STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-209426

THE STATE,

RESPONDENT,

v.

HENRY GRAY,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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1.

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2.

Whether the Court found Gray's argument preserved for appellate review; and whether the trial judge abused his discretion by denying Gray's request to charge the jury on involuntary manslaughter?

STATEMENT OF THE CASE

Appellant, Henry Gray (Gray), is presently confined in the South Carolina Department of Corrections (SCDC), as the result of his Richland County convictions and sentence. The Richland County Grand Jury indicted Gray on March 10, 2010, for lynching in the first degree. The Richland County Grand Jury indicted him on October 5, 2011 for murder. The Richland County Grand Jury indicted his sister, Robin Reese (Reese), in March 2010 for lynching in the first degree, (2010-GS-40-0040), and then for murder, in October 2011, (2011-GS-40-4916).

On February 28-March 2, 2012, Reese and Gray received a joint jury trial before the Honorable G. Thomas Cooper.[1] At trial, Andrew Farley, Esquire, represented Reese and Mathias Chaplin, Esquire, represented Gray. Fifth Circuit Deputy Solicitor K. Luck Campbell, and Assistant Solicitors April Sampson and Nicole Simpson prosecuted the case.

Judge Cooper instructed the jury on voluntary manslaughter but he denied each defendant's request to charge involuntary manslaughter. **Tr. pp. 1044-48;** *see also* **Argument II,** *infra*. The jury convicted both defendants, as charged. Judge Cooper imposed concurrent sentences of thirty years imprisonment for each conviction, on each defendant. Both defendants timely served and filed notices of appeal.[2]

ARGUMENTS

I. The trial judge did not abuse his discretion by allowing the State to introduce State's Exhibits 80-83, autopsy photographs, through the pathologist who conducted the autopsy because the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice.

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[1] Judge Cooper denied the defendants' pretrial motions for a severance.

[2] Reese's appeal is pending before this Court and he has raised the same two issues in his Initial Brief of Appellant. *See State v. Reese*, Appellate Case No. 2012-209826.

Gray maintains that the trial judge erred by allowing the State to introduce **State's Exhibits 80-83**, autopsy photographs, through the pathologist who conducted the autopsy because the probative value of these photographs was substantially outweighed by the danger of unfair prejudice. Respondent submits that Gray's argument lacks merit and that there was no abuse of discretion, Here, the photographs were extremely probative since they corroborated the findings of both of the State's pathologists about the cause of death, by illustrating the serious and fatal injuries suffered by the victim that were found on autopsy; the photographs were presented in the course of the autopsy pathologist's scientific and almost educational discussion of his findings; the autopsy pathologist testified that the photographs were necessary to demonstrate his findings; Reese and Gray had each made cause of death and when the cause of death was inflicted issues in the case by presenting a pathologist who disputed some of the findings of the pathologist who conducted the autopsy; and each defense pathologist relied upon the autopsy photographs in reaching a conclusion of the cause of death and the timing of when that injury was received.

A. How issue developed at trial.

Prior to trial, the trial judge noted a defense motion to suppress autopsy photographs. He stated that "my normal rule on photographs is that if they assist your pathologist in determining the cause of death, then they are admissible. If they are just for shock value, then they would not be admissible. But I will review them at the proper time." **Tr. p. 108, line 17 – p. 109, line 2.**

The Deputy Solicitor stated, "I will show them to Your Honor. In this case there is some issue as to cause of death, which may make them more relevant. **Tr. p. 109, lines 3-6.**

On direct examination of Dr. Marcus, the pathologist who performed the autopsy of the victim, the State showed him **State's Exhibits 51-57**. After he had looked at them, the State asked if these photographs were taken after the autopsy had been completed. Dr. Marcus replied that they had been taken before the autopsy. He also indicated that those photographs illustrated some of the injuries that he had described to the victim's head and eye areas. **Tr. p. 688, line 10 – p. 689, line 1**.

The State then moved to introduce these photographs into evidence and both defendants objected. Gray noted an objection. Then, Reese argued that they were highly prejudicial and that Dr. Marcus testimony could adequately describe the injuries that he had found. When Gray's counsel began to add to this objection, the trial judge sent the jury out, and addressed the question of admissibility *in camera*. **Tr. p. 689, line 2 – p. 690, line 1**.

The State showed the remaining photographs that it intended to introduce, **State's Exhibits 80-83**. The State then argued that cause of death was at issue and that the State had to prove malice. It also noted that both defendants had employed pathologists to dispute the autopsy findings. Therefore, the jury needed to have a clear understanding of precisely what injuries the victim sustained, "perhaps more than [in] any other [case]." **Trp. 690, line 12 – p. 691, line 2**.

The judge directed the State to make its proffer. The State made the following proffer through Dr. Marcus:

> MS. SAMPSON: Do these [State's Exhibits 51-57] illustrate some of the areas of injuries, as well has the areas of lack of injury that you noted in your diagram?
>
> THE WITNESS: Yes, they do.
>
> MS. SAMPSON: Were those helpful in determining the cause of death in this case as far as what you observed?

THE WITNESS: Yes, they do.

MS. SAMPSON: Then I'll go to the next set. Doctor, I'm going to show you State's Exhibits 80 through 83. Were those photographs that you actually picked out that went through these that show significant findings as to the cause of death in this case?

THE WITNESS: Yes, these photos depict the cause of death. I can't diagram this.

MS. SAMPSON: And these would be crucial?

THE COURT: What numbers?

MS. SAMPSON: Eighty-one (81) through 83 -- to illustrate to the jury what you're talking about.

THE WITNESS: Yes.

THE COURT: Three photographs?

MS. SAMPSON: Four.

THE COURT: You said 81 through 83.

MS. SAMPSON: Maybe I misstated it.

THE COURT: Yes.

MR. FARLEY: Your Honor, my objection would just [be] -- they are saying that all of the photographs are necessary or some of the photographs are superfluous and some just more essential than others? I guess they want all [of] the trauma to come in. Dr. Marcus is saying it's necessary to have every single one of those.

THE COURT: You want to ask him? You want to ask [a] hypothetical?

MR. FARLEY: Yes. Dr. Marcus, you're saying you must have every one of those photographs or are some of ... those photographs [unnecessary] for your demonstrate.

THE WITNESS: I'd like to have every photograph.

MR. FARLEY: I didn't ask you what you'd like to have, I said are they necessary?

THE WITNESS: I feel they're necessary, yes.

MR. FARLEY: Thank you, Your Honor.

THE COURT: Mr. Chaplin.

MR. CHAPLIN: Yes, Dr. Marcus, ---

THE WITNESS: Yes, sir?

MR. CHAPLIN: As far as those photographs are concerned, what they show is the trauma that you just discussed, correct?

THE WITNESS: Yes, sir.

MR. CHAPLIN: All right. But you can't testify as to the cause of that trauma?

THE WITNESS: I can testify that blunt trauma caused the trauma.

MR. CHAPLIN: Okay.

THE WITNESS: Blunt trauma.

MR. CHAPLIN: But you couldn't say specifically when the trauma occurred?

THE WITNESS: No. I can't say when it occurred.

MR. CHAPLIN: You can't say the location that it occurred?

THE WITNESS: I can't say the location, no.

MR. CHAPLIN: You just know that it is blunt force trauma?

THE WITNESS: Yes, blunt force trauma.

MR. CHAPLIN: And that would be the extents of your presentation?

THE WITNESS: I believe so, yes.

Tr. p. 692, line 22 – p. 695, line 25. The trial judge overruled the objection without further argument. **Tr. p. 696, lines 1-3**.

