

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Debra R. McCaslin, Circuit Court Judge

Opinion No. 6123 (S.C. Ct. App. filed September 24, 2025)

THE STATE,

RESPONDENT,

V.

QUAYSHAUN XZANDER CLARK,

PETITIONER,

APPELLATE CASE NO. 2022-000962

APPENDIX

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May 17 2024
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Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

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V.

QUAYSHAUN XZANDER CLARK,

APPELLANT

APPELLATE CASE NO. 2022-000962

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

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

STATEMENT OF THE CASE

Appellant Quayshaun Xzander Clark was indicted by the Lexington County Grand Jury on June 13, 2022, for murder, discharging a firearm into a dwelling, and possession of a weapon during commission of a violent crime. R. 20, l. 24—R. 21, l. 10; R. 1396-1401. His case proceeded to a jury trial before the Honorable Debra R. McCaslin beginning June 27, 2022. R. 1. Anna M. Williams and Robert “Theo” Williams represented Appellant, while the State was represented by L. Suzanne Mayes and Rhonda W. Patterson. R. 1.

The jury found Appellant guilty on all three counts. R. 1362, ll. 8-22. The trial court sentenced him to concurrent terms of incarceration as follows: 48 years for murder; ten (10) years for discharging a firearm into a dwelling; and five (5) years for possession of a weapon during commission of a violent crime. R. 1383, ll. 12-23.

STANDARD OF REVIEW

“The law to be charged to the jury is determined by the evidence presented at trial.” State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). “The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense.” State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). “An appellate court will not reverse the trial [court]’s decision absent an abuse of discretion.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id. at 570, 647 S.E.2d at 166–67. “The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” Id. at 570, 647 S.E.2d at 167. “In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.” Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). “A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense.” State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003).

STATEMENT OF THE FACTS

Appellant Quayshaun Clark went to the birthday party of his cousin, Shawanda “Wanda” Lites (Wanda) the afternoon of June 6, 2021, at Lot 7 of the Rocky Lane mobile home park just outside the town limits of Batesburg, South Carolina. R. 493, ll. 14-20; R. 1163, ll. 13-20; R. 1165, ll. 6-25. He drove over in his Mercury grand marquis, and enjoyed the afternoon with ten to twenty other friends and family members. R. 1166, ll. 3-24. At some point, he even tried to play music from the speakers recently installed in his trunk; however, after the speaker system failed, he and his cousin Nashua “Nash” Smith (Nash) attempted to fix the problem. R. 1167, l. 5—R. 1168, l. 8. While he possessed several firearms¹ in a bag located in the trunk of his car, he eventually moved the bag to the interior of the car while the speakers were worked on. R. 1168, ll. 10-24; R. 1170, ll. 2-25; R. 1198, ll. 1-7.

Unbeknownst to Appellant, his estranged² cousin Donald “DJ” Jackson (DJ) had gotten in an argument with two men, De Alewine and Var Pugh (Pugh), at Hartley’s convenience store in Batesburg the same afternoon. The matter between those parties at first ended when DJ left with his friend Nokia “Nitro” Tolen (Nitro) to DJ’s home, and De Alewine also left with Pugh. R. 680, l. 1—R. 682, l. 16. However, De Alewine and Pugh drove over to DJ’s home and had yet another argument. According to Nitro, they were going to meet again at Rocky Lane. R. 683, l. 5—R. 685, l. 8. In the meantime, Kashia “Kay” Norris (Kay) was already at DJ’s. Moreover,

¹ Appellant acknowledged he owned three (3) firearms: an AR pistol chambered in .300 blackout (kept in the trunk bag); an AK pistol chambered in 7.62 x 39mm (also kept in the trunk bag); and an FN 509 chambered in 9mm (kept in the glovebox). One witness who saw the AK pistol earlier in the day described it as looking “like the AK off of Fortnite.” R. 629, ll. 6-7. Appellant explained that all three firearms were kept in his car because he has a young daughter living in his house and did not want her to have access to them. R. 1168, l. 11—R. 1169, l. 16.

² DJ is a cousin to several people at Lot 7, including Appellant. However, due to his prior altercation with his own family, DJ was avoided. R. 1172, l. 4—R. 1173, l. 4.

Nitro also asked DeCarlos “Hugo” Chatman to go to Lot 7 at Rocky Lane as well. R. 692, l. 6-10. Although uninvited to the birthday party by the people living at Lot 7, Nitro drove DJ and Kay to Lot 7 at approximately 10:00pm. R. 725, l. 3—R. 726, l. 22.

When Nitro, DJ, and Kay arrived at Rocky Lane, Pugh’s car was seen near the area of Lots 15 and 16. A graduation party was also being held across from Lot 7 between Lots 15 and 16. R. 686, l. 5—R. 687, l. 15; R. 692, ll. 11-16 (State’s Ex. #178, photograph). Nitro parked by the porch of Lot 7. R. 730, ll. 3-20; R. 693, ll. 8-10; R. 694, ll. 5-7.

Appellant was still at his car at the Lot 7 birthday celebration. DJ texted once and repeatedly tried to call Appellant earlier in the night. R. 1089, l. 4—R. 1093, l. 4. When he finally got through on a 55 second call, Appellant indicated he simply put his phone down because DJ was yelling. According to Appellant, DJ was “just hollering at me, and I ain’t gonna hear it.” R. 1091, ll. 15-17; R. 1172, l. 4—R. 1173, l. 20.

According to Appellant’s testimony, things began to change later in the night when it was getting dark. Everybody was getting louder, but he brushed it off because he was at a birthday party. Then, while sitting in his car,³ he heard gunshots coming from somewhere in front of the vehicle.⁴ R. 1174, ll. 3-25; R. 1197, ll. 14-22. He ducked down, got out of the car while shots were still being fired, and ran to the back of the vehicle. He ran to the side of the trailer, and then back to his car to get one of his guns. R. 1175, ll. 5-15. Although he heard gunshots from

³ Testifying as a State’s witness, Nitro claimed he saw Appellant coming out of the trailer of Lot 7 behind DJ with a gun shortly before he heard shooting. R. 695, ll. 15-19. Nitro also acknowledged on cross examination he was “a lot intoxicated” the night of the incident, and even had an “Ultra beer” when speaking with police. R. 707, l. 18—R. 708, l. 3.

⁴ Other testimony indicated the first shots fired that night came from Hugo standing near the gravel road by Lot 7. R. 607, l. 22—R. 608, l. 2; R. 613, ll. 16-25. Appellant was unaware of this fact until after the incident. R. 1214, ll. 2-6.

everywhere, when he looked up, he saw a black male possibly with dreadlocks coming at him from across the street and shooting a handgun at him.⁵ R. 1175, l. 18—R. 1176, l. 9; R. 1179, ll. 8-12; R. 1202, l. 24—R. 1203, l. 2. Appellant was “very scared.” He had never been shot at before, or trained what to do in such a situation. R. 1176, ll. 18-25. Both he and his family members were on Lot 7. According to Appellant, he tensed up, “was scared and lost, [his] train of thought, almost like everything around [him] just kind of.... Like just kind of like a blur.” R. 1177, ll. 3-10. Appellant fired what he thought may have been 10 to 12 times from his AK pistol⁶ at the assailant until it was empty because he “really wanted him to stop shooting at us.” R. 1177, ll. 12-23. Appellant further indicated he did not want to injure anyone, and that he was afraid. R. 1183, ll. 1-4; R. 1213, l. 15—R. 1214, l. 1. Even after he ran out of ammunition in his gun, he still heard shooting; Appellant ran back behind his car again. He tried to run to the side of the trailer, but heard more shots coming from that side, and again ran back to his car. R. 1178, l. 1—R. 1179, l. 15; R. 1216, ll. 1-3.

After the shooting stopped, Appellant heard cars leaving the area. He got back into his car, threw his AK pistol into the backseat, and left with Nash to the home of Marvin Lites, Appellant’s Uncle. R. 1178, ll. 5-13. Appellant spoke with Wanda on his phone, and she picked up him and Nash in her vehicle. They drove around together while Appellant tried to calm himself. R. 1179, l. 13—R. 1279, l. 9. Appellant ultimately ended up at the home of Nash’s

⁵ Appellant indicated that even though it was dark, he saw the muzzle flash coming out of the assailant’s handgun. R. 1214, l. 22—R. 1215, l. 1. No testimony was provided whether the handgun was a semi-automatic pistol or a revolver. However, no shell casings were found in the area it was purportedly shot.

