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Dec 17 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County
The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

WILLIAM GRAY ACKERMAN, JR.,

Appellant.

Appellate Case No. 2024-001749

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S ISSUES PRESENTED

I.

Whether the trial court judge erred in allowing the State to introduce a text message authored by McClendon and sent to a third party as an offer of McClendon's then existing state of mind per Rule 803(3) of the South Carolina Rules of Evidence, although McClendon lacked personal knowledge of the contents of the texts and the text did not fall within an exception to the hearsay rule?

II.

Whether the trial court judge erred in denying Ackerman's request that the jury be instructed on involuntary manslaughter although there existed evidence in the record tending to reduce the offense from murder to manslaughter and Ackerman's actions in driving on the wrong side of the road although unlawful, did not naturally tend to cause death or great bodily injury under the facts of the case?

STATEMENT OF THE CASE

On May 7, 2023, at 1:11am, William Gray Ackerman, Jr. (hereinafter "Appellant") maliciously drove his 2019 Ford F-250 truck into the body of victim Kenneth Davis McClendon (hereinafter "Davis"). Davis died from the injuries sustained by the collision soon after. Appellant was indicted for murder. (2023-GS-24-00958). Appellant was represented by Jack B. Swerling, Esq. The State was represented by Assistant Attorneys General John Meadors, Esq., and John Conrad, Esq..

Proceedings began with a bond hearing on September 22, 2023. Voir dire was conducted on June 10, 2024, and Appellant's trial began on June 24, 2024, before the Honorable Judge Donald B. Hocker. However, the trial was postponed when defense counsel experienced health concerns during opening statements. The trial resumed on July 8, 2024, but following the conclusion of the first day of trial, defense counsel's health concerns resurfaced. Judge Hocker informed the jury on July 9th that they would be contacted about whether the trial would resume. After consulting with the parties, Judge Hocker learned that defense counsel would not be able to continue with the trial at that time. On July 10th the court assembled the jury and explained that due to the circumstances the trial would not be able to resume and that he would have to grant a mistrial and dismiss the jury.

A new jury was struck and Appellant's new trial commenced on September 23, 2024, again before Judge Hocker, and with all previous counsel for the parties. The trial proceeded normally through September 26th, but the damage caused by Hurricane Helene resulted in a postponement of the trial. (Sept Tr.) On October 2, 2024, the trial resumed with sixteen out of the seventeen jurors and alternates able to attend; the one missing juror was absent due to travel plans previously made known to the court. (Oct Tr. p. 7). That juror was replaced with an alternate and the trial

resumed without further incident. On October 5, 2024, the jury returned a guilty verdict against Appellant and Judge Hocker sentenced Appellant to 45 years imprisonment, with credit for time served. (Oct Tr. 681).

STATEMENT OF FACTS

The Crime

On May 7, 2023, at 1:11am, Appellant drove to the gated *dead-end* segment of Avid Court to meet with Davis McClendon ("Davis"), his soon-to-be divorced wife's new romantic partner. (Oct. Tr. p. 461; 481-482; 522); (Sept Tr. p. 736-738). Upon arrival, he purposefully drove his Ford F-250 truck on the wrong side of the road, at a speed of approximately 38mph, in the direction of Victim and Victim's vehicle, striking both and ultimately killing Victim. (Oct Tr. p. 466; 468; 484; 513); (Sept Tr. p. 793-795). He did not call 911. (Oct Tr. p. 474). He got out of his truck, screamed profanely at Victim, then returned to his truck and left the scene. (Oct Tr. p. 524-526; 167-168).

Evidence Presented at Trial

The evidence presented at trial detailing the events of May 7, 2023, was extensive. In May of 2022, Meredith Hainey filed for divorce from Appellant. The separation agreement resulted in Meredith and their kids remaining at their *** Tally Ho Drive home in Greenwood while Appellant moved in with his parents at **** Old Abbeville Highway. (Sept Tr. 702-703). Appellant was hoping to reconcile. (Oct Tr. p 437). The final hearing for the divorce was set for the last week of May 2023. (Sept Tr. p. 707).

Meredith met Davis on December 23, 2022. The two began to date, but out of respect for Appellant they did not see each other socially in Greenwood. (Sept Tr. p. 704). However, in late April Appellant found out about the relationship. He conceded that he was angered by the fact that

Meredith was seeing someone else and evidence of his opinion was clear.[1] (Oct Tr. p. 485-486). In an April 28th text to Meredith, he called Davis "a piece of shit." In his April 29th texts to his friend Daniel, he stated: "[Davis] has been f***ing Meredith. . . . I ha[d] my suspicions, but it was confirmed by her. I can't believe he would do that to me. I mean, damn, I've known him my whole life."[2] (Sept Tr. 624; 705); (Oct Tr. 486).