Before the jury, Dr. Marcus utilized **State's Exhibits 51-57** to help him illustrate a contusion caused by blunt force trauma on the right portion of the face (**State's Exhibits 51- 52**); a laceration over the left eye (**State's Exhibit 53**); a laceration to the side of the left eyebrow (**State's Exhibit 53**); sclera hemorrhaging in whites of the eyes (**State's Exhibit 54**); and an injury to his inner lip that had hemorrhaged (**State's Exhibit 55**). **Tr. pp. 696-98**.[3]

Dr. Marcus utilized **State's Exhibits 80-83** to illustrate the injuries to the victim's brain that he found. He explained that **State's Exhibit 81** was a photograph of how the scalp looked when the brain was exposed and it "shows some of the area of hemorrhage of the area of the brain. In a normal brain, this "area should be clean with no hemorrhage or anything to that area at all." **Tr. pp. 702-03**. He apparently used the remaining photographs, although not specifically identified in the record, to demonstrate the remaining brain injuries that he found. **Tr. pp. 703-05**.[4]

B. Discussion.

Gray is not entitled to relief. "The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008) (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). "The relevancy, materiality, and admissibility of photographs as

[3] **State's Exhibits 56-57** depict the injuries to victim's back and legs, respectively, and neither exhibit is even remotely prejudicial.

[4] **State's Exhibit 82** depicts the injuries to the left side of the victim's face before the autopsy and is not prejudicial. **State's Exhibit 80** depicts the subdural hemorrhaging and **State's Exhibit 83**, shows the exposed brain and contusions and bleeding on the brain.

evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986).[5]

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. *State v. Hamilton*, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct.App. 2001), overruled on other grounds, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Further, "'[i]f the offered photograph[s] serve[] to corroborate testimony, it is not an abuse of discretion to admit [them].'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353).

In the present case, the trial judge admitted the photographs, **State's Exhibits 80-83**, over the defendants' objection that they were prejudicial and that they were unnecessary, since the testimony of Dr. Marcus adequately described the injuries that he found on autopsy. Respondent submits that the trial judge did not abuse his discretion by rejecting the Rule 403 argument made by Reese.

First, **State's Exhibits 80-83** were extremely probative since they depicted the serious and fatal injuries suffered by the victim that were found on autopsy. The photographs thereby

[5] All relevant evidence is admissible. Rule 402, SCRE. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

corroborated the findings of both of the State's pathologists about the cause of death. *See Torres*, 390 S.C. at 623, 703 S.E.2d at 229; *Nance*, 320 S.C. at 508, 466 S.E.2d at 353. Although Dr. Marcus' opinion was that he could not determine in which of the two incidents the fatal injury occurred based upon his autopsy findings, he opined that the injury causing the cerebral contusion and the hemorrhaging would require a "[s]ignificant amount of force." He further opined that it was "[a]bsolutely" consistent with a person having his feet swept out from under him and landing on his head. **Tr. pp. 699-700; 704-12; 719**.

In reply, Dr. Clay Nichols, the former chief medical examiner for Richland County when the autopsy was performed, testified that he had reviewed the autopsy procedures followed by Dr. Marcus and concluded that the autopsy was correctly performed. **Tr. pp. 1008-11**. Also, Dr. Nichols had reviewed Dr. Marcus' findings and the history that had been provided. He opined that "[t]he timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete; resulting in closed head injury. The first assault, the evidence isn't there for a head injury. The second assault, there is real good evidence for a head injury." **Tr. p. 1012, lines 8-15**.

Thus, the photographs were also relevant to prove the cause of death and to circumstantially negate that the cause of death was the result of any acts by Reese and or Gray that were not malicious. This is particularly true in light of the degree of force required in order for the blunt force trauma to have been inflicted. The State had the burden of proof and had the right to prove its case in the manner it as to solely rely upon Dr. Marcus' expert testimony. *See Martucci*, 380 S.C. at 249, 669 S.E.2d at 607.

Secondly and despite Gray's hyperbole as to what is depicted in the photographs, the photographs were presented in the course of the Dr. Marcus' clinically scientific and almost educational discussion of his findings. For most of the photographs, he explained precisely what was depicted and why the matter depicted in the photograph was significant. Thirdly, Dr. Marcus' *in camera* testimony was clear: he thought that all of the selected photographs were necessary to fully illustrate and depict his findings. These findings were not something that he could clearly convey to the jury by a diagram.

Fourth, both Reese and Gray had chosen to make the cause of death and when the cause of death was inflicted issues in the case. Each defendant retained and presented a pathologist who offered differing opinions of what was revealed by the autopsy. As the Assistant Solicitor correctly observed during the *in camera* proffer, because of the position taken by Reese and Gray with respect to what the autopsy showed, the jury needed to have a clear understanding of precisely what injuries the victim sustained, "perhaps more than [in] any other [case]." **Tr. p. 690, line 12 – p. 691, line 2**. Having elected to base her defense, in part, upon a challenge to the findings on autopsy, Reese should not be heard to complain that the State was allowed to introduce photographs that the State's expert testified were necessary to illustrate his findings.

Fifth, both defense pathologists relied upon the autopsy photographs in reaching a conclusion of the cause of death and the timing of when that injury was received. **Tr. pp. 854-55; 873; 895; 900; 913; 915-16**. Reese's pathologist was somewhat critical of the photographs because the failure to include a ruler in them was not according to the protocol of the National Association of Medical Examiners. **Tr. p. 854, line 15 - p. 855, line 4**. However, he quickly added, "Otherwise [these] are beautiful pictures and good ones." **Tr. p. 855, lines 4-5**.

Given the manner in which the photographs were presented and the testimony about what they depict, Respondent submits that they did not create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71; *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149. Particularly in this day and age, where forensic matters are graphically shown in popular prime time television programs like C.S.I. and its progeny, the jurors simply would not be so shocked by these photographs that they would have rendered a verdict based on an emotional basis. Rather, they would have understood that the autopsy was a necessary and indispensable process to determine the cause of death. In other words, the photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. *Id. See also Martucci*, 380 S.C. at 249-50, 669 S.E.2d at 607-08 .

Additionally, the photographs complained of here, specifically **State's Exhibits 80-83**, were not beyond "**the outer limits of what our law permits a jury to consider**." See *State v. Collins*, 398 S.C. 197, 210, 727 S.E.2d 751, 758 (Ct. App. 2012) (citing *Torres*, 390 S.C. at 624, 703 S.E.2d at 229) (emphasis in original). In *Collins*, this Court found that the probative value of photographs of the 10-year-old child's partially eaten face and body, taken by a forensic pathologist before he performed an autopsy on child killed by dogs, was substantially outweighed by danger of unfair prejudice. *Collins*, 398 S.C. at 202-10, 727 S.E.2d at 754-58.

The defendant in *Collins* was charged with involuntary manslaughter and three counts of owning a dangerous animal. This Court found that the photographs in *Collins* added little to the testimony of witnesses; the issues to which the photographs related involved the conduct of defendant's dogs, as opposed to the defendant's own conduct; and that they were not material to

the issues of defendant's conduct and whether his conduct was criminal. Also, this Court found that the photographs were graphic and shocking; that they prompted an intense emotional response; and that they had an overwhelming capacity to lure the jury into declaring guilt on the emotional basis of sympathy for the child and his mother, as well as horror at the sight of the child's body.

Unlike the photographs in *Collins*, however, the photographs in this case were material to the issues of cause of death, the timing of the cause of death and whether the injuries were inflicted maliciously. Further, the photographs here depicted injuries that the State alleged were caused by the Gray and or Reese, while acting as accomplices. The photographs are not of injuries caused by dogs, or anyone or anything but the actions of Reese and Gray.