⁶ Appellant later acknowledged at trial that all 15 shell casings of 7.62 x 39mm at the scene were his. R. 1201, ll. 14-22.

girlfriend in Gilbert, South Carolina, where he was arrested on June 11, 2021. R. 1180, ll. 12-23; R. 1063, l. 22–R. 1064, l. 7.

911 was first called by 10:35pm after the shooting was over on June 9, 2021. R. 484, ll. 20-25. Officers and volunteer EMS/firefighters arrived first, followed by Lexington County Sheriff's deputies at approximately 10:51pm. R. 496, l. 14–R. 497, l. 8; R. 501, l. 2–R. 502, l. 2. The scene was chaotic and a large crowd from the neighborhood had gathered with numerous people inside the crime scene tape. R. 502, ll. 11-16; R. 528, ll. 1-20; R. 1060, ll. 8-25; R. 1134, l. 12–R. 1135, l. 10. Lots 15, 16, and 7, as well as the area in between, were all processed for evidence by law enforcement. Empty shell casings from several firearms were located throughout the scene near all three lots.⁷ R. 781, l. 3–R. 786, l. 24; R. 855, l. 2–R. 859, l. 17; R. 875, l. 6–R. 877, l. 11; R. 983, l. 25–R. 999, l. 15; R. 1390; R. 1387; R. 1388. Tragically, a Minor inside the kitchen of the trailer on Lot 15 was struck once in the head by a 7.62 x 39mm projectile, and was pronounced dead at the scene. R. 504, ll. 6-12; R. 517, ll. 11-15; R. 834, ll. 5-10; R. 842, ll. 19-22; R. 998, l. 18–R. 999, l. 15. The fatal projectile passed through the trailer, into the back of the refrigerator, exited the front of the appliance, and struck Minor. R. 1041, l. 9–R. 1045, l. 1; State's Ex. #126, (photographs); State's Ex. #46, (photograph).

At the end of Appellant's trial, the State acknowledged that the shooter at Lot 15 was "using Lot 15 as a barricade," and Appellant kept shooting into it. R. 1288, ll. 10-12. As such, the State also made clear to the jury that it was proceeding under the theory of transferred intent:

⁷ Additionally, at least one person present that night was known to carry a .22 revolver. When asked by the State "if a revolver was used by a participant in this gunfire exchange, would you expect to have a casing?" the SLED firearms analyst opined, "No, I would not expect any cartridge cases from revolvers." R. 693, ll. 20-22; R. 1000, l. 23–R. 1001, l. 2. The same was likewise confirmed by the Lexington County CSI sergeant. R. 914, ll. 22-25. Further, more bullet holes were found in at least four vehicles at the scene. The witness agreed it would be "consistent with a reckless shootout." R. 1157, l. 25–R. 1158, l. 4.

Under the law it does not matter that he had the intention to kill others and ends up killing [Minor]. That's called transferred intent and under the law if you commit a murder and you're shooting at A, but your bullet ends up killing an innocent bystander, person B, you are responsible under the law for the murder of person B....

R. 1292, ll. 18-24. In response to Counsel's closing argument that Minor was accidentally shot, the State ended its reply by asserting, "that shooter took that child's life, that shooter fired the bullet that snuffed her out, and for that he doesn't walk away." R. 1316, ll. 15-17. The trial court instructed the jury on self-defense without objection. R. 1333, l. 20—R. 1335, l. 25.

After the jury was charged, trial counsel (Counsel) objected to the court's refusal to instruct the jury on involuntary manslaughter and voluntary manslaughter.⁸ R. 1341, l. 24—R. 1345, l. 4; R. 1391-1395. Specifically, Counsel asserted the second prong of involuntary manslaughter was warranted because Appellant was acting lawfully in self-defense, but essentially with reckless disregard for the safety of others in his handling and shooting of his firearm. R. 1340, l. 24—R. 1342, l. 18. Counsel also argued voluntary manslaughter was appropriate due to the overt threat of gunshots fired at Appellant and Appellant's response of shooting back while under the heat of passion. Counsel further asserted that transferred intent applied to murder and manslaughter. R. 1342, l. 19—R. 1344, l. 25.

The State argued no evidence supported the charge of involuntary manslaughter by asserting that "at no point did the defendant testify that he accidentally discharged the gun, at no point did the defendant testify that he was engaged in a struggle with anyone else and that the gun went off." R. 1345, ll. 8-25. The State acknowledged unsettled law in South Carolina regarding whether transferred intent applies to voluntary manslaughter. However, the State

⁸ A jury charge conference was held, but objections were withheld until after closing arguments and instructions given by the trial court. R. 1268, ll. 2-3; R. 1317, l. 6—R. 1319, l. 6.

nonetheless argued that “there was not sufficient evidence on the record to support a voluntary manslaughter charge regardless of the transferred intent issue.” R. 1346, l. 20—R. 1347, l. 7.

The trial court ruled that it “didn’t hear any evidence supporting an involuntary charge. In fact, just the opposite. . . . There was not any testimony about any accident or it wasn’t intentional or none of that, so the Court declined the charge of involuntary manslaughter.” R. 1347, ll. 8-14. The trial court likewise rejected Counsel’s arguments for voluntary manslaughter:

I read the Childers, the Wharton and also the Williams case that was supplied by the defendant, and the law as it stands today in this State is our Court has not applied the doctrine of transferred intent to voluntary manslaughter. This Court does not believe the evidence even supports a voluntary manslaughter in this case, nor was there any overt act by the victim to indicate any provocation by the victim.

There’s—again, I have to turn back to the defendant arming himself. As a matter of fact, he goes to the back of his car, to the back of the trailer, he goes back to the car, arms himself. There was no testimony or evidence that I heard about a heat of passion or uncontrollable impulse to do violence, so I declined to charge the voluntary manslaughter.

R. 1347, l. 15—R. 1348, l. 5. Appellant was ultimately found guilty on all counts, and sentenced to an overall term of incarceration of 48 years.

This appeal follows.

ARGUMENT

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

The trial court also reversibly erred by refusing to charge the jury with involuntary manslaughter where evidence existed in the record supporting the instruction. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (providing a court must view the facts in the light most favorable to a defendant when determining if evidence required a charge on the lesser included offense of involuntary manslaughter).

“Importantly, our courts have long emphasized that to warrant a court’s eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010); see also State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).⁹ Thus, a request to charge a lesser-included offense

⁹ Although some prior State v. Gandy, 283 S.C. 571, 574, 324 S.E.2d 65, 67 (1984) upheld the denial of an involuntary manslaughter charge where the defendant’s act of self-defense and intent to kill another and thus negated the lesser charge for killing the victim, that case and its reasoning has been abrogated by later South Carolina case law confirming that self-defense and involuntary manslaughter jury instructions are not mutually exclusive. See, e.g., State v. Mekler, 379 S.C. 12, 16, 664 S.E.2d 477, 479 (2008) (“Finally, a self-defense charge and an involuntary manslaughter

is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Involuntary manslaughter is the unintentional killing of another without malice, but (1) while engaged in an unlawful activity 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. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003); see also State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

In the case at bar, evidence is present in the record supporting the charge of involuntary manslaughter. First, direct evidence was present in the record indicating Appellant did not intend to kill either Minor *or* the assailant shooting at him. Specifically, Appellant testified that he tensed up, “was scared and lost, [his] train of thought, almost like everything around [him] just kind of.... Like just kind of like a blur.” R. 1177, ll. 3-10. He acknowledged firing what he thought may have been 10 to 12 times from his AK pistol at the assailant until it was empty

charge are not mutually exclusive, as long as there is any evidence to support both charges.”); see also Crosby, 355 S.C. at 53, 584 at 112 (“The effect of the Court of Appeals’ holding is that if there is any evidence a shooting was intentional, all evidence from which any other inference is may be drawn is negated. This is not the law of this state.”) (emphasis in original); Light, 378 S.C. 641 at 650, S.E.2d at 470 (distinguishing State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) by holding it is a question for the jury to decide “[w]hen there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges as there is “any evidence” to support each charge.”). Further, Appellant asserts that, to the extent that Pickens remains applicable where a firearm is discharged under the lawful act of self-defense, yet in a manner exhibiting reckless disregard for the safety of others, the evidence presented under the “any evidence” standard has met the elements of involuntary manslaughter—including the statutory definition of criminal negligence as “the reckless disregard for the safety of others.” S.C. Code Ann. § 16-3-60 (Westlaw, West current through 2023). Thus, the matter must be strictly for the jury to decide regardless of whether the firearm was intentionally or unintentionally fired since the question of whether the conduct was “reckless” or rose to the level of “malice” was inherently a factual issue lying in the province of the jury rather than a matter of law.

because he “really wanted him to stop shooting at us.” R. 1177, ll. 12-23. Appellant further indicated he did not want to injure anyone, and that he was afraid. R. 1183, ll. 1-4; R. 1213, l. 15—R. 1214, l. 1. Thus, a factual issue for the jury existed under the any evidence standard as to whether the shooting itself was committed intentionally or unintentionally. See Light, 378 S.C. 641 at 650, S.E.2d at 470. Accordingly, evidence exists in the record showing Appellant harbored no malice in his heart at the time he responded to the assailant shooting at him.