A week later, on May 6th, Davis and Meredith met for date night at a restaurant called Break on the Lake in Greenwood. Meredith testified that just prior to her beginning the date, she finished a phone call with her children who were using Appellant's phone. She also received a text from Appellant stating: "Why do you hate me? I just don't understand." (Sept Tr. p. 714-715). Meredith began her date, but Appellant proceeded to call or "Facetime" her three times over the course of about twenty minutes. Meredith responded by asking if it was Appellant or the kids that wanted to speak to her. Appellant lied and informed her that it was the kids. (Sept Tr. 715-718). When Meredith returned the Facetime call Appellant answered and attempted to learn where she was at, whom she was with, and "why [she] was doing this to him." (Sept Tr. 732-733). Meredith became worried that Appellant was trying to find her.[3] (Sept Tr. 715-718). Davis paid their bill[4] and Meredith and Davis left Break on the Lake at 9:42pm. They briefly went to her home so that Davis could call his children and then proceeded to the home of one of Davis's friends for a Kentucky Derby party. From there they then proceeded to the Key West bar. (Sept Tr. 722-723).

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[1] The record also shows that although Appellant denied dating during the separation, he did not dispute utilizing the Tinder app "to see what his options were." (Oct Tr. p. 488).

[2] The phone logs for Meredith, Appellant, and Davis were acquired through law enforcement's investigation.

[3] Meredith held the phone close to her face in an effort to prevent Appellant from learning where she was located, but by Appellant's own admission, he ultimately learned where she was based on the background of the Facetime phone call. (Sept Tr. 719); (Oct Tr. p. 492).

[4] Victim's wallet was not on his body after the crime, the wallet was never found. (Oct Tr. p. 247).

Toward the end of their time at the derby party Appellant called Meredith four consecutive times in under two minutes. (Sept Tr. 726-729). He called again at 12:38am, after they had reached the Key West bar. Frustrated by Appellant's behavior,[5] Meredith chose to answer this call. Based on her sixteen years of knowing Appellant, she realized that he was not sober at the time of the call. He again asked where they were, told her that he was driving around looking for her and that he was going to find her. In response, Meredith threatened to call the police on Appellant, noting to him that he was drinking and driving. *Meredith was soon shown a text that Davis had sent to Brandon Smith; ultimately, she decided not to call the police but had hoped that the threat of her doing so would solve the problem*. (Sept Tr. p. 737; 730-733). In an attempt to get Appellant under control, Meredith also attempted to call Appellant's mother, father, brother, and cousin (Brandon Smith, who is also referred to as "Bee2" or "B2"), but no one answered her calls. (Sept Tr. 734-736; 508-509). Meredith received two more phone calls from Appellant at 12:45am. She answered the second and Appellant conveyed his desire to meet with Davis. (Sept Tr. p. 736-739). She informed Davis but testified that she did so in a way that she believed Davis would not agree to go. (Sept Tr. p. 740-741).

The incessant phone calls from Appellant continued. Meredith received five more calls over the course of two minutes. She did not answer these calls but at this point she became fearful of Appellant and the circumstances. At this juncture Davis responded by calling Appellant to get him to stop harassing Meredith. After doing so, Davis left the bar. (Sept Tr. p. 741-744). Meredith soon received a call from Davis and learned that he was planning to meet Appellant at Appellant's home (*** Old Abbeville Highway). Meredith insisted that they not meet at the house, since her

[5] She had also learned that Appellant had rudely questioned her friend, Abbi Mohajer, while at Key West bar. (Oct Tr. p. 10-20).

children were there. (Sept Tr. p. 745; 748). *At 1:08:13* she answered another call from Davis. They began a conversation and Meredith learned that he and Appellant were meeting at the intersection of Avid Court and Sawgrass. However, Meredith was not able to complete the call. She was instead *put on hold by Davis*. That was the last she ever spoke to him as her efforts to call Davis back went unanswered. (Sept Tr. p. 752; 755-756). She got a ride from her friend Megan McGovern and they drove out to Avid Court. When they arrived, they found Davis's body and vehicle and called the police. (Sept Tr. p. 336; 756-758).

The computer data from Appellant's Ford F-250 provided a detailed accounting of Appellant's whereabouts that night. (Sept Tr. p. 510-512; 515). This data provided a GPS location of Appellant's truck throughout the night, and records from Appellant's cellular phone usage corroborated his travel around Greenwood on the night of the crime. (Sept Tr. p. 760-801; Oct Tr. p. 134-136; 154-155). The data demonstrated that Appellant drove to the Key West bar and video surveillance footage showed that he began drinking while at the bar.[6] (Oct Tr. p. 154-156; Sept Tr. p. 410; 489). Meredith's friend, Abbi Mohajer, was also at the bar that night and testified that Appellant, who had never previously spoken to her, rudely confronted her and asked where Meredith was that night. Once Appellant left, Abbi notified Meredith of his behavior. The encounter was alarming enough to cause Abbi to feel anxious and ultimately leave soon after the confrontation. (Oct Tr. p. 10-20).

