him. In State v. Niles, the Supreme Court found the circuit court properly refused to charge voluntary manslaughter. Niles, 412 S.C. at 518, 772 S.E.2d at 878. In that case, Niles, Hammond, and Moore met the victim in a *Best Buy* parking lot to buy marijuana. Id. Moore testified that Niles set up the meeting with the victim and had made the decision to rob him. Id. at 518–19, 772 S.E.2d at 878. Moore claimed he was responsible for identifying the marijuana and entered the victim's vehicle to do so. Id. at 519, 772 S.E.2d at 879. As he returned to Niles's car, Moore testified that Niles had already exited and was leaning in the passenger-side door of the victim's vehicle. Id. Moore heard 2 gunshots and saw Niles leap back in the car. Id. Moore heard the victim fire a weapon in response and indicated the victim and Niles shot back and forth multiple times. Id. at 520, 772 S.E.2d at 879.

Conversely, Niles testified that he had merely set up the meeting, but that Moore had acted alone in robbing the victim. Id. Niles indicated that he had been sitting in his car with Hammond when he saw Moore and the victim fighting in the victim's vehicle before Moore exited with the stolen drugs and dove back into Niles's car. Id. Niles saw the victim draw his gun and shoot at

them knocking out the rear passenger windows, so he grabbed his gun and returned fire. Id. Importantly, Niles asserted, as Clark did, he shot back because he was concerned with stopping the shooter and for Hammond's safety, testifying as follows:

> So, while he was shooting in the car ... I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody ... I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

Id.

In determining Niles was not entitled to a voluntary manslaughter charge, the Supreme Court found Niles's own testimony did not establish that he was overtaken by a sudden heat of passion such that he had an uncontrollable urge to do violence. Id. at 522, 772 S.E.2d at 880. Rather, the court indicated that voluntary manslaughter required a criminal intent to do harm and Niles's testimony demonstrated that he lacked the intent to harm the victim. Id. at 523, 772 S.E.2d at 881.

Our Supreme Court further expounded on the relationship between voluntary manslaughter and self-defense in Cook v. State, finding the circuit court erred by charging the jury on voluntary manslaughter. Cook, 415 S.C. at 553, 784 S.E.2d at 666. Cook lived in an apartment above the victim, who constantly berated Cook for testifying in a murder trial against one of his associates and for telling their landlord the victim sold drugs. Id. On the day of the incident, Cook and the victim had been exchanging hostile text messages. Id. at 554, 784 S.E.2d at 666. Later that night, Cook, his girlfriend, and his cousin returned to Cook's apartment complex to find victim sitting outside on the porch. Id. The victim made a series of threatening comments directed at Cook echoing similar sentiments from the texts he had sent earlier. Id. The victim's last comment was

directed at both Cook and his girlfriend which really upset Cook; however, he continued up the stairs without saying anything to the victim. Id.

While in his apartment, Cook ate, placed the scraps inside a plastic bag, and grabbed his gun before going downstairs to discard the bag. Id. Cook testified that once he was downstairs, he did not have an opportunity to get to the dumpster because victim approached him, grimacing and threatening to shoot him in broad daylight. Id. Cook indicated victim had 1 of his hands in his back pocket and Cook was concerned victim would pull out a gun and shoot him. Id. At the same time, the victim's nephew was approaching from the opposite direction and Cook feared he was about to be jumped. Id. Cook claimed he tried to walk away from victim, but victim kept cutting him off and threatening him. Id. at 555, 784 S.E.2d at 667. At that point, Cook said "the dude was coming up" and "before I knew it, I fired a shot." Id. Cook indicated he fired a second shot and ran. Id. Cook said he fired the second shot "to make sure he was gone," explaining that "[a]s soon as I saw him reaching I just shot." Id. Additionally, the victim's nephew testified Cook and victim were talking so softly that he could hardly tell they were arguing. Id. He also indicated Cook stepped back, pulled out a gun and shot victim before walking over to the victim and shooting him again. Id. Cook's girlfriend also testified Cook shot victim a second time after he had fallen to the ground. Id.