Second, based upon Appellant’s testimony, he was lawfully engaged in self-defense when he fired the AK pistol in an act of self-defense, and the trial court charged the jury regarding the law of self-defense without objection from the State.¹⁰ Moreover, Appellant lawfully purchased and possessed the AK pistol in question. Additionally, the evidence taken in the light most favorable to the defense indicates Appellant did not unlawfully present or brandish his weapon toward his assailant either. Regardless, even if Appellant’s possession of the firearm was unlawful, “[a] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.” Crosby, 355 S.C. at 52, 584 S.E.2d at 112; see also Light, 378 S.C. at 649, n.6, 664 S.E.2d at 469, n.6; Burriss, 334 S.C. at 265, n.10, 513 S.E.2d at 109, n.10.

Thus, while engaged in the lawful act of self-defense, Appellant fired his AK pistol in a manner that the jury could reasonably infer was a reckless disregard for the safety of others.

¹⁰ Testimony of Appellant readily indicated that he was being assaulted by a man coming toward him from across the street while shooting a handgun at him. Appellant reasonably feared for his life, as would a person of ordinary prudence and courage. Moreover, evidence was also present that Appellant had no duty to retreat; due to his status an invited guest at Wanda’s birthday party at Lot 7, Appellant was in a place where he had a right to be. Furthermore, Appellant was being shot at by one assailant and heard shots from all around. Thus, Appellant is not required to expose himself to greater danger simply to retreat. R. 1175, l. 18—R. 1176, l. 9; R. 1179, ll. 8-12; R. 1202, l. 24—R. 1203, l. 2. Rather, under the law of self-defense, Appellant was allowed to act upon appearances, and meet force with force to defend himself.

Appellant testified that his hands tensed up, he was a blur, and shots toward the assailant hit the ground around him; however, it appears he missed every shot. R. 1176, ll. 14-17. Such reckless handling and operation of his AK pistol is likewise in accordance with Appellant's admitted lack of training. As a result, the magazine of fifteen rounds was emptied toward the assailant without apparently considering what was behind the assailant. Indeed, based upon the adduced evidence at trial that the 7.62 x 39mm ammunition here penetrated the wall of Lot 15, then passed through an entire refrigerator before coming out and fatally striking Minor, it could reasonably be considered reckless disregard for the safety of others for the AK pistol to have been fired in the environment of the Rocky Lane trailer park—regardless of whether he hit or missed the assailant, the bullet still could have passed through and gone to other unintended places. Succinctly stated, while harboring no malice towards anyone, Appellant's actions taken in self-defense to stop a deadly threat to himself and others, while lawful toward the assailant, inadvertently created a situation of reckless disregard for the safety of others.

Moreover, the State's own arguments highlight of how Appellant's firing his AK pistol was done in reckless disregard for the safety of others. As the State acknowledged in its closing argument, a shooter at Lot 15 was "using Lot 15 as a barricade," and Appellant kept shooting into it. R. 1288, ll. 10-12. In other words, the State's own theory indicates that Appellant fired his entire magazine toward a person that was using the trailer at Lot 15 as a barricade, and missed. Further, its own witness who processed bullet holes from vehicles at the incident location supports the notion that what occurred was a "reckless shootout." R. 1157, l. 25—R. 1158, l. 4. Thus, when taken as a whole and in the light most favorable to Appellant, evidence exists in the record tending to support the lesser-included offense of involuntary manslaughter.

Finally, Appellant was prejudiced by the trial court's failure to give an involuntary manslaughter jury instruction. Succinctly stated, Appellant was denied the opportunity to have the jury consider a lesser-included offense when deliberating his case. See, e.g., Hill, 315 S.C. at 262, 433 S.E.2d at 849 (stating reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence). We know the jury specifically examined Appellant's testimony—which included facts supporting involuntary manslaughter—because they specifically asked to hear it during their deliberations. R. 1358, l. 4—R. 1361, l. 6. Importantly, whether Appellant's allegedly reckless conduct amounted to malice, or simply an element of involuntary manslaughter, was a factual question for the jury to decide, not the trial court. Yet by refusing to instruct the jury on involuntary manslaughter, the trial court essentially permitted the State to argue such reckless conduct amounted to malice, while Appellant was denied the right and ability to argue Appellant's inadvertent shooting of Minor was unintended, without malice, yet occurred due to his reckless disregard for the safety of others while he was engaged in the lawful activity of self-defense. In other words, if the jury believed Appellant was responsible for Minor's death, the only means they were permitted to hold him accountable for such conduct was murder—a situation the State maximized in its final words to the jury: “that shooter took that child's life, that shooter fired the bullet that snuffed her out, and for that he doesn't walk away.” R.1316, ll. 15-17. Accordingly, Appellant was prejudiced by the trial court's reversible error of refusing to charge the jury with the lesser-included offense of involuntary manslaughter.

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

The trial court erred in refusing to charge manslaughter. “In determining whether voluntary manslaughter should be charged as a lesser offense of murder, the court must view the evidence in the light most favorable to the defendant.” State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008) (holding that voluntary manslaughter should have been charged as a lesser-included offense to murder). Thus, a request to charge voluntary manslaughter “is properly rejected only where there is no evidence whatsoever of the lesser offense.” Id. (internal quotations omitted). Additionally, “[b]oth self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements for self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.” State v. Gilliam, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988).

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as “the unlawful killing of another without malice, express or implied.” S.C. Code Ann § 16-3-50 (Westlaw, current through 2023). The offense is further defined by common law as “the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” Cottrell, 376 S.C. at 262, 657 S.E.2d at 452. “Sudden heat of passion upon sufficient legal provocation” mitigating felonious killing to manslaughter “must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” State v. Wiggins, 330 S.C.

538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (quotations omitted).

In the present case, the trial court refused to charge voluntary manslaughter because it did not believe any evidence in the record supported the charge, and that South Carolina courts have not applied the doctrine of transferred intent to voluntary manslaughter. R. 1347, l. 15—R. 1348, l. 5. However, contrary to the trial court’s ruling, when viewed as a whole the record contains evidence supporting the charge of voluntary manslaughter as a lesser-included offense of murder. First, direct evidence was present in the record indicating Appellant did not intend to kill either Minor or the assailant shooting at him. Specifically, Appellant testified that he fired what he thought may have been 10 to 12 times from his AK pistol at the assailant until it was empty because he “really wanted him to stop shooting at us.” R. 1177, ll. 12-23. Appellant further indicated he did not want to injure anyone, and that he was afraid. R. 1183, ll. 1-4; R. 1213, l. 15—R. 1214, l. 1. As such, evidence existed in the record indicating Appellant’s conduct of lawfully shooting his AK pistol in self-defense was not done with malice.

Second, the record also contains evidence that when Appellant returned fire in self-defense, it was under the sudden heat of passion and in response to sufficient legal provocation. Specifically, Appellant testified that he was sitting in his car when he suddenly heard shots coming from near the front of his car. After getting out of his car and hearing more shots, he frantically ran to the rear of the car, then to the nearby side of the trailer, and then back to his car where he obtained his AK pistol. When he looked up to the street, he saw an assailant coming toward him firing a handgun. Such circumstances readily constitute overt acts of sufficient legal provocation that would “naturally disturb the sway of reason, and render the mind of an ordinary

person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” Wiggins, 330 S.C. at 549, 500 S.E.2d at 495.