Appellant left the Key West bar at 12:10am on May 7th and he proceeded to Meredith's *** Tally Ho residence at 12:13am. (Oct Tr. p. 156). From there, Appellant drove to Lake Shore Drive, the street where Davis resided. He arrived at 12:38am. (Oct Tr. p. 157-158). The data next

[6] The state asserted at trial that video evidence showed Appellant having upwards of 7 or 8 beers, in addition to having had two beers earlier in the day. Despite the video evidence, he disputed this and testified that he only had 4 beers.

demonstrated that at 12:41am Appellant arrived at the parking lot of Break on the Lake, where Meredith and Davis had been a few hours earlier. (Oct Tr. p. 159). From there, he proceeded to Port Grille at 12:43am. (Oct Tr. p. 159). Appellant admitted at trial that he was attempting to locate Meredith at each destination, but in recounting his efforts he notably excluded his trip to Davis's residence on Lake Shore Drive; Appellant would later testify on cross that "it skipped [his] mind". (Oct Tr. p. 450; 493). He also testified that he did not know that Davis was with Meredith until he received a phone call from Davis. That 12:42am phone call took place *after* Appellant had driven out to Davis's residence. (Oct Tr. p. 452) On cross, Appellant conceded that out of suspicion he drove out to where he believed Davis lived. However, that concession came in tandem with testimony that 1) he knew Meredith's car was parked at her home, 2) he did not know what kind of car Davis drove, 3) he drove down there to see if he saw "a car", and 3) he did not know Davis's exact address. (Oct Tr. p. 493; 495-496; 505). Appellant denied ever telling Meredith that he wanted to speak or see Davis. (Oct Tr. p. 497).

In addition to GPS location data, the F-250's computer also recorded mechanical a "event" chronology for operation of components of the truck, such as door usage, system operations, hard accelerations, and hard braking events. Agent Hudak also testified that the system records "wheel traction possible wheel-spin" events, explaining that with modern traction control, if the system detects that a tire or series of tires is spinning or about to spin it will automatically reduce power. These records show how Appellant operated his truck, what responsive data the truck experienced, where such operations took place, and precisely when such operations took place. (Sept Tr. p. 787-797). Of import, the following collection of recorded events transpired:

- Between 1:01 and 1:06am there are various hard accelerating events followed by hard breaking events, as well as wheel traction events. These were taking place primarily along Highway 25 and Old Abbeville Highway. (Sept Tr. p. 787-791; Oct Tr. p. 160-164);

- Appellant's truck had traveled *from* Old Abbeville Highway *onto* Avid Court by 1:07am. (Oct Tr. p. 162-163). This was after Davis's car had already arrived at the end of Avid Court. (Oct Tr. p. 512);

- Appellant's truck then *returned* to Old Abbeville Highway by 1:08am. (Oct Tr. p. 163);

- Appellant then called Davis at 1:09am wherein he alleged Davis called him "a f***ing p***y." (Oct Tr. p. 464; 510);

- Appellant's truck arrived at the Ackerman home driveway at 1:10am. (Oct Tr. p. 164);

- From the Ackerman home, between 1:10:10am and 1:10:30am, there was a change of gears from drive to reverse, and the back to drive. (Sept Tr. p. 792; Oct Tr. p. 164);

- The truck then returned to driving along Old Abbeville Highway. By 1:11:07 it turned on to Rivers Run, and then at 1:11:16 the truck reached Avid Court for the second time. (Oct Tr. p. 165);

- While the truck is on Avid Court, at 1:11:16am there is a hard acceleration event ultimately producing a wheel speed of 38mph as it reached the Sawgrass intersection and approached the gated dead-end 73 feet away. (Sept Tr. p. 281; 792-793; 800; Oct Tr. p. 165; 268-269);

- At the intersection of Sawgrass Place and Avid Court, between 1:11:29am and 1:11:32am (*4 seconds*) there was then:
  - a hard braking deceleration event (-.95Gs) articulating a wheel speed decrease of 38mph to 25.9mph with a possible traction slip event (Sept Tr. p. 793-794);
  - a hard braking (-.65Gs) deceleration (Sept Tr. p. 795);
  - another traction slip event with speed deceleration of 24.4mph to 14.2mp (-2.4Gs) – this was noted as a possible collision (Sept Tr. p. 795; 800);

- Following the suspected collision the truck computer reported another traction event, an acceleration, and then hard braking with traction events to bring the car to a stop at 1:11:33am. By 1:11:34am, Appellant had opened his truck door. (Sept Tr. p. 797-799; Oct Tr. p. 167);

- By 1:12:33am, the truck door was closed. (Sept Tr. p. 801; Oct Tr. p. 167);

- By 1:14:52am, the truck had returned to the Ackerman residence at **** Old Abbeville Highway. (Oct Tr. p. 168).

Appellant testified that upon the downhill approach he saw the headlights of what he presumed was Davis's vehicle and knew that the street stopped at a gated dead-end shortly behind Davis's vehicle. (Oct Tr. p. 481-482; 522). He also conceded that he was on the phone with Davis when he was driving down Avid Court. (Oct Tr. p. 512). Appellant had his headlights on as he

drove. (Oct Tr. p. 523). Although he testified that nothing else was visible to him, he admitted that he purposefully crossed into the opposite traffic lane, testifying that he did so "to get closer to [Davis's] car so [he] could pull up beside his car to speak with him." (Oct Tr. p. 466; 468). He did not dispute that he did so at a speed of about 35mph, but he testified that he was not aware of his speed at the time. Appellant did not dispute that 35mph was a lot of speed for approaching a dead-end. (Oct Tr. p. 513; 484). Appellant testified that it was his plan to slow down "as he got close to his vehicle." Given his speed, when asked if he was going to "slam on the breaks right there," Appellant responded: "If I needed to." (Oct Tr. p. 483-484). There was also an operating streetlight at the Sawgrass and Avid Court intersection mere feet from where Davis had parked. (Oct Tr. p. 523; 338). The speed limit for that road was 25 miles per hour. (Sept Tr. p. 315).