Also, the photographs were not inflammatory simply because they were taken at autopsy or because they were "graphic." To the contrary, both this Court and the South Carolina Supreme Court have upheld the introduction of autopsy photographs or graphic crime scene photographs that pass a Rule 403 analysis in a number of cases. *See, e.g., State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution, despite claim that, because victim's body was found in woods 46 days after crime was committed, weather or local fauna could have altered crime scene during that period; photographs corroborated other testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *Martucci*, 380 S.C. at 249-50, 669 S.E.2d at 607-08 (upholding admitting autopsy photographs of child victim's internal organs and other injuries); *State v. Todd*, 290 S.C. at 214, 349 S.E.2d at

340 (black and white photograph of the victim's right upper chest with the breast exposed showing the location of the bullet wound was admissible to corroborate pathologist's testimony regarding location of wound, and did not prejudice defendant, since there was explicit testimony that victim's blouse and brassiere had been removed by medical personnel when they arrived at scene in order to administer medical assistance); *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002) (upholding the admission of graphic autopsy photographs in homicide by child abuse case because they corroborated testimony and demonstrated the extent of the injuries); *State v. Ward*, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (upholding trial court's finding that probative value of two photographs illustrating graze wounds on the victim's back outweighed their prejudicial effect, since the jury's knowledge of the graze wound was necessary to rebut the defense's arguments about the angle of the shot); *State v Dial*, ___ S.E.2d ___, Op. No. 5157, 2013 WL 3456559 (Ct.App., Jul 10, 2013) (probative value of three autopsy photographs of five-month-old victim's head injuries was not outweighed by danger of unfair prejudice in prosecution for homicide by child abuse; where photographs were introduced to corroborate testimony of forensic pathologist who performed autopsy that victim's various injuries were inconsistent with an accidental injury as defendant claimed had occurred, and they were highly probative of whether victim was abused and whether abuse was cause of his death, both integral elements of charged offense); *State v. Nichols*, 325 S.C. 111, 121, 481 S.E.2d 118, 124 (1997) (admitting a photograph of the victim's face because it demonstrated the angle and distance from which the victim was shot).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since their introduction could not

reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). At worst, these photographs were cumulative to the other expert testimony concerning the victim's injuries. *See State v. Brazell*, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage") (citing *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942) (finding the photographs unnecessary but harmless because they were not prejudicial or inflammatory)).

In addition to the previously stated reasons, there was overwhelming evidence of Gray's and Reese's guilt, both individually and under a theory of accomplice liability. This evidence is discussed in **Argument II**, *infra*. On the other hand, Gray did not challenge that the injuries occurred, but when they occurred. He did this through Dr. Shaker's expert testimony that the fatal blow could have occurred in the first beating and the victim had a lucid interval in which he was ambulatory and could communicate He also benefited from and relied upon Reese's testimony that she and Gray did not have any contact with the victim until after he was lying motionless on the ground. Also, neither she nor Gray did anything that could have caused the victim's death.

Under these circumstances any error must be viewed as harmless. Therefore, Gray's argument is without merit and there was no abuse of discretion.

II. Assuming *arguendo* that the Court finds Gray's argument preserved for appellate review, the trial judge did not abuse his discretion by denying Gray's request to charge the jury on involuntary manslaughter because there was no evidence presented at trial that supported this instruction.

Gray's remaining argument is that the trial judge erred by refusing his request for a jury instruction on involuntary manslaughter, as a lesser-included offense of murder.[6] On appeal, she argues for the first time that involuntary manslaughter should have been charged because "there was evidence from which the jury could have concluded that Appellant Reese and co-defendant Gray, under the hand of one is the hand of all theory argued by the prosecution, were engaged in an unlawful assault and battery, not of a character of itself to cause death, but which resulted in the unintentional killing of Mack, without malice." Respondent submits that this argument is not preserved for appellate review because she did not present the same argument to, and obtain a ruling on it from, the trial judge. Alternatively, Respondent submits that the trial judge did not abuse his discretion by denying Reese's request to charge the jury on involuntary manslaughter because there was no evidence presented at trial that supported this instruction.

A. The evidence presented at trial.

1. The prosecution's case.

On the afternoon of February 13, 2010, two officers with the Columbia Police Department were dispatched to a fight involving several people on McDuffie Street. They were told that one person involved in the altercation was wearing a red hoodie or hat and that another person involved in it had on a black sweat shirt or hoodie and was carrying a red backpack or satchel. **Tr. pp. 175; 177-78; 192-96; 206.**

[6] Thus, this allegation has no bearing on his conviction and sentence for lynching in the first degree.

The officers did not find a fight when they first arrived at McDuffie Street. However, one officer saw an individual with a red backpack enter an apartment, as they drove through an apartment complex near this street. So, after notifying the other officer of what he was going to do, this officer went to that apartment and spoke with Ms. Valerie Goodwin. She told him that that "Bloom," Marcellius Brooks, had come into her apartment but was no longer there. **Tr. pp. 178-79; 182; 189-90; 196-98; 205-07**.

The officers then received a call that there was a person on the ground between two buildings in the apartment complex. When they investigated the call, they found an unconscious man, later identified as Kenneth Mack, lying on the ground. Mr. Mack looked like he had fallen and he had injuries to his nose and lip. Also, he did not respond to a sternum rub and it appeared that he was having a seizure.[7] So, the officers immediately called EMS, and the man was transported to Richland Memorial Hospital shortly before 3:30 p.m. **Tr. pp. 179-81; 184; 198-200; 382-88; 678-80**. This man, Mr. Kenneth Mack, was pronounced brain dead shortly after he arrived at the hospital. **Tr. pp. 679-80; 760**.

A number of witnesses testified at trial to the attacks that ultimately resulted in Mr. Mack's death. As can be expected, these eyewitnesses gave varying accounts of the attacks. The first eyewitness called by the State was Angelo "Ricky" Boyd. Boyd testified that he was sixteen years old when the beatings occurred and that he lives on McDuffie St. On February 13, 2010, Boyd met up with his friend, Marcellius Brooks, that afternoon and the two started walking to Cousins Mini Mart, on Forrest Dr., which was a very short distance from where the victim was later found. **Tr. pp. 242-45; 254; 523-25**.

[7] Mr. Kevin Thomas, a Richland County EMT who responded to the call testified that Mr. Mack "was having some posturing signs," and he explained that this is an involuntary response that is similar to a seizure "but it is more indicative of a brain injury. It's a different part of the brain than a seizure." **Tr. p. 386, lines 9-18**.

As the two were walking, they saw a man grabbing on the arm of Melquanna S., a/k/a "Lucy," Reese's thirteen year old daughter. "She was yelling 'Stop.'" The man did not stop and, eventually, he "threw her to the ground." Boyd is a friend of Lucy and her brother. So, he and Brooks intervened. Brooks tackled the man and held him down. Boyd kicked the man's face or body with his Timberland boots and, at the insistence of Brooks and Boyd, Lucy hit him "a couple" of times while Brooks held him down. **Tr. pp. 245-48; 254-55; 260-63.**

By this time, a crowd had gathered. After this beating, Brooks and Boyd took Lucy to Cousins Mini Mart, to let Reese know about what had happened. They also let her know that "it was already good." Reese looked as if she was going to finish her video poker game.[8] Boyd and Brooks then both left the store. **Tr. pp. 248-54; 256-57.**

Police reviewed the store's surveillance video and could see several men came into the store and approach a woman who was playing video poker. The men then left and headed back towards the apartment complex. **Tr. pp. 457-58; 523-28; 798-99; State's Exhibit 78.** Malik Akbar, one of the store's co-owners at the time testified that he ran the store's restaurant. He was familiar with Reese, Gray, and Brooks, and that Reese would come into the store and play video poker. **Tr. pp. 523-25; 530-31.**

Mr. Akbar testified that he saw Reese playing video poker there on the afternoon of February 13th. At some point, a group came into the store and Mr. Akbar saw the group, including Lucy and Brooks, talking to Reese and "dancing around" where Reese sat. Also, there was "quiet fussing." Lucy and Reese left a short time later. **Tr. pp. 532-39; 541-42.**

[8] While Boyd did not recall doing so, he admitted that he could have told police that upon hearing that the man was harassing her daughter, Reese "jumped up and said, 'Hell, no.'" He also could have told police that Reese stayed in the store and finished her video poker game. **Tr. pp. 250-51; 253.**

Police also reviewed a video of a nearby fish market. **State's Exhibit 93**. This video "corroborated that Brooks went to the store after the attack, "told Ms. Reese about the assault with her daughter and that she had left with her daughter and that she was on the cell phone at the time when she walked out the door." However, there were technical problems when police tried to seize the video. **Tr. pp. 773-75**.

Ms. Donnetti Perry lives in the Columbia apartment complex where the crimes occurred, across the hall from Gray's father.[9] Her friend, Sanovia Thompson, came to her door about mid-afternoon on February 13, 2010, and told her that something was happening outside. When Ms. Perry went to her door and looked outside, she saw Mr. Mack having a conversation with "Six," or Gray.[10] **Tr. pp. 274-79**.