Moreover, Appellant’s testimony likewise indicates the assailant’s overt act of shooting at him indeed overcame his capability of cool reflection and caused him to act in an uncontrollable impulse to do violence: he testified that he tensed up, “was scared and lost, [his] train of thought, almost like everything around [him] just kind of.... Like just kind of like a blur.” R. 1177, ll. 3-10. He did not even remember how many shots he fired or where exactly each of his shots hit. Rather, his testimony, coupled with the forensic evidence in the case, indicate a panicked and uncontrolled response by Appellant of shooting his entire magazine in the direction of his assailant in an effort to stop the assailant from shooting at him. As previously indicated, Appellant did not initially know exactly how many shots he fired, or where each of his shots hit when he fired back in his scared, blurred state of mind. See, e.g., State v. Starnes, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010) (“Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the distinction between voluntary manslaughter and self-defense.”). As such, evidence was present in the record that Appellant acted under the sudden heat of passion in response to an overt act amounting to sufficient legal provocation. Accordingly, the trial court erred in refusing to charge the jury with voluntary manslaughter.

The trial court’s reluctance to instruct the jury on the lesser-included offense of voluntary manslaughter simply because some ambiguity exists regarding application of the doctrine of transferred intent in such circumstances was likewise erroneous.¹¹ See State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) (“[T]he applicability of the doctrine of transferred intent to

¹¹ Unlike State v. Williams, 439 S.C. 620, 889 S.E.2d 562 (2023), the issue was indeed raised before the trial court in Appellant’s case and is preserved for review.

voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina.”).

In State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), the Court readily indicates the doctrine of transferred intent may indeed apply to murder or manslaughter cases:

This Court in several cases has held that a defendant *may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent*. In the classic case, the defendant *intends to kill or seriously injure* one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant’s criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. “*If there was malice in [defendant’s] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake.*”

Id. 340 S.C. at 272, 531 S.E.2d at 515 (quoting State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941)). Under the Fennell Court’s rationale, if the defendant harbored malice in his heart when fired with intention to kill an intended victim but missed, then the same malice and intent to kill follows the bullet that strikes the unintended victim. Thus, the bullet striking an unintended victim would carry no malice or intent to kill if the defendant harbored no malice or intent to kill when firing towards the intended target.

What is more, the rationale Fennell highlights the fact that the source of malice or intent (or lack thereof) in the mind of the defendant toward the unintended victim makes no difference in the analysis of transferred intent; rather, what matters is whether the defendant harbored malice or intent towards the original intended target. Id. In the words of the Fennell Court, “The defendant’s *mens rea*, whatever it may be at the time he allegedly commits a criminal act, is contained within the defendant’s brain when he commits the act. . . . A more apt description might be that the mental state is like a spotlight emanating from its source—the defendant’s

mind—to its target—the intended victim.” Id. 340 S.C. at 271, 531 S.E.2d at 515. If the defendant harbored malice toward the intended victim, but missed and struck an unintended victim, then the doctrine of transferred intent applies regardless of how or why the defendant harbored malice toward the intended victim. Accordingly, traditional common law aspects of voluntary manslaughter, such as the intended victim being the source of sufficient legal provocation causing the defendant’s reason to be overcome in the sudden heat of passion,¹² are likewise transferred when the defendant fires at the target that provoked him. This is so because the “spotlight” of *mens rea* is on the defendant’s mental state emanating toward the intended victim. To hold otherwise would essentially elevate voluntary manslaughter to a specific intent crime, whereas murder and involuntary manslaughter would remain general intent offenses.

Yet, the Fennell Court’s observation that that “a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent” is also in accord with South Carolina law regarding the application of transferred intent to “general intent” offenses. As the Court in State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019) confirmed, “It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes.” Id. 427 S.C. at 157, 829 S.E.2d at 707; see also State v. Smith, 430 S.C. 226, 234 n9, 845 S.E.2d 495, 499 n9 (2020) (acknowledging the applicability of the doctrine of transferred intent to general intent offenses). “General intent” is defined as the state of mind required for the commission of certain common law crimes not requiring specific intent” and it “usually takes the form of recklessness ... or negligence.” State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) (internal quotations omitted), overruled in part by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). As previously stated, voluntary manslaughter is

¹² See, e.g., Harris v. State, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003) (citing State v. Locklair, 341 S.C. 352, 362-63, 535 S.E.2d 420, 425 (2000)).

statutorily defined as “the unlawful killing of another without malice, express or implied.” S.C. Code Ann § 16-3-50 (Westlaw, current through 2023). The heightened *mens rea* for murder is noticeably absent. Rather, “[v]oluntary manslaughter, of course, is an offense which does involve intent on the part of the perpetrator but lacks the element of malice.” State v. Blassingame, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978). No specific intent is included in this definition; by eliminating the requirement of malice the definition has even an even less specific *mens rea* than general intent offense of murder. Further, the common law requirements that the killing occur under the sudden heat of passion “such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence,” likewise indicate that voluntary manslaughter is a general intent offense not requiring a specific intent to kill. Wiggins, 330 S.C. at 549, 500 S.E.2d at 495 (citing Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (quotations omitted)).¹³ Thus, transferred intent likewise applies to the general intent offense of voluntary manslaughter.

Accordingly, the trial court erred by failing to provide the lesser-included jury instruction to the jury. As previously discussed, facts were present in the record supporting the required elements, and the doctrine of transferred intent applied.

¹³ This understanding is shared with other jurisdictions as well. See, e.g., Pethtel v. State, 177 So. 3d 631, 635 (Fla. Dist. Ct. App. 2015) (“Voluntary manslaughter, on the other hand, carries a much broader ambit of intent. To be guilty of this kind of manslaughter, a defendant need not actually intend to kill or injure a victim.”); State v. Ceretti, 871 N.W.2d 88, 94 (Iowa 2015) (“specific intent to kill is not an essential element of voluntary manslaughter.”) (listing additional jurisdictions reaching the same result); Bruce v. State, 2015 WY 46, 66, 346 P.3d 909, 929 (Wyo. 2015) (“voluntary manslaughter is a general intent crime that does not require a deliberate intent to kill.”).

Appellant was also prejudiced by the court's refusal to charge voluntary manslaughter. Appellant was denied the opportunity to have the jury consider a lesser-included offense when deliberating his case. As the State emphasized in its closing, "that shooter took that child's life, that shooter fired the bullet that snuffed her out, and for that he doesn't walk away." R. 1316, ll. 15-17. Yet, Appellant was denied the right and ability to even argue to the jury that it should consider the lesser-included offense of voluntary manslaughter, even though evidence in the record supported the charge. Thus, Appellant was prejudiced by the trial court's refusal to charge voluntary manslaughter. See, e.g., Hill, 315 S.C. at 262, 433 S.E.2d at 849.

CONCLUSION

For the foregoing reasons, Appellant Quayshaun Xzander Clark respectfully requests reversal of his convictions, and remand for a new trial.



Breen Richard Stevens
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This 17th day of May, 2024.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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May 17 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

QUAYSHAUN XZANDER CLARK,

APPELLANT

APPELLATE CASE NO. 2022-000962

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 17th day of May, 2024.



Breen Richard Stevens
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May 20 2024

SC Court of Appeals

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APPELLANT.

Appellate Case No. 2022-000962

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QUESTIONS PRESENTED

- I. Whether the trial court reversibly erred by failing to charge involuntary manslaughter as a lesser included offense where direct evidence indicated Appellant fired his gun without malice and in self-defense, but missed the target and inadvertently struck a bystander inside the mobile home behind the assailant?
- II. Whether the trial court reversibly erred by failing to charge voluntary manslaughter as a lesser included offense under the doctrine of transferred intent where direct evidence indicated Appellant was being shot at when, under the sudden heat of passion, he obtained his own firearm and returned fire to stop the threat to himself and other family members present?

ALTERNATE QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

On June 9, 2021, appellant Quashawn Clark (“Clark”) murdered 11-year-old Ta’Shya ____ in the Batesburg-Leesville area of Lexington County. Clark was arrested 2 days later, on June 11, 2021, in Gilbert, S.C. Clark was indicted on June 13, 2022, by the Lexington County Grand Jury for Ta’Shya’s murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime. (Indictment #s 2022-GS-32-1991 - 1994). Clark proceeded to a jury trial on June 27, 2022, before Circuit Court Judge Debra McCaslin. The State was represented by Deputy Solicitor Suzanne Mayes and Assistant Solicitor Rhonda Patterson. Clark was represented by Anna M. Williams and Robert “Theo” Williams, Esquires. At the conclusion of the trial, the jury found Clark guilty of murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime. Clark was sentenced to 48 years for murder, 10 years for discharging a firearm into a dwelling, and 5 years for possession of a weapon during a violent crime. The sentences were ordered to run concurrently. Clark appeals raising 2 issues. (IBOA, p. 1). This is the Final Brief of Respondent. (R. 1, 20-21, 807-08; 1361-84, Indictments & Sentencing Sheets).