Appellant testified that he only first saw Davis at the moment he had reached the very front of Davis's vehicle and that Davis was out in the middle of the road. (Oct Tr. p. 467; 513). ***Appellant testified at trial that he did not hit the brakes prior to striking Davis*** *with his truck because "he didn't have time."* (Oct Tr. p. 515). Instead, Appellant testified that he only had "a couple of seconds" at most to react and he *jerked his truck as hard as he could to the left* to try and stop his vehicle's motion from going forward.[7] (Oct Tr. p. 468). He then described that he hit Davis's BMW "at a slight angle." (Oct Tr. p. 469). He got out of his truck and screamed, describing himself as hysterical and in disbelief. He testified that he screamed at Davis to try and get him to respond. Davis did not respond, so he got down and touched Davis's face two or three times to try to get him to come to. Davis had blood coming out of his ears and Appellant believed Davis was dead. On direct examination he testified that he then got back into his truck, drove home, and told his

[7] Appellant testified that he jerked his car *to the left*; however, neither party disputes that Davis was struck by the *left* portion of Appellant's truck.

parents what had happened. He was not sure how much time passed, but he heard sirens coming down the road and for that reason he elected not to call 911.[8] (Oct Tr. p. 471-474). He did however call his attorney after he heard sirens. (Oct Tr. p. 478). Appellant testified that he had a few beers but felt physically and mentally fine at the time. (Oct Tr. p. 476).

Two residents who live on or near the Avid Court and Sawgrass Place intersection had security cameras that captured portions of the crime: Mr. Terry Cummings and Mr. Roderick Macedia. (Sept Tr. p. 272; 309; State's Exhibits 1A, 1B, 1C, 1D; State's Exhibit 2). Additionally, Mr. Macedia's camera recorded audio; the sound of the crash and yelling could be heard. (State's Exhibit 2). Mr. Macedia described the yelling as "angry" in tone. (Sept Tr. p. 312). The State argued that the words uttered were: "what the f***" – "what the f*** do you think you want" – "there's nothing to talk about, f*** it." Appellant conceded the first part and agreed that he "could have" said the last part as well. (Sept Tr. p. 298; Oct Tr. p. 525-526).

Davis was deceased by the time paramedics arrived. (Sept Tr. p. 354). The initial investigation revealed that another vehicle was responsible for striking Davis. There was significant damage to the front left quadrant of Davis's BMW, but such damage did not extend as far as the driver's door or sideview mirror. (Sept Tr. p. 372; 374; 71). The forensic pathologist testified that Davis suffered numerous blunt-force trauma injuries. The most grievous were fractures to the left side of his skull, a fracture to the base of his skull, a two-inch laceration to the back of the head, a palpable fracture to his right femur, bruising to the left femur at approximately the same height above the heel, and large patches of abrasions (road rash). Some of these injuries contained "some leafy, soil type debris . . . which is consistent with impacting the ground and

[8] Appellant did not offer testimony as to how he knew the sirens were in response to Davis, as opposed to some other emergency in the area. (Oct Tr. p. 480).

sliding across the ground." (Sept Tr. p. 193-210). Davis's shirt and one of his shoes were located about fourteen feet away from his body and on the other side of his vehicle. (Sept Tr. p. 488).

Interviews with witnesses resulted in law enforcement's decision to investigate Appellant's residence. Additionally, an oil puddle and a fluid trail were discovered at the scene. The trail of oil led up Avid Court and all the way to Appellant's residence at **** Old Abbeville Highway; it ended underneath the White Ford F-250 belonging to Appellant. (Sept Tr. p. 374; 379-380; 462; 508). Searches of the residence and the truck were conducted; officers identified smudges for further forensic testing, along with a significant dent approximately 5ft high and on the hood, that was in line with a crack in the chrome grille below the driver's headlight. (Sept Tr. p. 387-391; 472-473). *The damage indicated a left-of-center collision by the truck with Davis*. (Oct Tr. p. 79). A presumptive positive blood stain was found on Appellant's shorts and sent for DNA analysis. A mixture of DNA was found and the comparative ratio showed that it was 29 septillion times more likely that Davis and an unidentified unrelated individual contributed to the swabbed stain on Appellant's shorts. (Sept Tr. p. 563; 602-605).

Sergeant Andis, a MAIT analyst, testified that in addition to the F-250's data, the BMW's "crash data retrieval" was available for analysis as well. (Oct Tr. p. 29). The BMW was idling, stationary, and in park at the time of the crash. In the 3 to 5 seconds before the crash, there was a reported steering change. Sergeant Andis testified that the only rational explanation for such data is that someone was inside the vehicle during the 3 to 5 seconds preceding the collision. (Oct Tr. p. 36; 38-40; 42). Additionally, the doors of the BMW were found shut, and given the absence of damage, they were likely shut prior to the collision. (Oct. Tr. p. 46; 71). The collision broke the suspension arm of the BMW driver's-side front tire. The MAIT analysis concluded that it was the left-front tire of F-250 that made contact in a parallel angle of approach with the BMW; such was

corroborated by the black tire smudging on the BMW and the road scuff marks found showing the BMW was pushed backward, as opposed to sideways toward the roadside. (Oct Tr. p. 65; 70; 73; 75; 77). MAIT analysis found no indication that the F-250 attempted to swerve out of the way, as such would leave weight shifted road markings. (Oct Tr. p. 79). The F-250 truck was inspected; no mechanical problems existed that could have contributed to the collision. (Oct Tr. p. 54; 65; 68). MAIT analysis also concluded that Davis was standing directly next to the BMW in front of the truck, and the truck's collision with Davis would have been at nearly the same moment the truck's tire struck the BMW. Impact with the higher profiled truck then carried Davis's body forward, as opposed to a lower profiled vehicle that would have forced his body up and onto the hood or windshield. (Oct Tr. p. 81-82). Neither victim's final location nor the damage profile of the BWM supported a swerving collision. (Oct Tr. p. 84).