Gray was apparently unaware of the previous difficulty at that time and Gray asked Mr. Mack what had happened to him because Mr. Mack looked like he had been in a fight. As soon as Gray received a phone call, however, Gray used his feet to "clip" or undercut Mr. Mack's feet from under Mack. Mr. Mack immediately fell to the ground, striking his head. **Tr. pp. 279-81**.

Although Mr. Mack stayed on the ground, Gray repeatedly kicked him "all over." Gray also cussed him and asked him what he had done to Gray's niece. At some point, Reese came from her apartment and joined the fracas. Reese said, "'yes, that's him' and started kicking him [while] saying ... 'I'm going to teach you for messing with my daughter' ... [or] something similar to that." Mr. Mack never got off of the ground or "put up a fight." Nevertheless, Reese

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[9] Although not redacted in Gray's Initial Brief of Appellant, Respondent has not identified the apartment complex by name because many of the eyewitnesses, such as Ms. Perry, lived in complex. *See In re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, 375 S.C. 56, 57, 650 S.E.2d 462, 462 (2007).

[10] Ms. Perry did not know Mr. Mack at the time and she was unaware of the first assault. **Tr. pp. 295-96**.

got a metal chair off of a nearby porch, and both she and Gray hit Mr. Mack with it "two or three times." **Tr. pp. 281-87; 301; 303-06.**[11]

By then, a crowd had gathered. Eventually, the siblings stopped their savage onslaught and walked back to their respective apartments. Perry testified that she could see that Mr. Mack was injured "all over," and that blood was coming from his mouth. Thompson called the police. **Tr. pp. 287-90.**

Ms. Mary Anderson testified that her deceased sister also lived in the same apartment complex in February 2010, and that she had visited her sister on the afternoon of February 13th. As she was leaving, she saw Reese and Gray[12] "beating the boy down [on] the ground[,] stomping [him], kicking him, doing everything and beating him with an iron chair" while the victim "wasn't moving at all." [13] She was unable to recall who used the chair. However, but she had indicated in her statement to police that both defendants did. Reese was wearing a pair of boots. **Tr. pp. 347-53; 361; 367-68; 379-80.**

As Reese was attacking Mr. Mack, Ms. Anderson heard Reese say, "motherfucker, why [did] you approach my 13-year-old?" The attack "[l]asted for a while" and was so intense that Ms. Anderson momentarily turned away from it and eventually had to leave. She was concerned

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[11] Police seized the chair (**State's Exhibit 72**) and it was swabbed for DNA. **Tr. pp. 444-46; 448-49.** Subsequent testing of these swabs by SLED DNA analyst Katie Ukra revealed that a presumptive test for the presence of blood was positive on several swabs. More importantly, a partial DNA profile was developed from the bottom seat of the chair and this partial profile matched the DNA profile of Mr. Mack, the victim. "The probability of randomly selecting an unrelated individual having a DNA profile matching this item is one in approximately twenty-five million." **Tr. pp. 605-12.** Respondent has not designated **State's Exhibit 72** as part of the record, but would represent as an officer of the Court that the chair is both sturdy and sufficiently heavy that using this object to strike another person is clearly indicative of malice.

[12] She knew them through their father and recognized both. She identified Gray as "Six." **Tr. p. 349.**

[13] She did not know the victim but knew that he worked at a Forest Drive barber shop. **Tr. p. 351.**

that Reese and Gray were going to kill the man. After Reese and Gray stopped their attack, they walked to their father's apartment. **Tr. pp. 353-56; 361; 368.**

In February 2010, Ms. Kara Chase was homeless but her best friend, Synovia Thompson, lived in the apartment complex where the beatings occurred.[14] On the afternoon of February 13th, she and Ms. Thompson were outside and they had one of the children of Ms. Thompson's cousin with them. Ms. Chase remembered seeing a man whom she did not know, Mr. Mack, walking down the street that runs through the complex. This man had a "disagreement" with "Six," *i.e.*, Gray, over something the man had said. Gray grabbed the man and told him, "'you['re] gonna talk to me." **Tr. pp. 393-99.**

The grab "wasn't forceful but it looked like Mr. Mack didn't want to go with him either." Something else was said and Gray hit Mr. Mack hard enough to take Mr. Mack's feet out from under him. Mr. Mack fell to the ground and did not get up. **Tr. pp. 399-401; 403.**[15]

"That's where it kind of gets blurry to me because I don't remember exactly what happened from right there while the man was lying on that particular area. ... I know when the man hit the ground that [Gray] walked off." Ms. Chase remembered Mr. Mack saying, "I'm not going anywhere;" Reese saying, "'That's him;'" and Reese hitting Mr. Mack. She also remembered telling police that it looked like Mack hit his head when he fell to the ground and was "out cold" after this point, and that "the other man continued to kick and stomp the man in

[14] She was blind and on dialysis at the time of trial. **Tr. p. 401, lines 22-23.**

[15] Ms. Chase's daughter is the best friend of Reese's daughter (**Tr. p. 402**) and, unfortunately because of that friendship, her physical limitations or because Reese, Gray and Lucy S. are all affiliated with the Bloods (**Tr. p. 765; 799-800; 827; 830**), Ms. Chase's trial testimony deviated wildly from her statements to police, beginning at this point forward. *See also* **Tr. pp. 421, lines 22-24**) (admitting that she would like to do what she could to help the defendants). Because the evidence must be viewed in the light most favorable to the accused in determining whether or not to submit lesser included offenses, *see State v. Meckler*, 379 S.C. 12, 15, 664 S.E.2d 477, 479 (2008) ("A trial court should refuse to charge the lesser-included offense of involuntary manslaughter only where there is no evidence the defendant committed the lesser offense"), however, Respondent has discussed the remainder of it.

his face once the female stopped." However, she did not remember Reese striking Mr. Mack with a chair or even picking up a chair. **Tr. pp. 401-07; 410; 412-13; 422-24.**

During the attack, Gray hit Mr. Mack with the chair. Also, Gray was wearing construction boots in the attack. Once the attack ended, Mr. Mack just lay on the ground. "Either he was faking it, so that way nothing else would happen to him, or he was seriously hurt." **Tr. pp. 407-08; 412-13.**

Because of the inconsistencies between Ms. Chase's testimony and what she told police, the State was allowed to introduce and publish her February 16, 2010 statement to police, as **State's Exhibit 88.** In her statement, she stated that:

> I saw the victim in between ... [two] buildings of [the apartment complex] having a conversation with another man. The other man grabbed the victim and went to walk him down the sidewalk. The victim snatched back and the other man swept the victim from [off] his feet causing the victim to hit his head on the pavement ... . A few seconds later a female runs up the street saying "That's him." She begins kicking the man repeatedly, picking up an old metal chair, throwing it on top of the victim. The other man continued to kick and stomp the man in his face. Once the female stopped, the victim laid on the ground the whole time this was occurring."

Tr. p. 750, lines 1-16. *See also* **State's Exhibit 88, R. pp. ____-__.**[16]

She did not know the victim but she identified the male attacker as "Six" and the female attacker as his sister. Likewise, she had heard Mr. Mack say, "I am not going anywhere. Just do what you're doing to do to me here." Further, she indicated that Mr. Mack "did not have a chance to fight back or flee" and that "Six" was wearing construction boots. **Tr. pp. 750-52.**

On February 13, 2010, Amber Hardy was the pharmacy manager at the CVS pharmacy located on Forest Drive and near the apartment complex. While she was in her car that afternoon, following a shoplifter and on the phone with police, she saw four black males and a black female

[16] Also, an investigator with the Fifth Circuit Solicitor's Office interviewed Ms. Chase on the day before the trial started. She confirmed at that time that her February 16th statement was correct. **Tr. pp. 732-36; 745.**

taking turns kicking and punching another black male on McDuffie Street. The victim was trying to defend himself. Although the beating only lasted for about "five minutes," Ms. Hardy testified that "[i]t seemed like forever." **Tr. pp. 474-78; 480-83; 490**.