The Supreme Court found the facts of the case did not support a finding Cook shot the victim in a sudden heat of passion. Id. at 557, 784 S.E.2d at 668. The Court pointed out Cook had tried to walk away from the victim, stating, "[t]he fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off." Id. Additionally, the court found that at no point during Cook's statement did he indicate he lacked control over his actions. Id. As

such, the Court determined the facts of the case suggested Cook either shot the victim with malice or in self-defense. Id.

The Cook Court noted the circuit court's decision to charge manslaughter relied on the following facts: 1) Cook was in fear; 2) Cook shot victim twice; and 3) Cook's statement "before I knew it, I fired a shot." Id. The Court indicated, without more, these facts were insufficient to establish Cook acted in a sudden heat of passion, stressing neither the fact Cook shot victim twice nor his statement "before I knew it, I fired a shot" constituted evidence Cook's fear manifested itself in an uncontrollable impulse to do violence. Id. at 557–58, 784 S.E.2d at 668. The State argued Cook's statement demonstrated he lacked self-control when he shot victim. Id. at 558, 784 S.E.2d at 668. The Court disagreed, stating,

> Due to the short, swift motion of firing a gun, we believe this statement could be heard in any case in which the defendant is charged with firing a weapon, even out of self-defense. Thus, we do not believe this statement is indicative as to whether Cook was acting under an uncontrollable impulse to do violence.

Id.

In State v. Cole, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000), our Supreme Court found the trial court did not err in refusing to instruct the jury on voluntary manslaughter, determining there was no evidence of sudden heat of passion or sufficient legal provocation. There, the victim's friend attacked the defendant's friend, resulting in the defendant intervening to fight victim's friend, and victim then breaking up the fight. Id. at 99-100, 525 S.E.2d at 512. However, the victim's friend continued to behave hostilely, threatened the defendant's brother, overturned the defendant's stereo as he walked out, and promised to return. Id. at 100, 525 S.E.2d at 512. Once the victim and his friend went out the front door of the defendant's apartment, the defendant went out his back door; went next door to his mother's apartment where he retrieved a gun; and went out his mother's front door and stood in his front yard, where he claimed he heard shots being fired. Id. The

defendant fired his gun, killing the victim. Id. The defendant claimed: "he fired toward the ground, but the cause of the victim's death was determined to be a gunshot wound to the chest." Id. The shooting occurred 3 to 5 minutes after victim and victim's friend left the defendant's apartment. Id. The defendant stated he fired the gun because he was scared they might be coming back, he was scared they might come into his house and kill or hurt him and his brother, and he did not know what to do and "was scared." Id. "[The defendant] testified that he did not intend to shoot the victim, he was just scared and wanted to frighten [the victim's friend] and the victim away." Id.

Viewing the evidence in the light most favorable to the defendant, the Court noted the victim's friend assaulted the defendant's friend and stole his jewelry; the defendant twice fought briefly with the victim's friend and was pulled off the victim's friend by the victim; and the victim's friend pushed over the defendant's stereo, after which the victim and his friend left the defendant's apartment. Id. at 102, 525 S.E.2d at 513. The court found these facts did not constitute sufficient legal provocation for voluntary manslaughter and, further, "there was no evidence presented that [the defendant] was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.'" Id. On the contrary, the court found that "by [the defendant's] own testimony, he shot at the men to scare them away," and the defendant's "testimony appear[ed] designed to support a charge of self[-]defense, not heat of passion." Id. Additionally, the court determined, "[e]ven if [the defendant] had been in the heat of passion during the confrontation in his apartment, 3 to 5 minutes had passed in which he had time to go to his mother's apartment and find his gun," and that "[f]ar from passion, these actions indicate 'cool reflection.'" Id; *See also* State v. Payne, 434 S.C. 121, 143–44, 862 S.E.2d 81, 92–93 (Ct. App. 2021)(discussing Cole).

In State v. Childers, 373 S.C. 367, 370, 645 S.E.2d 233, 234 (2007), the defendant became upset when the victim, his former girlfriend, refused to leave her mother's house to talk to him.