The defense offered Mr. Davis Torres as its own reconstruction expert. Mr. Torres testified that Davis was five feet from the front of the BMW and three feet from the car toward the center of the road. (Oct Tr. p. 272). On cross-examination, he agreed that this would put Davis within the vicinity of the driver's door. (Oct Tr. p. 298). He concluded that the truck collided with Davis and the BMW at the same time, and that it did so at an angular approach while being 2-3 feet on the wrong side of the road. (Oct Tr. p. 272). "He steered left . . . to reach the area of impact and then steered right to reach final rest at some point." (Oct Tr. p. 278). He opined that the BWM was pushed backward and sideways in equal distance (1-2 feet).[9] In addition to these findings, Mr. Torres did not dispute that 1) the left-front truck tire caused most of damage to the BMW, 2) Davis

[9] Mr. Torres conceded on cross that he did not have the scuff mark to view by the time he came to the crash scene for inspection, and he conceded that the forward force was three times greater than the lateral force. (Oct Tr. p. 287; 291) He also conceded that he did not use any data from the F-250's infotainment computer. (Oct Tr. p. 297).

was struck by the left side of the vehicle, 3) at approximately 34-39mph, and 4) the truck carried Davis forward after the collision. (Oct Tr. p. 270; 289; 274-275). The defense also offered the testimony of John Nelson as an expert in illumination and visibility. His testimony demonstrated that on the night of the crime there was 1) a full moon at 27 degrees high, 2) clear skies, 3) a downhill approach, 4) Davis (Caucasian, 6ft tall) was wearing khaki pants and no shirt, and the nearby streetlight was functional. (Oct Tr. p. 332-338). Collectively, he opined that a pedestrian under the circumstances would have been visible within a distance of 100 feet and in slightly less than 2 seconds of time prior to impact if traveling at 35mph. (Oct Tr. p. 364; 372).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only" and it is bound by the trial court's findings of fact, unless they are clearly erroneous. *State v. Collins*, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014) (citing *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Collins*, 409 S.C. at 529–30, 763 S.E.2d at 25 (2014) (citing *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)). The trial judge is given broad discretion in ruling on questions concerning the relevancy and admissibility of evidence, and his decision will be reversed only if there is a clear abuse of discretion. *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Lopez,* 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct.App.2002).

ARGUMENT

I. The trial court did not err in admitting the text message evidence that Davis sent to Brandon Smith.

Issue as it was presented at trial

The State moved to enter "States Exhibit 30," a text that had been sent from Davis (victim) to Appellant's cousin, Brandon Smith. The text, sent at 12:42:14am on May 7th, reads as follows: "fyi – apparently Bud is drunk and out trying to hunt Meredith down. She is wanting to call the cops. I was hoping maybe you could get his dad to rope him in." (Sept Tr. p. 623). The State acknowledged that it was hearsay and moved to have it admitted as an exception under SCRE 803(3). The State argued that the text set forth Davis's state of mind, in light of the fact that Davis was experiencing Appellant's behaviors with Meredith in real time, and being privy to the communications as Meredith received them. In short, they were a couple experiencing the actions and declarations of the Appellant together and the text articulated his state of mind in relation to such. (Sept Tr. p. 623-624; 625-626). Defense counsel argued that it was improper because: 1) it was seeking to present the state of mind of the victim, as opposed the defendant, and 2) Davis had not yet had a personal text or phone call with Appellant, rendering the text his speculation. He then added that admission of such would be substantially more prejudicial than probative under Rule 403. (Sept Tr. p. 626-627). The court chose to recess for a few minutes so that he could consider the arguments of counsel and the record. (Sept Tr. p. 628). When the court returned, the trial court ruled that it did not find Exhibit 30 admissible, noting that in consideration of *State v. Weston* the text did not really present Davis's state of mind, but more so Meredith's. The court also made a finding that the probative value outweighs the unfair prejudice and explicitly noted that it was not excluding the evidence under Rule 403. (Sept Tr. p. 629).

A few days further into the trial, this issue resurfaced. During Appellant's case-in-chief,

Appellant attempted to testified to what Davis stated during his first phone conversation that took place at 12:51:15am on May 7th. (Oct Tr. p. 452-453). The State objected on the basis of hearsay, and Appellant argued that the testimony goes to [Davis's] state of mind as to what happened later in the evening." (Oct Tr. p. 453). The trial court proceeded to hear the testimony outside the presence of the jury. Thereafter, Appellant testified that Davis initiated the call and stated:

> He was trying to be, he called and said he was trying to be patient with me and that from, I guess he was upset that I was trying to call Meredith so many times that evening to locate her. And then he got pretty aggressive with me on the phone, said he wanted to kick my ass, and I told him, I said, Davis, you know, if you want to talk about it, you can come to my house, and we'll talk about it. And then there was more rhetoric, you know, from, about, you know, how he was going to beat my scrawny ass and, you know, this, that, and the other. But I told him if he wanted to talk, he could come to my house, and we'll talk it out.