After the "brutal" attack was over, the attackers walked away from the victim and to the open air market. The victim could stand after the attack. However, he was very unsteady on his feet. Ms. Hardy returned to CVS. **Tr. pp. 477-78; 489-90**.

Marcellius Brooks, a/k/a "Bloom," testified that he had been charged with murder in this case, but that he cooperated with law enforcement and was testifying because he was innocent of killing Mr. Mack. **Tr. p. 572, line 1 – p. 573, line 9; p. 575, lines 3-14; p. 578, lines 16 – p. 579, line 1; p. 592, lines 14-24**. Brooks used to live in the apartment complex where the beatings occurred and he was familiar "with the open air market ... on Forest Drive," Cousins. He was friends with Reese and he used to be her next door neighbor. He also knew that Reese had a thirteen year old daughter named Lucy. He "knew of" Gray, to whom he referred as "Six." **Tr. pp. 552-56; 580**.

As Brooks was walking down McDuffie Street on the afternoon of February 13, 2010, he saw Lucy involved in an altercation with a man that he had never seen. At first, she and the man were talking, but she soon slapped him. After that, the man picked up Lucy and slammed her on the ground. In response, Brooks decided to help Lucy. **Tr. pp. 556-58; 582**.

Brooks "bum rushed" the man, which he described as "tackling him off of her." Brooks admitted that he hit the man twice "[w]ith a closed fist" while he held the man down. Brooks denied kicking the man or anyone else participating except for Lucy, whom Brooks persuaded to

kick the man several times. However, Brooks was on top of the man and she could not kick him cleanly. As they were on the ground, a crowd started to gather. **Tr. pp. 558-61.**

At some point, Boyd pulled Brooks off of the man. The man ran away from Brooks and "towards the bottom of [the complex]." The man had a busted lip. **Tr. pp. 562; 569; 583; 590-91.**

Brooks then got Lucy, and he and Boyd walked her to the open air market because Reese was there playing video poker and he wanted to tell Reese about what happened. The crowd followed them. When Brooks told Reese what had happened, she was "upset." Reese asked who the man was, and both Brooks and Lucy said that they did not know. **Tr. pp. 562-65; 597.**

Reese and Lucy soon left the store. She called someone on her cell phone as she was leaving, but Brooks did not know whom she had called. When Reese and Lucy left the store, Reese was mad and she walked down Forest Drive. Brooks did not accompany them. Instead, he walked down McDuffie Street and went to Valerie Goodwin's apartment, as he had previously planned to do, and got some money to give to her incarcerated son. Brooks' mother then picked him up and took him to her home. **Tr. pp. 565-70.**

The police called Brooks' phone the following day and he turned himself in on February 15th. The charges against him were still pending at the time of trial and he had not received any promises or consideration on his charges, in exchange for his testimony. **Tr. pp. 570-76; 578-79.**

Ms. Sanovia Thompson testified that she lives in the apartment complex where the beatings occurred. On the afternoon of February 13, 2010, Ms. Thompson was babysitting her cousin and five children. The children were running around playing outside, but Ms. Thompson

"was back and forth" because Ms. Chase was staying with her at the time. As Ms. Thompson was sweeping her stairs outside, she saw a man whom she did not know walking on the sidewalk on Forest Drive, "with his hand over his head. He appeared to be intoxicated ... ." **Tr. pp. 635-38.**

Although the man could talk, he "had a knot on his head and it obviously was bleeding. He was kind of like staggering." After the man spoke to someone else, Gray looked at him and asked, "'[w]hat happened to you?'" Gray then started to go "on about his business. The man "said something about some young b-i-t-c-h up the street." Just then, Gray's telephone rang and he went into his father's apartment answer it. **Tr. pp. 637-41.**

As soon as Gray came back outside, his demeanor had changed. He said, "'you put your hand on my niece.' He grabbed [the man] on the collar. He said, 'we're going to talk to my sister.'"[17] Ms. Thompson followed the men, and when she saw them again, the man was on the ground. Reese was walking up the sidewalk and "looked like she was upset, maybe crying." **Tr. pp. 642-45; 653.**

Because Ms. Thompson was unsure about what would happen next, she took the children inside. When she came back out, she saw Reese ask the man, "'Why did you put your hand on my baby' or something like that. She kicked him on the leg one or two times." Then, Reese and Gray walked away from the man, who had never defended himself and did not get up. Ms. Thompson called 911 and Ms. Chase reported that the man was lying on the ground. **Tr. pp. 645-47; 650.**[18]

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[17] Thompson had known Reese for roughly five years at the time. **Tr. p. 642.**

[18] At some point, Ms. Thompson noticed that a neighbor's chair was in the grass instead of where it was normally kept. **Tr. p. 646.**

Mr. Issac Weathers testified that he lived in the same apartment complex in February 2010, and that he witnessed a fight on February 13th. "A young lady and a guy [were] arguing." At first, Mr. Weathers thought that they were playing. They got "tangled up and they fell." Then, "a bunch of guys just went and jumped on him." Brooks or "Bloom" was the first person to hit the man. The girl also hit him at Brooks' invitation for her to "'get your licks in.'" **Tr. pp. 656-58; 662; 664.**

The man who was being beaten tried to convince his attackers that he and Lucy had been playing. Also, he tried to defend himself. When the attackers stopped beating him, the man "jumped up and ran." The attackers went to the store. Mr. Weathers heard Brooks say that he did not get the man good enough. **Tr. pp. 658-60; 665; 670-71.**

Dr. Bradley Marcus testified that he is a forensic pathologist and he works as the coroner and chief medical examiner for Richland County. **Tr. p. 672-73; 677.** On February 16, 2010, Dr. Marcus performed an autopsy on Kenneth Mack.[19] Dr. Marcus detailed the injuries that he found on autopsy through diagrams (**State's Exhibit 86-87**) and photographs (**State's Exhibits 51-57** and **80-83**). *See* **Argument I.** There was a contusion caused by blunt force trauma on the right portion of the face (**State's Exhibit 52**); a laceration over the left eye (**State's Exhibit 53**); a laceration to the side of the left eyebrow (**State's Exhibit 53**); sclera hemorrhaging in whites of the eyes (**State's Exhibit 54**); an injury to his inner lip that had hemorrhaged (**State's Exhibit 55**); hemorrhaging along the scalp on the right side; hemorrhaging in the scalp on the back of the head; and hemorrhaging in the skin underneath the blunt force trauma contusion. **Tr. pp. 681-89; 696-98.**

[19] Although Mr. Mack was declared brain dead shortly after arriving at the hospital on February 13th, he was kept on life support until his organs could be harvested. **Tr. pp. 679-80.**

Dr. Marcus' internal examination focused on the head area and he concluded that the cause of death was a closed head injury due to blunt force trauma to the head. When he removed the skull cap and looked at the victim's brain, Dr. Marcus found "a significant injury and the ultimate cause of his death. ... There was a massive amount of subdural hemorrhage, a massive area of blood around the left area of the head." On the right, Dr. Marcus likewise found a subarachnoid hemorrhage and "cerebral contusions, which is actually hemorrhage in the brain itself." This is usually caused by blunt force trauma and required a "significant amount of trauma." **Tr. pp. 698-703; 706; 710-11; 716-17**. *See also* **State's Exhibits 80-83**.

Dr. Marcus explained that a person can live with trauma on the scalp but a person cannot live with the hemorrhage on the brain, itself. Dr. Marcus opined that the victim could have possibly lived if there had only been a subdural hemorrhage. **Tr. pp. 703-05**.

Dr. Marcus also found a skull fracture "in the right parietal area," or "[t]owards the back of the head" and in the same area where he found the cerebral contusion and the hemorrhaging. Such an injury would require a "[s]ignificant amount of force" and it was "[a]bsolutely" consistent with a person having his feet swept out from under him and landing on his head. **Tr. pp. 699-700; 704-05; 710-11; 712**.

The injuries that Dr. Marcus found on autopsy were also consistent with the "posturing observed by the EMT. Dr. Marcus opined that "[t]he second assault certainly contributed to [the victim's] death in this case," but he could not distinguish which injuries were sustained in the first attack from those injuries that were sustained in the second attack. **Tr. pp. 706-09; 712; 719**.