RESPONDENT'S STATEMENT OF FACTS

Brief Statement of the Crime

On June 9, 2021, 11-year-old Ta'Shya ____ ("Ta'Shya") was murdered in the home of a friend, Comilla Jackson, who Ta'Shya considered her "auntie," while Ta'Shya was playing with her brand-new cell phone and with a friend, Jamiya, Comilla's daughter. Comilla lived in a mobile home on Lot 15 of the Rocky Lane Mobile Home Park in the Batesburg-Leesville area of Lexington County. Two (2) other small children, Akia and Princess, were also in the home playing at the time of the shooting. The victim's mother, Shandrika Jay ("the mother") was in the den of the home talking to Comilla, her close friend. An 18-year-old young man who had just graduated from high school was also in the home. Ta'Shya was killed by an AK/SKS bullet fired by appellant Quashawn Clark ("Clark") from the porch or backyard of a home located on Lot 7 in the same mobile home park.¹ Clark fired at-least 15 shots with his AK-47 pistol/rifle, 1 of which struck Victim in the head killing her.² Clark owned the weapon, and 15 fired shell casings from his gun were found near the back porch of Lot 7 where Clark fired from. Clark owned another gun, a 9mm, that was also used in the shooting. (R. 482-547; 549-52; 554-826; 830-43; 851-917; 920-972; 978-1007; 1011-1132).

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

² The firearm is not really a pistol. It is an AK-47 type weapon with the rear stock removed from the gun. It looks like a rifle without the back end on it. The gun has a firing range of 400 yards (R. 759-75).

The State's Case

The State's evidence at trial proved beyond any doubt that Ta'Shya died as a result of a gun battle between 2 groups of armed men, 1 group at Lot 7 of Rocky Lane Mobile Home Park and another group located between Lot 15 and 16 of the same mobile home park.³ Clark was part of the group of men at Lot 7 and it was 1 of the bullets he fired that struck the victim killing her. The gun battle erupted at 10:34 p.m. The conflict between the 2 groups of men that led to the gun battle had been brewing for most of the afternoon before the shooting and ended with the gunfight at the residential mobile home park where an innocent child, Ta'Shya, was murdered by Clark's gunfire from his assault weapon. The mobile home Ta'Shya was inside of, on Lot 15, which contained numerous children [4 in all] and 3 adults, was struck multiple times [8 in all] by the hail of gunfire from Lot 7, where 2 of Clark's guns were fired, including the AK pistol/rifle. At least 2 of the shots fired by Clark struck the mobile home where Ta'Shya was hiding including the 1 which struck and killed Ta'Shya. The assault weapon which killed the victim was owned and fired by Clark and a 9mm owned by Clark was fired by a friend and associate of Clark. A .40 caliber pistol was also fired from the back yard of Lot 7 in the direction of the mobile home located on Lot 15. Vehicles and other homes were also struck by stray bullets. (R. 482-547; 549-52; 554-806; 809-26; 830-43; 851-917; 966-72; 979-1007; 1011-1132).

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

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

sit perpendicular, not parallel to the road. After you enter the mobile home park, you will pass several mobile homes on both sides of the road and then you will pass Lot 15 and then Lot 16 on your left. Lot 15 is where Victim was located when murdered. As you continue into the mobile home park, the road makes a “Y” with roads going off to the right and left. If you take the road to the right, Lot 7 is the second mobile home on the right after the road makes the Y. Lot 7 is also perpendicular to the road. The back porch of Lot 7 faces back toward the entrance of the mobile home park and toward Lots 15 and 16, with Lot 16 being closer to Lot 7, but both mobile homes, Lots 15 and 16, are on the opposite side of the road from Lot 7. There are approximately 20 mobile homes in the mobile home park. At the time of Ta’shya’s death, there was a high school graduation party going on between the mobile homes on Lots 15 and 16 and a birthday party going on at the mobile home on Lot 7. (R. 499-547; 549-52; 554-646; See also State’s Ex. #s 12; 19; 85; 86; 87; 101; 176).

What led to the child’s murder

Earlier that same day, June 9, 2021, in the late afternoon/early evening, appellant Clark’s cousin, Donald Jackson (“D.J.”) and a friend Nokia Tolen (“Tolen”), stopped at *Hartley’s* convenience store. While inside the store, D.J. ran into to 2 men, Var Pugh and De Alewine. These men were enemies of D.J. and an altercation or dispute occurred inside the store, and Pugh and Alewine followed D.J. out of the store where threats were made or exchanged between D.J. and De Alewine. Tolen tried to calm the dispute, to no avail. Tolen and D.J. then drove to D.J.’s home in Tolen’s car, where other friends or associates of D.J. were located. Pugh and Alewine eventually followed D.J. to his home where the dispute continued. More heated words were exchanged. Finally, the men agreed to resolve the dispute later at Rocky Lane. (R. 677-758).

While these threats were being exchanged between De Alewine, Var Pugh, and D.J., and thereafter, D.J. was calling Clark on his cellphone. Clark's phone records showed 14 phone calls in this frantic sequence of events where D.J. was trying to reach Clark. D.J. also e-mailed Clark. Finally, D.J. and Clark spoke for approximately 55 seconds according to phone records. Clark was already at Lot 7 of Rocky Lane and armed with several firearms including the AK/SKS pistol/rifle and the 9mm later used in the shooting. (R. 677-75; 646-76; 594-600; 628-29; 902-12; 1056-1111; State's Ex. 21 & 22; 37, 84; & 163).

At D.J.'s home when the group of men agreed to resolve the dispute at Rocky Lane was Kaymonte "Kay" Norris [a male] (hereinafter "Norris") who was armed with a loaded .40 caliber semi-automatic pistol. Tolen [D.J.'s friend who drove him home from *Hartley's* store] also phoned Decarlos "Hugo" Chatman ("Hugo") to go to Lot 7 at Rocky Lane as well. Tolen drove himself, D.J. and Norris to Lot 7 and Hugo drove his own car. Hugo was known to carry a .22 revolver. Around 10:00 p.m., Tolen arrived at Lot No.7 of Rocky Lane Mobile Home Park with D.J. in the passenger seat and Norris in the back seat. As Tolen pulled into the mobile home park and passed Lot 15 on his left, he saw Var Pugh's [D.J.'s enemy's] car parked near Lot 16 between Lots 15 and 16. The testimony established De Alewine [also an enemy of D.J.] was also there between Lot 15 and 16 as well. Tolen briefly pulled into Lots 15 and 16 and told his young cousin, who had just graduated from high school, that he needed to leave the area now, something was about to happen, and Tolen told his young cousin that he did not want to be there when it occurred. There were more men now congregating between Lots 15 and 16. After warning his cousin of the impending danger, Tolen then drove to Lot 7 with D.J. and Norris in the car. Hugo arrived next and was armed with the .22 revolver. (R. 677-758; 554-646).

As previously stated, Clark was already there at Lot 7 when this group of men [Tolen, D.J., Norris, and Hugo] arrived at Lot 7 and got out of their cars. Clark had previously backed his car in near the back porch of Lot 7 which faces the direction of Lots 15 and 16. In Clark's trunk was a tote bag that contained multiple firearms and ammunition for those weapons. In the bag there was the AK-47 pistol/rifle, similar to one on the TV show *Fortnight* known as a *Draco* chambered in 7.62 x 39mm ammunition. There was also a 9mm pistol, an F509 chambered in 9mm ammo, that was in the glove box. There was also another AR pistol chambered in .300 blackout kept in the trunk. At some point, Clark took the tote bag out of the trunk and put it in the passenger compartment of his car where he was seen handling the AK pistol/rifle before the shooting erupted. (R. 677-758; 590-676; 778-806; 1112-1132; 893-96; 901-02; 979-1007).⁴

The men at Lot 7 then began exchanging words with the men standing between Lot 15 and Lot 16. The men between Lots 15 and 16 included De Alewine, who was seen by Comilla Jackson in her yard, Lot 15, and Comilla told him to leave her yard. Var Pugh was also there. These were the same 2 men that D.J. had the altercation with earlier at *Hartley's* convenience store and who D.J. agreed to resolve the dispute with at Rocky Lane. (R. 590-820; 623-646; 554-89; 677-758).