(Oct Tr. p. 454). The State again objected on the basis that state of mind is permitted, but not the reason for the state-of-mind, and that Appellant had clearly presented the reason for the state of mind. The State then referenced its own prior argument regarding the text to Brandon Smith, noting that Appellant is now seeking to admit hearsay under the same argument that it previously sought to exclude it. (Oct Tr. p. 456). Appellant attempted to distinguish the Brandon Smith text message as lacking firsthand knowledge supporting the state of mind in question. The State argued that the two situations were quite similar, noting again that Davis had first-hand knowledge because Davis was present when the communications were coming in, he could be seen looking at them and watching them take place in the surveillance video. (Oct Tr. p. 457).

The trial court took another break to consider the matter. When the court returned he found that he was going to allow Appellant's request to admit the statements made by Davis to Appellant under the state of mind exception to hearsay. However, the court then noted the State's 803(3) evidence it had previously excluded, found that it too was "a very, very similar" expression of

Davis's state of mind in light of Appellant's actions that night, and rescinded its prior ruling such that the State could admit the text via reply. (Oct Tr. p. 458). Following the ruling, Appellant testified similarly before the jury, noting that Davis was "pretty aggravated" with him about the number of times he was calling Meredith that evening. He described Davis as "being hostile and aggressive over the phone, said he wanted to kick my ass, and you know, meet up with me and kick my scrawny ass, and I told him that he could come to my house and we can talk about it if he wanted to." (Oct Tr. p. 461).

On the topic of a fight potentially taking place, he reiterated that it was Davis who was aggravated; he had no intention of fighting. He then characterized the disparity in size between himself and Davis. Appellant went on to testify about a second phone call from Davis at 12:59am, wherein Davis changed the location for their meeting. He then described Davis as having seemingly calmed down. (Oct Tr. p. 462-463). When he called Davis at 1:09am, Appellant claimed that he told Davis he was already home and would not be coming to meet him. He then describes Davis's reaction as: "He had a few choice words about me going back to mom and daddy's house. . . he called me a f***ing p***y." (Oct Tr. p. 464). Appellant then testified that he continued the conversation until Davis appeared calm down again, and that the Davis had agreed to simply wanting to talk. According to Appellant's testimony, it was at this juncture that he drove to the meeting spot. (Oct Tr. p. 464).

On cross-examination, Appellant denied knowing that Meredith was with Davis until his 12:42am phone call and he denied ever telling Meredith that he wanted to talk to Davis.[10] (Oct Tr. p. 497). He also disputed that he was "driving around and drinking," but confirmed Meredith had

[10] Appellant's denial was ultimately general in nature, but the question was first directed in reference to the phone call he had with Meredith at 12:38am. (Oct Tr. p. 497).

said she was going to call the police on him for drunk driving. (Oct Tr. p. 507). On redirect, Appellant reiterated that he understood from some of Davis's phone calls that his purpose for meeting was "to fight." He followed through with meeting Davis because he believed Davis had calmed down. (Oct Tr. p. 533).

In reply, Lieutenant Womack was recalled. He identified Exhibit 30 as the text message to Brandon Smith from Davis on May 7th, at 12:42:14am. The exhibit was admitted and Lieutenant Womack read the text aloud. (Oct Tr. p. 542-545).

Discussion

The ruling of the trial court was not in error, and for a plethora of reasons, the evidence in question was admissible and otherwise entirely lacking in prejudice toward Appellant. There is no basis for a finding of reversible error.

The exception set forth under South Carolina Rule of Evidence 803(3) permits the admission of otherwise hearsay evidence when such constitutes the:

> then existing mental, emotional, or physical condition. A statement of the **declarant's then existing state of mind**, emotion, sensation, or physical condition (such as **intent**, plan, **motive**, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed **unless it relates to the execution**, revocation, identification, or terms **of declarant's will.**

(emphasis added). Such statements "may either directly or circumstantially show the declarant's state of mind, emotion, or physical condition." *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999) (citing M. Graham, *Handbook of Federal Evidence* (1996)). Here the state of mind of Davis was that of concern (via both circumstantial evidence and direct evidence) and the intent/motive of getting Appellant under control through the contact and assistance of his family members. That's permissible because the content set forth explained why Davis took the action

that he did (texted Brandon Smith for help) – it relates to the execution of Davis's will.