Later that night, the defendant saw victim, victim's sister, and the sister's ex-husband at a turkey shoot, where a confrontation ensued. Id. Evidence was presented that in the following early morning hours victim, her sister, and the sister's ex-husband were standing in victim's mother's yard talking after the turkey shoot when the defendant "suddenly appeared in the yard and shot the victim twice, at close range, in the head." Id. The defendant testified, however, that after the turkey shoot, he decided to walk from a friend's home to victim's mother's home to talk to victim. Id. at 370, 645 S.E.2d at 234-35. He claimed he carried a loaded gun during the walk to protect himself from stray dogs and, as he approached the group standing in the yard, the sister's ex-husband shot at him first. Id. at 370, 645 S.E.2d at 235. The defendant stated: "[h]e returned fire, and in doing so, he shot the victim." Id. The defendant also testified "he did not visit the victim that night with the intention of shooting anyone, but he fired because he was fired upon." Id. at 370-71, 645 S.E.2d at 235. The majority of the court found the trial court did not err in failing to give a jury charge on voluntary manslaughter. Id. at 372, 645 S.E.2d at 235-36. Two of the justices determined this Court erred in concluding the defendant was entitled to a voluntary manslaughter charge based on the fact that, although the victim did not provoke the defendant, the provocation by the sister's ex-husband could be transferred to the victim under the doctrine of transferred intent. Id. at 373-74, 645 S.E.2d at 236. They concluded, "[The defendant's] testimony does not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation by the victim because, contrary to the Court of Appeals' decision, the overt act that produces the sudden heat of passion must be made by the victim." Id. One of the justices concurred in result in a separate opinion, finding the defendant's own factual scenario "is completely void of any evidence remotely supporting a charge of voluntary manslaughter," because "[v]oluntary manslaughter, by definition, requires a criminal intent to do harm to another," and "according to the defendant's story, he had

no criminal intent whatsoever." Id. at 375, 645 S.E.2d at 237 (Toal, C.J., concurring). Finally, 2 justices dissented, disagreeing with the State's contention the defendant failed to present evidence that he was "inflamed by passion" when he returned fire and noting "the jury could have found the 'heat of passion' in [the defendant's] testimony that he fired back because he was scared and feared he would be shot at again." Id. at 378, 645 S.E.2d at 238 (Pleicones, J., dissenting; Moore, J., concurring in dissent).

In State v. Sims, this Court held as follows:

> Here, taken in the light most favorable to Sims, we find there is no evidence to support the inference that Sims shot David in a sudden heat of passion. *See* Niles, 412 S.C. at 522, 772 S.E.2d at 880 ("To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion."). Sims indicated that she was in the bathroom alone when David entered with pliers and a knife and began calling her a liar. Sims then indicated that David got physical with her over control of her phone. Sims claimed that David then began threatening her and taunting her with the knife, causing her to grab the gun out of fear. Even though she was afraid, Sims said she held the gun by her side and asked David to stop what he was doing, indicating she did not want to use the gun. *See* id. at 523, 772 S.E.2d at 881 ("Because [Appellant], by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.").
>
> Sims also told police she grabbed the gun hoping to "scare" David so he would stop his threatening behavior, adding that she had never meant to shoot him. *See* Cole, 338 S.C. at 102, 525 S.E.2d at 513 ("[B]y Appellant's own testimony, he shot at the men *to scare them away*. Appellant's testimony appears designed to *support a charge of self defense, not heat of passion*.") (emphases added). According to Sims, David became even angrier, continuing to threaten her as she tried to back out of the bathroom. *See* Cook, 415 S.C. at 557, 784 S.E.2d at 668 ("The fact that [Appellant] was trying to walk away from the conflict does not suggest [Appellant] was incapable of cooling off."). As she tried to back out, Sims testified that David lunged at her and "my hand went up and I shot, and I shot out of reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared." *See* id. at 558, 784 S.E.2d at 668 ("We do not believe ... [Appellant's] statement 'before I knew it, I