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

⁴ There was a birthday party occurring at Lot 7 and a partygoer captured with her camera Clark's trunk open and seen inside the trunk is the soft black bag containing Clark's weapons. (R. 596-600). This bag was later recovered by police after the shooting, but the AR pistol/rifle and its ammo were missing from the bag, but it still contained 9mm ammo and the 9mm pistol used in the shooting. (R. 891-902).

the party at Lot 7. Norris then walked back to Lot 7 with his gun out and visible. The heated exchange between the 2 groups of men continued with D.J. walking from Lot 7 *toward* the same men between Lots 15 and 16, but D.J. did not cross the road. D.J. started yelling things at the men between Lots 15 and 16. Then Hugo walked down toward the men between Lots 16 and 17 but did not cross the road and was still in the yard of Lot 7. Hugo was armed with his .22 revolver. (R. 590-646).

While this was occurring, inside the mobile home located on Lot 15, Ta'Shya, her mother, her mother's small child, Comilla, and her 2 children were minding their own business. Ta'Shya's mother was talking with Comilla, and the children, including the 4 and 5-year-olds, were playing or talking in different parts of the home. The 18-year-old male who had just graduated entered the home and went to the back of the home. (R. 554-89).

Back outside the mobile home, Hugo was on the same side of the road as Lot 7 and pulled out his revolver. Hugo pointed the gun up in the air and fired multiple times into the air like a referee starting a race while yelling out: "Bust, N [word], bust."⁵ Then gunfire erupted from both sides of the road, from the men at Lot 7 and the men between Lots 15 and 16. (R. 623-646; 590-622; See 660-778).

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

⁵ "Bust" in street slang means to fire your weapon. (R. 145-1132).

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

⁶ Tolen testified he could not see Hugo shoot his weapon in the air multiple times because of where he was standing, but immediately after the shots were fired in front of them from the area where they were at, Lot 7, appellant Clark began firing with his assault rifle. (R. 693-96).

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

eight (48) shots were counted on a nearby home's door-bell camera. (R. 677-758; 590-622; 623-46; 554-89; 646-76; 759-806; 809-26; 830-43; 851-917; 966-72; 979-1007; 1011-1111).

S.L.E.D.'s firearms examiner determined the 9mm shell casings found in the yard of Lot 7 and the 2 found in Clark's girlfriend's purse were all fired by Clark's 9mm semi-automatic pistol that came out of his glove box.⁸ As previously stated, this gun was believed to have been fired by D.J. The .40 caliber shell casings found in the yard of Lot 7 were all fired by the same gun believed to have been fired by Norris. All 15 of the AK/SKS fired shell casings were fired by the same gun, the gun Clark later admitted he was shooting. Clark had purchased the gun and the ammo several months before the shooting, which was proven by paperwork from the gun store. It was determined there were at least 3 shooters firing from Lot 7 toward Lots 15 and 16. And, there were at least 3 shooters shooting from the area of Lots 15 and 16 toward Lot 7. The bullet that killed Ta'Shya came from an AK or SKS assault rifle. (R. 979-1007; 778-806; 759-75; 830-43; 913-14; 646-76; 770-77; 1038-1045).

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

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

.380 pistol that he took off of Nash at Lot 7 immediately after the shooting. This gun did not fire any of the casings at the scene. Tolen also testified at trial. (R. 677-758; 1069; 979-99).

Sometime after fleeing, Clark got rid of the murder weapon, the AK pistol/rifle and the ammo for that weapon. Even though police searched, neither the gun nor the ammo for the AK were ever found. Clark also deleted all phone calls *and* a text message from his cell phone that came from his cousin D.J. leading up to the murder. Police had to obtain the Clark's phone records themselves to show the 14 calls and the text message between D.J. and Clark that occurred that night before the murder. There were 13 missed calls and 1 call lasting over 50 seconds. There was also the 1 text from D.J. to Clark before D.J. arrived at Lot 7. In Clark's phone were found the phone numbers for D.J., Hugo, and Norris proving they were associates before the shooting. (R. 819-25; 828-832; 975-1030; State's Ex. 208-09; 34; 84; 163).

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

pistol itself. These calls were the morning after Ta'Shya's murder. (R. 902-06; 1056-1132; State's Ex. 208-09; 34; 84; 163).

Clark dumped his car at his Uncle Marvin Lite's home. He also got rid of his car keys. He gave the 9mm used in the shooting to his cousin, Wanda Lites, and the bag containing the FN nine-millimeter ammo. He also fled his rental home where he and his girlfriend lived and instead stayed with his cousin Nash who was also with him at Lot 7 at the time of the shooting. Police arrested Clark and his girlfriend there, at Nash's home, in Gilbert, S.C. (R. 807-18; 893-96; 901-02).

After his arrest, Clark was interviewed by police and an FBI polygraph examiner. Clark gave 3 different statements. Each statement that Clark gave was false and attempted to misdirect police. His first statement was he was at Lot 7, but he did not shoot at all, and he did not know who did the shooting. Clark then claimed in his second statement that he only fired *the FN 9mm*. Then in his last statement, he admitted he fired *an AK* which he claimed he found on the ground and picked up and fired 10-12 times and then left it at the scene. He denied he owned the weapon or got it out of his own car. He drew a diagram, State's Ex. 5, claiming shooters came across the road from Lots 15 and 16, and Clark claimed that all of the threats to him came from Clark's side of the road. No shell casings were recovered in this area after the murder. No independent witness saw anyone cross the road from Lots 15 and 16 to the side of the road where Lot 7 was located. (R. 646-76; 590-622; 623-46; 677-758; 971-72).

The Defense Case

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

failed, he and his cousin Nash attempted to fix them. He admitted he possessed several firearms in a bag located in the trunk of his car, which he eventually moved to the interior of the car while the speakers were being worked on. Clark admitted he owned 3 firearms, an AR pistol chambered in .300 blackout ammo; a 9mm kept in his glovebox chambered in 9mm ammo; and, finally, an AK “pistol” chambered in SKS 7.62 x 39mm ammo. Clark claimed that his cousin D.J. was avoided by the family because of some previous altercation with a family member. Clark claimed when D.J. called him complaining about De Alewine and Var Pugh, Clark ignored D.J.s rants. Clark claimed he was still at his car at Lot 7 when D.J. texted him once and repeatedly tried to call him earlier in the night before the shooting. When D.J. finally got through on a 55 second call, Clark indicated he simply put his phone down because D.J. was yelling and Clark did not want to hear it. (R. 1161-73).

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

been 10 to 12 times from his AK pistol at the man. He claimed he fired the AK gun until it was empty because he wanted him to stop shooting at us. Clark further indicated he did not want to injure anyone, and he was afraid. Even after he ran out of ammo, he still heard shooting and ran back to his car again. He tried to return to the side of the trailer, but heard more shots coming from that side, and again ran back to his car. He acknowledged that all 15 shell casings of 7.62 x. 39mm found at the scene were his and were fired by him. After the shooting stopped, Clark heard cars leaving the area. He got back into his car and threw the AK into the back seat and left with Nash to go to the home of his uncle Marvin Lites. Clark then spoke with Wanda Lites on his phone, and she picked Clark and Nash up in his vehicle and Clark left his car at Marvin's home. According to Clark, they drove around together while Clark tried to calm down. He eventually ended up at the home of Nash's girlfriend in Gilbert, S.C., where he was arrested on June 11, 2021. (R. 1173-1217).

The Defense also called Kirsten Webster who executed a search warrant on Tolen's cousin's car. The car had been shot during the shootout and windows were shot out as well. Webster testified no one interviewed Tolen's cousin who owned the car. On cross-examination, Webster admitted the car appeared to have been involved in a shootout and based on her reading the incident report, other cars at the scene were also shot, including cars at both Lots 15 & 16 and at Lot 7. (R. 1147-60).

The Defense also called Carleisha Gilliam who was the lead detective who testified they developed numerous suspects from both groups of men involved in the shootout at Rock Lane. She named some of them. She was questioned about deficiencies in the investigation including that no DNA testing was done of samples taken and other suspects were not pursued. (R. 1236-1251). On cross-examination, she testified to Clark's incriminating statements introduced in the

State's case. The State brought out that *in his statement to police* Clark claimed he did not see anyone shooting or shooting up into the air. Again, it was brought out that Clark initially claimed he shot the 9mm. And, he later admitted he fired the AK pistol/rifle, but picked it up off the ground. Gilliam also testified to how and why evidence is submitted to SLED and the thoroughness of her investigation. Finally, she testified the investigation was not closed, but remained open, and other suspects were being pursued and she named several. She also testified on re-direct that Comilla Jackson was afraid of Var Pugh, and Hugo was a suspect along with another individual. (R. 1251-63).