Appellant's argument attempts to challenge Davis's competency as a witness under Rule 602 by arguing that he would not have had personal knowledge of the matters to which his text was directed. This is not accurate, both by the record and in consideration of the circumstances. First, the *record* demonstrates that at least one of the phone calls that Meredith had with Appellant *was taken via facetime/video call*. (Sept Tr. p. 718-719). This particular call was also the one where Appellant asked about Meredith's location, whom she was with, and stated, "Well, I'll see you later tonight." As there is nothing within the record to suggest Meredith used a headset of some kind, both Appellant's and Meredith's statements during the Facetime call were audible to Davis personally. Second, regarding the phone calls that were not conducted via Facetime, Davis is not learning about the events, actions, and statements of Appellant and Meredith after the fact. He is observing them take place; he is hearing Meredith accuse Appellant of being drunk and her threats to call the police in real time. To the extent that his text is based upon such, Meredith's statements constitute a present sense impression exception to hearsay and can be properly relied upon by Davis. Third, Davis's text is not based solely on spoken content, his state of mind is also formulated on the basis of Appellant's actions that he personally observed. Despite Meredith making it clear to Appellant that she did not want to speak to him, he personally witnessed Appellant call Meredith repeatedly throughout the night, often numerous times over just a minute or two. Davis was witnessing Appellant *harass* Meredith, and his state of mind established in his text to Brandon is just as much based upon those collective observations. Davis is not relying on the hearsay of others to formulate his state of mind. He is hearing the conversations and experiencing Appellant's behaviors in tandem with Meredith that night. For that reason, Appellant's argument against admissibility fails.

Appellant also fails to establish any basis for prejudice resulting from the text message sent to Brandon Smith because it was admitted after each and every portion of the text had already been attested to in some way by Meredith during the trial, and/or proven by evidence of Appellant's behavior and admissions at trial. Meredith had already testified that based upon her sixteen years of knowing, living with, and conversing with Appellant, she knew that he was drunk during his phone calls to her that night. Additionally, the State presented persuasive video evidence that Appellant was intoxicated that night, given the number of trips to the bar he made while at Key West. For the truth of the matter asserted, "fyi – apparently Bud is drunk" had been well established by the State. Secondly, both Meredith's testimony and Appellant's own testimony confirmed that he was going to extreme lengths to find Meredith that night. The State presented unrefuted evidence that Appellant was "out trying to hunt Meredith down."[11] Thirdly, Meredith testified explicitly that she wanted to call the cops and even informed Appellant of her intent to do so. "She is wanting to call the cops" is again a well-established fact of the case by the State. Fourthly, Meredith's testimony demonstrated that she called four of Appellant's family members in an effort to find someone to get him under control that night. Davis's text that "I was hoping maybe you could get his dad to rope him in" to Appellant's cousin, Brandon Smith, provides merely cumulative evidence of the same established fact. Lastly, taken as a whole the text is not overly inflammatory toward Appellant's behaviors as it has not demonstrated violence toward Davis or even the expectation of violence toward Davis at that time.[12] *State v. Jennings*, 394 S.C. 473, 478,

[11] While Appellant attempts to exaggerate the insidious nature of the word "hunt" used in the text, Respondent would argue that it is merely a colloquialism and does not convey an intention for violence. Nevertheless, the harassing nature of Appellant's behavior that night certainly warranted Davis's phrasing.

[12] It is also important to consider the fact that Appellant benefited greatly from the court's decision to admit his own presented 803(3) evidence. Davis's text is particularly tame, but to the extent Appellant insists that the court misapplied Rule 803(3), Appellant was able to utilize the court's

716 S.E.2d 91, 93–94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.").

Nothing about Davis's text is lacking sound evidentiary proof already set forth in the record and therefore no prejudice can arise. Appellant cannot establish reversible error on the part of the court in the absence of prejudice. *Id*.

Appellant's argument seems to address the issue as if the evidence had only ever been offered for purposes of the State's case-in-chief, and absent the circumstances that led the court and parties to revisit the ruling *as part of the State's Reply*. The manner in which this issue played out demonstrates that Appellant opened the door to the issue of Davis's state of mind and made the topic a relevant matter at trial. Appellant described Davis as being aggressive, hostile, threatening, and derogatory toward him while carrying the expressed intent of wanting to fight (even if Appellant testified that believed Davis to have calmed down prior to their meeting). These descriptions of Davis's state of mind were presented at 12:51am. The State's Exhibit 30, a text sent just 9 minutes earlier, became admissible evidence in reply because it impeached Appellant's characterizations of Davis's state of mind, and in Davis's own words, it demonstrated how he was calm, concerned, and seeking to merely get Appellant to end his search for Meredith and go home. In contradiction to that intent, Appellant's testimony suggests that Appellant was goaded back out to Avid Court to speak with Davis. The evidence in reply to impeach that assertion was admissible. *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence."); *Accord State v. Taylor*, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998)

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ruling to his considerable advantage by detailing Davis's alleged threatening and aggressive comments to him during their first phone call.

("Where Rule 106, SCRE, applies, it does not require all of the document to be introduced, merely 'any other part of any other writing or recorded statement *which ought in fairness to be considered contemporaneously with it*.'" (emphasis added); *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370 (1996), overruled on other grounds by *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014) (res gestae evidence is appropriate to complete the story and provide the immediate context of the crime being litigated).

The issue should also be viewed in the lens of additional sustaining grounds. Given the nature of the other evidence presented at trial, the evidence arguably does not constitute hearsay because it was not offered as an out-of-court statement seeking to prove the matter asserted. It was admitted to demonstrate how Davis reacted to the circumstances he believed to be the truth – regardless of whether they were the truth. While this was not the tack taken by the State at trial, it is nonetheless a sound basis for deeming the evidence admissible.