fired a shot' is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence."). While Sims acknowledged that she shot out of fear, she never indicated that she lost control or was overcome with an uncontrollable impulse to do violence. *See* Starnes, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear."); id. at 598, 698 S.E.2d at 609 ("[T]he fear must ... cause the defendant to lose control and create an uncontrollable impulse to do violence."); Cook, 415 S.C. at 557, 784 S.E.2d at 668 ("[A]t no point during [Appellant's] statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest [Appellant] shot [v]ictim either with malice or in self-defense."). The record is clear that Sims only shot David once. *See* Cook, 415 S.C. at 558, 784 S.E.2d at 668 ("We do not believe the fact that [Appellant] shot [v]ictim twice ... is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence."). After shooting David, Sims immediately began administering CPR and called 911. *See* State v. Oates, 421 S.C. 1, 28, 803 S.E.2d 911, 926 (Ct. App. 2017) (finding "Appellant's behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting"); *see also* Niles, 412 S.C. at 523, 772 S.E.2d at 881 ("Because [Appellant] ... lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts."). Accordingly, like the defendants in Starnes, Niles, and Cook, we find the only evidence in the record is that Sims deliberately and intentionally shot David and that she either shot him with malice aforethought or in self-defense.

In deciding to charge voluntary manslaughter, the circuit court erred in relying on Sims's testimony that her hand went up and she shot out of reaction.[14] *See* Cook, 415 S.C. at 558, 784 S.E.2d at 668 ("We do not believe ... [Appellant's] statement 'before I knew it, I fired a shot' is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence.").[15] Furthermore, we find a voluntary manslaughter charge was not justified by a gap between the altercation and David's death,[16] as there is no evidence supporting the conclusion that Sims was overcome with an uncontrollable impulse to do violence. *See* Niles, 412 S.C. at 522, 772 S.E.2d at 880 ("To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion."); *see also* State v. Cain, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017) ("The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the [criminalized conduct].").

State v. Sims, 426 S.C. 115, 134–39, 825 S.E.2d 731, 741–43 (Ct. App. 2019). Here, Clark testified he ran to the corner of the Lot 7 and hid. He then ran back to his car and retrieved his AK weapon. He then fired intentionally 10 to 12 times *just to make the shooter stop* to protect himself and his friends and family inside and outside Lot 7. He testified *he did not intend to shoot or injure anyone* but just *to cause the other person to stop shooting.* As a result, based on the above case law, this case is murder or self-defense; it is not voluntary manslaughter. Judge McCaslin did not abuse her discretion in refusing to instruct on voluntary manslaughter. Sims, 426 S.C. at 134-39; 825 S.E.2d at 741-43. Her decision is fully supported by the record and case law. Lastly, Respondent submits that a harmless error is not warranted as, based on the foregoing, there could be no error to review for harm. To the extent that the Court would consider a harmless error analysis, there could be no possibility of reversible error for the same reasons argued above - there is no evidence to support the required elements.

CONCLUSION

For the above stated reasons, Clark's convictions for murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime must be affirmed.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Senior Assistant Attorney General
State ID No. 11973

Office of the Attorney General

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

By: *s/ J. Anthony Mabry*
ATTORNEYS FOR RESPONDENT

March 29, 2024.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

QUAYSHAUN XZANDER CLARK,

APPELLANT.

Appellate Case No. 2022-000962

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to Appellant's Designation of Matter, Respondent requests the following material be included in the record on appeal:

Tr. pp. 1-21;
Tr. pp. 530-47;
Tr. pp. 548-619;
Tr. pp.621-89;
Tr. 691-744;
Tr. 748-897;
Tr. 904-91;
Tr. pp. 998-1000:
Tr. pp. 1004-1024;
Tr. pp. 1032-52;
Tr. pp. 1059-88;
Tr. pp. 1092-95;
Tr. pp. 1118-1175;
Tr. pp. 1178-1192;
Tr. pp. 1199-1230;
Tr. pp. 1234-1304
Tr. pp. 1323-1328;
Tr. pp. 1334-1350;
Tr. pp. 1352-54;

Tr. pp. 1355-1404;
Tr. pp. 1404-1441;
Tr. pp. 1449-1453;
Tr. pp. 1469-73;
State's Ex. #s 5, 12; 19, 85, 86, 87, 101, 176

I certify that this designation contains no matter that is irrelevant to this appeal.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

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

J. ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

By: s/*J. Anthony Mabry*
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

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Appellate Case No. 2022-000962

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent has been forwarded to Appellant's counsel, Breen Stevens, Esq., via email today, March 29, 2024 to bstevens@sccid.sc.gov, and to his assistant at sleverett@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 29th day of March, 2024.

s/ Donna D'Alessio
Donna D'Alessio, Legal Assistant to
J. Anthony Mabry,
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305