On cross-examination, Reese elicited that a toxicology screen on the victim's blood reflected that he had marijuana and .125 mg. of Lorazepam, or Ativan in his system. Lorazepam is an anti-anxiety medication that is used to relax people. This level of Lorazepam was "in the midrange of therapeutic" and would not have contributed to the victim's death. **Tr. pp. 712-15; 727.**[20]

Inv. William Pegram testified that he is the supervisor of the City of Columbia Police Department's violent crimes unit and that he was the lead investigator in this case. The victim was already brain dead by the time he reached the hospital on February 13, 2010. **Tr. pp. 758-60.** As part of the investigation, a search warrant was issued and the records obtained for Brook's Nextel cell phone. **Tr. p. 771;** *see also* **State's Exhibit 75** (portions of Brooks' records). Also, investigators spoke to many of the witnesses, including Brooks, as well as Reese and her daughter, Lucy.[21] Police were unaware of the second attack when Reese and her daughter were questioned. **Tr. pp. 769-71; 775-81.**

Because Reese's calls from her cell phone became important, Inv. Pegram testified that a search warrant was likewise issued and the records obtained for her Nextel cell phone. **Tr. pp. 786-87;** *see also* **State's Exhibit 76** (portions of Reese's records). He explained that there was a phone call from Reese to Brooks at 3:11 p.m. on the 13th and other calls between them that day.

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[20] Dr. Clay Nichols, a forensic pathologist, testified that he was the chief medical examiner for Richland County when the autopsy was performed. In that role, he had reviewed the autopsy procedures followed by Dr. Marcus and concluded that it was correctly performed. **Tr. pp. 1008-11.** Dr. Nichols had also reviewed Dr. Marcus' findings and the history that had been provided. He explained that "[t]he timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete, resulting in closed head injury. The first assault, the evidence isn't there for a head injury. The second assault, there is real good evidence for a head injury." **Tr. p. 1012, lines 8-15.** Dr. Nichols had discussed his opinion with both the coroner's office and police and he adhered to that opinion. **Tr. p. 1012, lines 16-25.**

[21] Lucy was interviewed on February 14th and provided information about Brooks. A warrant was obtained for Brooks' arrest on the 15th. **Tr. pp. 769-70.** Reese had not mentioned being involved in an incident involving a chair and police were focusing on Brooks because they did not know that there had been a second attack. **Tr. pp. 1036-40.**

This showed deception in that Brooks and Reese knew each other, whereas they had tried to distance themselves from each other when interviewed. There was also a call from Reese to her father's telephone at 3:07 p.m. on the 13th, which police believed corroborated information that Gray had received a call before his attack on the victim. **Tr. pp. 788-91**.

Among the witnesses presented in reply, the State presented SLED toxicologist Quintas Young, who testified that he had analyzed blood samples of the victim. There was "a negative blood alcohol." However, the drug screen was "positive for [benzodiazepines] and tetrahydrocannabinos[,] which we found later to be Lorazepam and a [metabolite] of marijuana/THC." Mr. Young indicated that the carboxyl THC that was present was "inactive" or non-interfering. This just meant that there was marijuana use in the past, and that it could possibly have been a week earlier, depending on the frequency of use. **Tr. pp. 1015-16; 1018-20**.

Mr. Young further explained that Lorazepam, or Ativan, is in a class of drugs called "benzodiazepines." Benzodiazepines are commonly used to treat anxiety. However, "Lorazepam is normally administered in hospitals for head injuries ... [because] it [slows] the brain activity to prevent brain swelling." Ativan is "a very simple central nervous system depressant similar to that of alcohol" and the amount of Ativan found in Mr. Mack's system fell within the therapeutic range. Even combined with Ativan, the THC found in Mr. Mack's system "would not play a role in impairment" because it was inactive. **Tr. pp. 1020-22**.

2. Gray's evidence.

Gray's first witness was Dr. Adel Shaker, a forensic pathologist. Dr. Shaker was critical of the manner in which the autopsy had been performed. However, he agreed that the cause of death was blunt force trauma to the head and that he could not determine which attack led to the

death. However, Dr. Shaker opined that the fatal blow could have been struck in the attack McDuffie Street and that the victim could have experienced a lucid interval before herniation due to bleeding of the brain. Dr. Shaker further opined that, during the lucid interval, the victim could have walked to the location where the second attack occurred and then collapsed. **Tr. pp. 844; 849-51; 854-60; 866-67; 892-93; 895.**

Dr. Shaker further opined that the injuries he observed were not consistent with being beaten with a metal chair. Also, he hypothesized that the level of benzodiazepine in the victim's system, when combined with marijuana could have made the victim so unsteady on his feet that he fell. However, the drugs were unrelated to the cause of death and he conceded that hospital personnel had given the victim Ativan when he was admitted. **Tr. pp. 852-53; 857; 863; 883; 889; 900.**

Ms. Kiki Burns testified that she had witnessed an incident on February 13, 2010, and that she had given a statement to police. She was working at a BP gas station immediately across Forest Drive from McDuffie Street. As she was waiting on customers, she saw "four or five people running up the street." One man was in front of the others, and the others wore black hoods. **Tr. pp. 993-96.**

The man in front ran to his left and he "must have tripped over a chain or something and he fell." The people who had chased him then beat him. Ms. Burns also saw a black female involved in the beating. After the attackers had walked away, the man tried to stand. However, "he stumbled back down." Ms. Burns "went to turn around and look and he was gone." **Tr. pp. 996-97; 1002-04.**

3. Reese's evidence.

Dr. Sandra Conradi, Reese's forensic pathologist, testified that she had reviewed the autopsy report, the coroner's report, the investigative reports from the City of Columbia Police Department, the laboratory report and the photographs in this case. **Tr. pp. 912-13**. Based upon Dr. Conradi's review of this evidence, she opined that the cause of death was brain injury, as the result of blunt force trauma to the head. **Tr. pp. 915-16**.

She further opined that:

> Mr. Mack was fatally injured in the second fight and in my opinion, he struck, his head on a hard surface, fractured his skull, suffered very severe head injuries including bleeding between the scalp and his skull, bleeding under the skull, between the skull and the brain and he had bruising or contusions of his brain along with the other fractures and associated abrasions and contusions of his face and mouth, which were not fatal. The fatal injury was the brain injury. He suffered that from falling and being propelled onto a hard surface on the back of his head.

App. p. 914, lines 8-20. *See also* **Tr. p. 918, line 24 – p. 919, line 6**.

She explained that it takes "quite a severe" force to fracture a skull, and this could not be caused by simply falling to the ground. Rather, "you have to be propelled very hard to fracture the skull as this Mr. Mack did on the right side of his head and causing the degree of brain bruising and bleeding that he had." **Tr. p. 916, lines 17-25**.

Melquanna "Lucy" S. testified that she was thirteen years old in February 2010. She had planned to get her nails done, at a salon on Forest Drive, on the afternoon of February 13th. However, the store was locked and a lady told her that it would not be open until Thursday.[22] As she was standing there, a man approached her and said that she could come in his house. Although she did not know the man at the time, she later learned that this man was Mr. Mack. **Tr. pp. 921-26**.

[22] A review of a 2010 calendar reflects that February 13, 2010, was a Saturday.

Lucy went into the open air market and told her mother that she could not get her nails done that day and she bought some potato chips. As she was walking home, Mr. Mack approached her again and asked her if he could have some chips. Lucy told him to leave her alone because she was "trying to avoid having a conversation with him." However, he stopped her in her tracks and was "jerking" her around. **Tr. pp. 926-27**.

He also threw a snowball at her. When she told him that she was going to get her mother, he grabbed her with his right hand. In response, Lucy hit him with her right hand. Mr. Mack then picked her up, threw her between two bushes and they began "tussling." At that point, Brooks came over, "got [Mr. Mack] off of me, hit him a couple of times and then some dudes came and jumped on him." **Tr. p. 927**.