If the hearsay nature of the evidence is still presumed, then the evidence is admissible as a present sense impression. Rule 803(1) requires: "(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). Here, the text explained the events and circumstances in concern: Appellant was drunk, looking for Meredith, and was in need of being "roped in." The text was made while Appellant was in the process of looking for Meredith and contemporaneously with Meredith's and Davis's exhausted patience for the manner Appellant was seeking to communicate with Meredith (incessant phone calls). Thirdly, as was argued by the State at trial, Davis was with Meredith witnessing these conversations as they were happening. He therefore personally observed the events that created the condition for which he spoke and acted.

As demonstrated above, the evidence was appropriate under numerous theories and the court did not err in admitting the text message. In the alternative, any error in the admission of the evidence is cumulative, without prejudice, and definitively harmless. The ruling of the trial court should therefore be affirmed.

II. The trial court did not err in denying Appellant's request for an involuntary manslaughter charge.

Issue as it was presented at trial

Following an informal charge conference, the trial court stated for the record that Appellant had requested an involuntary manslaughter charge. The court noted that it had denied that charge, finding that Appellant cannot satisfy either of the circumstances for which an involuntary manslaughter charge would be appropriate – i.e. engaging in an unlawful act that does not tend to cause death or great bodily injury or engaging in a [ ]lawful[13] act with reckless disregarding for the safety of others. Specifically, the trial court found that by Appellant's own testimony and the testimony of his expert witness, he committed the unlawful act of driving on the wrong side of the road and that such actions directly resulted in death. The court concluded that that such actions naturally tend to cause death and great bodily injury, and as a result, the first basis for charging involuntary manslaughter could not be met. The court then ruled that because there was an unlawful act as a matter law, the second basis for charging involuntary manslaughter could not be met either.[14] (Oct Tr. p. 548).

Appellant objected to the court's ruling and argued that the standard in South Carolina is

[13] The transcript uses the term "unlawfully" for both involuntary manslaughter grounds. Given that the court's explanation indicates that he clearly found an unlawful act negating the second basis for involuntary manslaughter, the court either misspoke or there was a transcription error. (Oct Tr. p. 548).

[14] The trial court did grant the charge of "Accident."

that of reckless disregard to the safety of others, which Appellant argued was a jury question. He argued further that since Davis was parked just beyond the Sawgrass intersection, he was not on a through road. Appellant argued that it is the circumstances that should be judged "not the literal language of whether or not it's an act that would naturally or intend to cause death or serious bodily injury." Appellant's challenge was to the court's finding of the unlawful act naturally tending to cause death or serious bodily injury. (Oct Tr. p. 551-553).

The State agreed with the court's ruling and responded briefly by distinguishing *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003) as an arming oneself in self-defense case and therefore not particularly applicable to the arguments that Appellant sought to make. (Oct Tr. p. 555-556). After hearing the arguments of counsel, the trial court maintained its ruling.

Discussion

Appellant, both by the letter of the law and the "circumstances" of the case, committed unlawful acts that naturally tend to cause death or great bodily harm. The court was correct to deny the involuntary manslaughter charge.

"Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). As evaluated by the court, the crossing over into the opposing lane of traffic on a public road is unlawful and Appellant's own testimony conceded the act. S.C. Code Ann. § 56-5-1810. The act "naturally" risks circumstances where that vehicle may then strike vehicles in the oncoming lane.

Such circumstances tends to cause death or great bodily injury and the law exists specifically to avoid that inherent danger. There was no error on the part of the court in finding involuntary manslaughter inappropriate due to the presence of an unlawful act tending to cause death or great bodily harm.

Appellant relies upon *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999) to argue that the circumstances of this case should have been further considered, and that such circumstances would demonstrate the absence of a naturally dangerous act.[15] Contrary to *Chapman*, however, when the "circumstances" of this case are scrutinized, the dangerousness and unlawfulness of Appellant's acts are demonstrated to be *more* severe. By Appellant's own admission, he crossed the lane of traffic *while knowingly approaching another visible vehicle*, thereby confirming the natural danger contemplated by the law. Had the circumstances been such that the crossing of the center lane was done under circumstances where a driver had no visible cars in its path (e.g. perhaps for purposes of avoiding a pot-hole) then one might reasonably contest the inherent dangerousness of the act. But such are not the facts of this case.

By Appellant's own admission he also testified that he committed the unlawful act while having limited or no visibility of the surrounding roadway. Appellant's own concessions at trial indicate that the crossed into an oncoming lane of traffic, with other vehicles present, at night and with what he suggested was limited visibility. To further emphasize the illegality of his actions, Appellant did not commit this act at a slow speed; Appellant conceded that he was driving approximately 35 miles per hour even when he reached the opposing vehicle. The record therefore demonstrated that Appellant was *also* committing the unlawful act of speeding and doing so in

[15] In *Chatman* the Court found that the nature of the assault and battery was not one that naturally tends to cause death or great bodily injury.

circumstances wherein he was quickly approaching another vehicle and a gated dead-end. Nothing about the circumstances of Appellant's actions suggests that his actions lacked a natural tendency to cause death or great bodily injury. Appellant's argument for error in the denial of an involuntary manslaughter charge fails. The court's ruling was proper.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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December 17, 2025