ARGUMENT I.

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

What occurred below

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

⁹ A jury charge conference was held before jury instruction, but objections were withheld until after closing arguments and instructions given by Judge McCaslin. (R. 1268, ll. 2-3; 1317; 1.6 – 1319, l. 6).

his handling and shooting of his firearm. The State argued no evidence supported an involuntary manslaughter instruction because “at no point did the defendant testify he accidentally discharged the gun, at no point did the defendant testify he was engaged in a struggle with anyone else and that the gun accidentally went off.” Judge McCaslin ruled that she “...didn’t hear any evidence to support an involuntary charge. In fact, the opposite. . . There was not any testimony about any accident or [that] it wasn’t intentional or none of that, so the Court declined the charge of involuntary manslaughter.” Judge McCaslin correctly overruled the objection where Clark admitted he intentionally fired his AK/SKS weapon 15 times. (BOA, p. 8, R. 1340, l. 24-R. 1342, l. 18; 1347, ll. 8-14).

Standard of Review

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

730, 731 (1979). “Only the law applicable to the case should be charged to the jury.” State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). “If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury.” Id. When the record contains no evidence to support a lesser included offense, a charge on the lesser included offense should not be given. See State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005), *referencing* State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000). A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error for a judge to refuse to charge a lesser included offense unless there is evidence tending to show the defendant was guilty of the lesser offense. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The presence of evidence to sustain a crime of a lesser degree determines whether it should be submitted to the jury and a defendant’s mere contention that the jury might accept the State’s evidence in part and might reject it in part will not suffice. State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). The trial court should refuse to charge a lesser included offense where there is no evidence the defendant committed the lesser, rather than the greater offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Due process requires that a lesser offense be charged when the evidence warrants it, but only if the evidence would permit a jury to rationally find the defendant guilty of the lesser offense. Patterson, 337 S.C. 215, 522 S.E.2d 845. In order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury’s view of the evidence. State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987). In determining the issues to be submitted to the jury, all of the testimony, both for the State and the defense must be considered. State v. Knoten, 347 S.C. 296, 309, 555 S.E.2d 391, 398 (2001).

Analysis

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

The State's case

Under the State's version of what occurred, Clark is guilty of murder. Clark was part of a group of armed men at Lot 7 who had a dispute with a group of armed men between Lots 15 and 17 and the 2 groups of men agreed to resolve the dispute by gunfire in a crowded mobile home park. Clark, who was already at Lot 7 when the rest of his group arrived, joined his group armed

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

The Defense' case

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

Clark is not entitled to an instruction on involuntary manslaughter where he intentionally fired his assault weapon 15 times. Douglas, 332 S.C. 7, 504 S.E.2d 307; Crosby, 355 S.C. at 52-53, 584 S.E.2d at 112; Pickens, 320 S.C. 528, 466 S.E.2d 364.¹⁰

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

In both State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) and State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991), the murder convictions were sustained because there was evidence indicating the defendant had acted intentionally in using a deadly weapon. See also State v. Dobson, 281 S.C. 36, 314 S.E.2d 310 (1984)(conviction of reckless homicide reversed); State v. Cox, 279 S.C. 205, 305 S.E.2d 76 (1983)(conviction of involuntary manslaughter reversed). See Pickens, 320 S.C. 528, 466 S.E.2d 364 (because self-defense is intentional and involuntary manslaughter is unintentional, a defendant is not often entitled to an instruction on involuntary manslaughter and self-defense).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Harmless error

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

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

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

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

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

ARGUMENT II.

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

What occurred below

As previously discussed, at the charge conference, Clark also requested the court instruct the jury on voluntary manslaughter. Judge McCaslin declined. Clark renewed his objection after the jury instruction. The State argued the provocation did not come from the victim, which is required under South Carolina law to have voluntary manslaughter, and South Carolina has not extended transferred intent to voluntary manslaughter, and regardless, "there was not sufficient evidence on the record to support a voluntary manslaughter charge regardless of the transferred intent issue." (R. 1346, l. 20 - 1347, l. 7). Judge McCaslin correctly declined to instruct the jury on voluntary manslaughter stating as follows:

I read the Childers, the Wharton, and also the Williams case that was supplied by the defendant, and the law as it stands today in this State is our Court has not applied the doctrine of transferred intent to voluntary manslaughter. This Court does not believe the evidence even supports a voluntary manslaughter [instruction] in this case, nor was there any overt act by the victim to indicate any provocation by the victim.

There's ---again, I have to turn back to the defendant arming himself. As a matter of fact, he goes to the back of his car, to the back of the trailer, he goes back to the car, arms himself. There was no testimony or evidence that I heard about a heat of passion or uncontrollable impulse to do violence, so I declined to charge the voluntary manslaughter.

(R. 1347, ln. 15 – 1348, ln. 5).

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

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

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

2. Locklair cites the Texas case, Sattiewhite v. Texas, 786 S.W.2d 271 (Tex.Crim.App.1989), for the proposition that provocation on the part of the deceased or a third party acting in concert with the deceased will support a manslaughter verdict. However, a Texas statute specifically defines sudden passion as "passion directly

caused by and arising out of provocation by *the individual killer or another acting with the person killed* which passion arises at the time of the offense and is not solely the result of former provocation.” Id. at 287 (citing Tex. Code Ann. § 1904(b)) (emphasis added). South Carolina does not have a comparable statute.

Locklair also relies on the South Carolina case, State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) for the proposition that provocation by a third party would support a voluntary manslaughter verdict. In Wyatt, the appellant hit his wife at a race track and then was confronted by an angry crowd as he tried to leave. The appellant shot two men who tried to prevent him from leaving. The appellant's theory in Wyatt was self-defense. Therefore, under the facts in Wyatt, the provocation derived from the victims' actions, not his wife's, who was merely a third party to the incident.

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

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

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

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

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

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

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

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

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

Williams v. Commonwealth, 64 Va. App. 240, 249, 767 S.E.2d 252, 257 (2015)(footnote

omitted). The Virginia Supreme Court noted that other states also agree:

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

Here, taken in the light most favorable to Sims, we find there is no evidence to support the inference that Sims shot David in a sudden heat of passion. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 (“To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion.”). Sims indicated that she was in the bathroom alone when David entered with pliers and a knife and began calling her a liar. Sims then indicated that David got physical with her over control of her phone. Sims claimed that David then began threatening her and taunting her with the knife, causing her to grab the gun out of fear. Even though she was afraid, Sims said she held the gun by her side and asked David to stop what he was doing, indicating she did not want to use the gun. *See id.* at 523, 772 S.E.2d at 881 (“Because [Appellant], by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.”).

Sims also told police she grabbed the gun hoping to “scare” David so he would stop his threatening behavior, adding that she had never meant to shoot him. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 (“[B]y Appellant's own testimony, he shot at the men *to scare them away*. Appellant's testimony appears designed to *support a charge of self defense, not heat of passion*.”) (emphases added). According to Sims, David became even angrier, continuing to threaten her as she tried to back out of the bathroom. *See Cook*, 415 S.C. at 557, 784 S.E.2d at 668 (“The fact that [Appellant] was trying to walk away from the conflict does not suggest [Appellant] was incapable of cooling off.”). As she tried to back out, Sims testified that David lunged at her and “my hand went up and I shot, and I shot out of reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared.” *See id.* at 558, 784 S.E.2d at 668 (“We do not believe ... [Appellant's] statement ‘before I knew it, I

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

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

State v. Sims, 426 S.C. 115, 134–39, 825 S.E.2d 731, 741–43 (Ct. App. 2019)(footnotes omitted).

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

CONCLUSION

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

Respectfully Submitted,

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May 20, 2024.

By: s/ J. Anthony Mabry
ATTORNEYS FOR RESPONDENT

May 20 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

v.

QUAYSHAUN XZANDER CLARK,

APPELLANT.

Appellate Case No. 2022-000962

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 20th day of May, 2024.

s/ J. Anthony Mabry
J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

May 20 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
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APPELLANT.

PROOF OF SERVICE

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

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

This 20th day of May, 2024.

s/ Donna D'Alessio
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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Quayshaun Xzander Clark, Appellant.