Lucy also got in "some licks," meaning that she hit him "a couple of times" because she was upset and thought that Mr. Mack had "harassed" her.[23] After the fight, Brooks took her to the open air market, with the other participants in the beating following. They told her mother what had occurred, and Reese took Lucy home. When they got home Lucy was crying and she told her mother that the man had attacked her. Reese was also upset, but they did not call the police. **Tr. pp. 927-29; 933-34**.

The remaining defense witness was Robin Reese, who testified that she went to the open air market on February 13th to play a video game. Lucy "was on punishment" that day because of her grades but Reese allowed her to go to the nail salon because it was close to Valentine's Day. When Lucy came back and told her the salon was closed, Reese told her to go home. Lucy left

[23] She admitted on cross-examination that she had told police that she had also kicked him "a time or two. **Tr. p. 932, lines 4-7**.

after buying a bag of potato chips with money that Reese had given to her. Reese stayed and continued playing the video game. **Tr. pp. 936-38.**

Between twenty and twenty-five minutes later, Lucy came back, accompanied by Brooks and another man. At first, Reese was mad because she thought that Lucy had disobeyed her. However, Brooks, who had been Reese's neighbor, told her that he had just pulled a man off of Lucy. Lucy was crying and wet. Upset by what she had heard, Reese "wanted to know what happened and what do you mean 'pulled off?'" **Tr. pp. 938-40; 955-56; 959; 962-63.**[24]

Reese got the tickets for her video game, took them to the counter and cashed them in. She and Lucy then left the open air market. She tried to call her brother but her father answered the phone. Reese hung up because he was too intoxicated to speak. **Tr. pp. 941-42; 955; 964.**

> I still wasn't satisfied. The only thing I know at this time was a grown man on top of my daughter. So I called [Brooks] and asked him what happened. He said that he really didn't know, that he'd just seen that the guy was tugging at her. He knew that was Lucy but he didn't know that grown man.
>
> So after he seen it, they told me that it happened like two or three times that he had pulled on her coat. She'd turned around and hit him. He scooped her up and was on top of her and that's when [Brooks] came to her.
>
> I was never a part of this. This is what came back to me.

App. p. 942, line 18 – p. 943, line 6.[25]

Following this conversation, Reese walked Lucy back home. After talking to Lucy to make sure that she had not been touched sexually, Reese "told her that I was going back to the store." Reese left the apartment. Instead of going back to the store, however, she went to an area where she was told the man had gone and where a crowd had gathered because she wanted to know who had been on top of Lucy. **Tr. pp. 943-44.**

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[24] She did not think to call the police. **Tr. pp. 963; 969-70.**

[25] Reese also unsuccessfully attempted to call her then-husband, Lucy's stepfather. **Tr. p. 943.**

Gray was on his way back from the Lizard's Thicket at that point. By the time Reese first saw the man, he was "[lying] on the ground and he had his hands ...covering his face." The man was "all bloodied up," but Reese did not see how he got that way. Also, she never saw the man's face but his clothes matched the description that Lucy had given her. **Tr. pp. 944-46; 976-78.**

> So I was raising hell, excuse me, excuse me, and I just wanted to know ... 'Why [were] you on top of her? Why would you even be hav[ing] a conversation or anything with a thirteen year old.' But he was just [lying] there. When I ran up, I tried to kick him but I slipped and fell because ... [of] the ice and stuff.
>
> So instead of getting back up, I just reached over and I slapped him across his face and told him 'you stay away from my kid, you need to round grown women, there's grown people out here that you can be around.'

Tr. p. 946, lines 8-19.

According to Reese, this is when Gray first appeared at the scene and he helped her back to her feet. While she was still upset, he told her to let the police handle the matter. Reese saw the metal chair in front of an apartment and she slung it onto the grass. It did not, however, make contact with Mr. Mack's body. The man was not moving when Reese walked back to her apartment. **Tr. pp. 946-47; 977-78.**

B. The charge conference.

During Gray's case, the trial judge asked the parties to submit their requests to charge and they did so. **Tr. p. 991, line 10 – p. 992, line 11.**

After the State rested its case in reply, the trial judge held a charge conference. He began by noting that the only issue for discussion was whether or not he should instruct the jury on involuntary manslaughter. Also, he asked, "[W]hat is involuntary about this death/killing when [Reese] says she didn't do anything to kill him?" **Tr. p. 1044, lines 9-19.**

Reese's counsel and the trial judge then had the following exchange:

MR. FARLEY: ... Your Honor, I would just say that we believe Ms. Reese does deserve a charge of involuntary manslaughter given the facts that have been put forth by the witnesses in this case. We believe she has done nothing that could have led to the intentional death of the victim in this case.

THE COURT: We are not talking about the intentional.

MR. FARLEY: Yes, sir.

THE COURT: We're talking about – I hate to use the word "accident", but it's very similar to an accident.

MR. FARLEY: Well, again, Your Honor, I think that's exactly the case. As far as the actions of Ms. Reese, ---

THE COURT: She doesn't even admit that she did anything to kill him.

MR. FARLEY: That's correct. So if death is the end result, I think that has to be considered involuntary manslaughter. She did nothing to facilitate the death given the facts that she was involved with.

THE COURT: But there has to be a killing. For involuntary manslaughter, there has to be a killing, first, and then there has to be an unlawful act, not [ ]tending to cause death or great bodily harm.

If I assume that the unlawful act that she admits is throwing the chair, she says it didn't hit him. She says it didn't kill him.

Now, if she had said on the stand 'I threw a chair, but I didn't mean to hit him but it hit him and killed him', then I've got the link between the killing and her act. But she says none of that happened. She says she got age angry (sic) and threw a chair that did not hit him, so there's no killing as a result of ... involuntary actions. There has to be both. There has to be a killing and it has to be done involuntarily.

It's the shooting of an unintended victim a mile away that the bullet comes down and kills somebody.

But she doesn't admit the killing. She admits an unlawful act but there's no killing. It's got to be both to warrant an involuntary manslaughter charge.

MR. FARLEY: I understand.

THE COURT: If I look at the testimony in the light most favorable to her and if the jury believes everything she said, there's still not an involuntary killing because she doesn't admit to killing.

She says she didn't mean[] to kill him. She says that if something killed him, it was not me. So it's not to be a not guilty or involuntary or voluntary or murder. So ---

MR. FARLEY: I understand, Your Honor.

THE COURT: That's the way I read the case law.

MR. FARLEY: I understand, Your Honor. Thank you.

THE COURT: All right. I respectfully deny your request to charge involuntary because there's been no involuntary killing.

Tr. p. 1045, line 5 – p. 1047, line 19.

Gray then put his requests-to-charge on the record. He did not further argue the request for a charge on involuntary manslaughter. Of relevance to the present issue, the trial judge granted the request for a voluntary manslaughter charge but he declined to give an involuntary manslaughter instruction for the same reasons as he had refused Reese's request. **Tr. p. 1047, line 23 – p. 10487, line 20**.

C. Discussion.

1. Reese's argument is procedurally barred.

On appeal, Gray claims, for the first time, that involuntary manslaughter should have been charged because

> Gray's conduct, at worst, constituted the misdemeanors of either assault and battery of a high and aggravated nature or simple assault and battery. ... If Chase's testimony is to be believed, as it must for purposes of this analysis, Gray only attempted to swing at Mack and Mack fell down. This type of assault would not normally cause great bodily injury.

Brief of Appellant, pp. 20-21. He also cites to *State v. Chatman*, 336 S.C. 149, IS2, S19 S.E.2d 100, 101 (1999), in support of his position. However, his argument is not preserved for appellate review because he did not present the same argument to, and obtain a ruling on it from, the trial judge.

It is a well settled rule in this state that an issue is not preserved for appellate review unless it is both presented to and passed upon by the trial judge. *E.g.*, *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (an issue must be raised to and ruled upon by trial court to be preserved for appellate review); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Fleming*, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal"). An analogous rule of appellate procedure is that an appellant may not raise a different argument on appeal in support of an objection or motion from the argument that he or she raised in the trial court. *See, e.g., State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Beekman*, ___ S.E.2d ____, ___ 2013 WL 3199303, *5 (S.C. Ct.App. Jun. 24, 2013) ("Because Beekman's only objection at trial on the basis that it was prior bad act evidence related to evidence of prior inappropriate touchings of Stepson, his argument on appeal that the substantive evidence surrounding the charges as to Stepdaughter and Stepson were inadmissible in the joint trial as they did not fall within an exception allowing prior bad act evidence is not preserved for our review"). *See also State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) (issue not preserved if party argues one ground for objection at trial and a different ground on appeal);

State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (same). Finally, a motion or objection must be clearly stated at trial, so the party alerts the trial judge of the precise nature of why the objection or motion should be granted. *E.g.*, *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

As shown, neither Reese nor Gray made this argument in the trial court. **Tr. pp. 1044-47**. Therefore, the foregoing authorities make clear that Gray's argument is not properly before this Court on appeal.

2. The trial judge did not err.

Yet, even assuming *arguendo* that this Court finds his argument is preserved for appellate review, it is without merit. The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). In determining whether to charge the lesser included offense of manslaughter, the trial judge must view the evidence in the light most favorable to the defendant. *Id.* "[T]o warrant a court's eliminating the offense of [involuntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter." *State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct.App. 2010) (emphasis in original).

Under South Carolina law, involuntary manslaughter is the killing of another without malice and unintentionally **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. Murray*, 404 S.C. 300, ___, 744 S.E.2d 607,

609 (Ct.App. 2013); *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Respondent submits that Gray's problem is that there is no evidence in the record that would have entitled him to an instruction on involuntary manslaughter because she does not fit in either of these two (2) categories.

First, Reese's testimony was that neither she nor Gray did anything that would have caused the victim's death. She claimed that she did not see the victim until he was already motionless on the ground, and that Gray did not arrive on the scene until after she had missed in her effort to kick the victim and had simply slapped him. Although Reese's pathologist, Dr. Conradi, testified that the victim received the fatal blow when he struck his head after being knocked from his feet in the second attack, under Reese's testimony, neither she nor Gray caused this to occur.

Likewise, the opinion of Gray's pathologist, Dr. Shaker, did not support a manslaughter instruction. Dr. Shaker further distanced Gray from culpability by hypothesizing that the fatal blow was received in the initial beating and that the victim had a lucid interval during which he walked and communicated before collapsing where he was found. Indeed, the problem correctly recognized by the trial judge was that there was no causal connection between Reese's testimony that would show a misdemeanor assault and battery and the victim's death.

Further, Respondent submits that the State's evidence was vastly unlike the factual scenario in *Chapman* and did not support the requested charge. There was not a "trivial fight," as Gray suggests. **Brief of Appellant 21**. Under the State's evidence, Reese and Gray were both guilty of murder under a theory of accomplice liability. *See State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) ("'Under the 'hand of one is the hand of all'

theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.' ... '[The defendant's] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal'") (citations omitted). The State's evidence showed that after the first beating, which was administered for harassing sixteen year old Lucy S., the victim had visible injuries and he was very unsteady on his feet. His injuries included an injury to his head. However, he was alive, was walking and could communicate.

Gray had seen this and, initially, wondered what had happened to the victim. Gray did not become hostile until he received a telephone call, inferably from his sister, alerting him to what Mr. Mack had done to Lucy. Meanwhile, Reese had formulated a plan to, at the least, severely beat Mr. Mack after she had been told what he had done and even though she was aware that he had already been beaten.

Thereafter, Gray swept Mr. Mack's feet out from under him. This caused him to fall and, inferably, hit his head because he never made any effort to defend himself or escape the maliciously brutal attack that ensued. Either Reese or Gray, or both of them, repeatedly kicked and stomped on the victim with construction boots, and beat him one or more times with a metal chair.

In *Chapman*, on the other hand, the appellant was engaged in an assault and battery. However, the Court found that his act of pressing his shoulder into the victim's neck, during the course of their fight, was not the type of action naturally tending to cause death or great bodily harm. *Chapman*, 336 S.C. at 152-153, 509 S.E.2d at 101. Here, though, the injuries suffered by

the victim and the testimony of the various eyewitnesses as to how those injuries were inflicted belie any contention that the defendants' actions were not the type of action naturally tending to cause death or great bodily harm.

Moreover, Reese and Gray were engaged in at least two felonies at the time the injuries were inflicted: lynching under S.C. Code Ann. § 16-3-210 (Supp. 2009)[26] and assault and battery with intent to kill.[27]

Finally, Gray supports his argument by segregating Ms. Chase's testimony on direct and cross-examination from the remainder of the State's case and from the statement that the prosecution used by to impeach her testimony. However, "a lesser-included offense may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011); *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) (same); *State v. Tyndall*, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct.App. 1999) ("The possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of

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[26] As this Court explained in *State v. Barksdale*, 311 S.C. 210, 428 S.E.2d 498 (Ct.App. 1993):

> The crime of lynching in the first degree is defined in S.C. Code Ann. § 16-3-210 as "[a]ny act of violence inflicted by a mob upon the body of another person which results in the death of the person...." To constitute the crime of lynching, the death must have been inflicted by a mob. A mob is defined in § 16-3-230 as the "assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." In cases of lynching, a mob has been equated to an "unlawful assemblage of persons." *Cantey v. Clarendon County*, 101 S.C. 141, 143, 85 S.E. 228, 229 (1915).

Barksdale, 311 S.C. at 213, 428 S.E.2d at 500. *See also State v. Smith*, 352 S.C. 133, 572 S.E.2d 473 (Ct. App. 2002) (involving lynching in the second degree).

[27] "ABIK is an unlawful act of violent nature to the person of another with malice aforethought, either express or implied." *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (2003). "Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence ... of the intent to commit the crime when intent or state of mind is in issue." Danny R. Collins, *South Carolina Evidence* 319 (2d ed.2000). "State of mind is an issue any time malice or willfulness is an element of the crime." *Id.* Here, the State established the clear motive discussed above.

simple assault and battery does not entitle the defendant to have the lesser offense submitted to the jury"); *State v. Foxworth*, 269 S.C. 496, 238 S.E.2d 172 (1977). Therefore, an involuntary manslaughter charge would have been improper. Because there was no evidence presented to support the requested charge, the trial judge properly denied it. *See Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. *See also Tucker*, 324 S.C. at 170-71, 478 S.E.2d at 268; *State v. Gibson*, 390 S.C. 347, 355-58, 701 S.E.2d 766, 771-72 (Ct.App. 2010).

CONCLUSION

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

Respectfully submitted,

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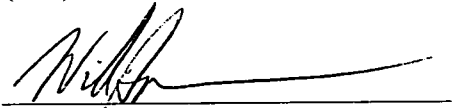
By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

August 27, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-209426

THE STATE,

RESPONDENT,

v.

HENRY GRAY,

APPELLANT.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal:

1. From the February 28th – March 2, 2012 Transcript:

Pages:

- 108-109;
- 174-265;
- 273-317;
- 327-332;
- 346-433;
- 440-490;
- 493-631;
- 635-737;
- 745–831;
- 843-919;
- 921-989;
- 991-1005;
- 1008-1049;
- 1135-1158;

- 1161-1166;
- 1183-1186;

2. State's Exhibit 51 (photograph);
3. State's Exhibit 52 (photograph)
4. State's Exhibit 53 (photograph)
5. State's Exhibit 54 (photograph)
6. State's Exhibit 55 (photograph);
7. State's Exhibit 56 (photograph);
8. State's Exhibit 57 (photograph); and
9. State's Exhibit 88 (Statement of Kara Chase).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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By: _____
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ATTORNEYS FOR RESPONDENT

Dated: August 28, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-209426

THE STATE,

RESPONDENT,

v.

HENRY GRAY,

APPELLANT.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Initial Brief of Respondent and Designation of Matter on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

David Alexander, Esq.
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This 28th day of August, 2013

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August 28, 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: *The State vs. Henry Gray*
Appeal from Richland County
Appellate Case No. 2012-209426

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please contact me.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: David Alexander, Esq. (w/two copies of encls.)
The Honorable Daniel E. Johnson, Solicitor, 5th Judicial Circuit (w/copy of encls.)
Sandi Wofford, Victim Services (w/copy of encls.)