Appellate Case No. 2022-000962

Appeal From Lexington County
Debra R. McCaslin, Circuit Court Judge

Opinion No. 6123
Heard April 10, 2025 – Filed September 24, 2025

AFFIRMED

Appellate Defender Gary Howard Johnson, II, of
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Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody J. Brown, and Senior
Assistant Attorney General J. Anthony Mabry, all of
Columbia; and Samuel R. Hubbard, III, Solicitor, of
Lexington, all for Respondent.

TURNER, J.: Quayshaun X. Clark appeals his convictions and sentences for murder, discharging a firearm into a dwelling, and possession of a weapon during the commission of a violent crime. On appeal, Clark argues the trial court erred by (1) failing to charge involuntary manslaughter and (2) failing to charge voluntary manslaughter under the doctrine of transferred intent. We affirm.

On June 9, 2021, Clark was involved in a shootout at the Rocky Lane mobile home park outside of Batesburg, South Carolina. According to the evidence presented at trial, there were two parties in the neighborhood that day—Clark attended a birthday party for his cousin at Lot 7 and a graduation party was also taking place across the street between Lots 15 and 16.

According to Clark's testimony, around 10:30 p.m., he was sitting in his car, which he had parked near the back porch of the mobile home on Lot 7, facing in the direction of Lots 15 and 16.¹ Clark heard gunshots coming from the area in front of the car and initially ran behind the mobile home, but he then returned to his car and retrieved his AK pistol.² He testified he saw a man shooting and walking towards him across the street, so he returned fire because he wanted the shooting to stop. In much of his testimony, Clark described what seems to be a single person shooting and "coming across the street." Clark explained that although he only saw one individual whom he could "sort of make out," he saw shots being fired from the direction of Lots 15 and 16 *and* "a guy come across the street shooting." Further, he stated he could see "silhouettes of people" in the area of Lots 15 and 16 but could not identify them.

Clark stated he felt "scared and lost" and "everything around [him was] just kind of . . . like a blur." Clark fired approximately fifteen rounds in the direction of Lots 15 and 16 until his magazine "went dry." One of those rounds entered the mobile home on Lot 15, striking and killing an eleven-year-old girl (Victim).

¹ The State presented conflicting testimony showing Clark armed himself prior to the first shots being fired and gave his 9mm pistol to another man present at the party; no other witness saw anyone cross the street and no shell casings were found in the area where the man firing at Clark was alleged to have been; Clark fled the scene before law enforcement arrived; and Clark gave multiple untrue statements to police about his involvement, including initially denying that he shot a gun or that he saw anyone shooting at him. However, because our standard of review requires us to view the evidence in the light most favorable to Clark, we have focused on his version of events here.

² Clark testified he had three guns in his car—"an AR pistol that shoots 300 blackout," "an AK pistol that shoots [a] 7.62 [mm bullet,]" and "an FN pistol 509," which is a 9mm pistol. He stated he typically stored the AK and AR pistols in the trunk and the FN pistol in the glove box because he did not want his daughter to gain access to them.

Clark requested jury instructions on involuntary manslaughter and voluntary manslaughter. He asserted he killed Victim while acting lawfully in self-defense but with a reckless disregard for the safety of others in shooting towards the homes on Lots 15 and 16. He also argued voluntary manslaughter was appropriate because he acted while under the sudden heat of passion due to being fired upon first, and he asserted that the doctrine of transferred intent applies to both murder and manslaughter. The trial court denied the request for an involuntary manslaughter instruction because "[t]here was not any testimony about any accident or [that the shooting] wasn't intentional." The trial court also declined to give the voluntary manslaughter charge because our courts have "not applied the doctrine of transferred intent to voluntary manslaughter." It also noted that it did "not believe the evidence even support[ed] a voluntary manslaughter [charge] in this case, nor was there any overt act by [V]ictim to indicate any provocation by [V]ictim." Finally, the trial court stated it had not heard any testimony or evidence "about a heat of passion or uncontrollable impulse to do violence." The trial court charged self-defense without objection.

The jury convicted Clark of murder, discharging a firearm into a dwelling, and possession of a weapon during the commission of a violent crime, and the trial court sentenced him to an aggregate term of forty-eight years' imprisonment. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err by failing to charge involuntary manslaughter as a lesser-included offense?
- II. Did the trial court err by failing to charge voluntary manslaughter as a lesser-included offense under the doctrine of transferred intent?

LAW/ANALYSIS

"An appellate court will not reverse a trial court's decision regarding a jury instruction unless there is an abuse of discretion." *State v. Brooks*, 428 S.C. 618, 625, 837 S.E.2d 236, 239 (Ct. App. 2019). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* (quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007)).

"The trial [court] determines the law to be charged on the presentation of evidence at trial." *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "If there

is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). "A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense." *State v. Crosby*, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). "In determining whether the evidence requires a charge on [a lesser-included offense], this [c]ourt must view the facts in the light most favorable to the defendant." *State v. Childers*, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007).

I. Involuntary Manslaughter

Clark argues the trial court erred in denying his request to charge involuntary manslaughter because (1) the evidence created a "factual issue for the jury . . . as to whether the shooting itself was committed intentionally or unintentionally" and (2) he was lawfully engaged in self-defense when he shot "in a manner that the jury could reasonably infer was a reckless disregard for the safety of others." We disagree.

Involuntary manslaughter is either "the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm" or "the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." *State v. Wigington*, 375 S.C. 25, 35, 649 S.E.2d 185, 190 (Ct. App. 2007). "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." *Crosby*, 355 S.C. at 52, 584 S.E.2d at 112. "[T]he negligent handling of a loaded gun will support a finding of involuntary manslaughter." *State v. Light*, 378 S.C. 641, 648, 664 S.E.2d 465, 469 (2008).

Further, "a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges." *Id.* at 650, 664 S.E.2d at 470. However, "[t]o warrant a jury charge on involuntary manslaughter under either definition, there must be some evidence that the killing was unintentional." *Sullivan v. State*, 407 S.C. 241, 244-45, 754 S.E.2d 885, 887 (Ct. App. 2014).

Clark contends there is evidence that the killing was unintentional because he did not intend to kill anyone and he was scared and "everything around [him was] . . . just kind of a blur." However, Clark testified repeatedly that he fired his gun aiming at a specific target—the man or group of people he saw shooting at him

from the direction of Lots 15 and 16—and for a specific reason—because he was trying to stop the gunshots; further, he stated he only stopped shooting because "[his] magazine went dry." Although Clark maintained he only fired in self-defense and did not mean to shoot Victim, we find no evidence that Clark pulled the trigger unintentionally. Thus, we hold Clark was not entitled to an instruction on involuntary manslaughter. *See State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996) (holding the defendant was not entitled to a charge of involuntary manslaughter when he "admitted he shot the gun" but "contend[ed] he acted lawfully but recklessly in defending himself"); *Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310-11 (1998) (reasoning that because "involuntary manslaughter is at its core an unintentional killing[,] when "a defendant intentionally arms himself and shoots into a crowd . . . he is not entitled to an involuntary manslaughter charge"); *Sullivan*, 407 S.C. at 245, 754 S.E.2d at 887 ("When the victim was killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter."). We therefore affirm the trial court as to this issue. *See Shuler*, 344 S.C. at 632, 545 S.E.2d at 819 ("The trial [court] determines the law to be charged on the presentation of evidence at trial."); *Brooks*, 428 S.C. at 625, 837 S.E.2d at 239 ("An appellate court will not reverse a trial court's decision regarding a jury instruction unless there is an abuse of discretion.").

II. Voluntary Manslaughter

Clark next argues the trial court erred in refusing his request to charge voluntary manslaughter. He asserts there was evidence in the record that he did not intend to kill Victim or the person shooting at him; thus, the shooting was without malice. Further, Clark asserts that he shot while "under the sudden heat of passion and in response to sufficient legal provocation" because he was fired upon first, which "overcame his capability of cool reflection and caused him to act in an uncontrollable impulse to do violence." Clark argues that the doctrine of transferred intent applies to voluntary manslaughter pursuant to *State v. Fennell*,³ and "traditional common law aspects of voluntary manslaughter," such as the requirement that the victim be the source of the provocation, are also transferred when a defendant fires at the person who provoked him or her. We disagree with Clark's reasoning and affirm the trial court.

"Whether a voluntary manslaughter charge is warranted turns on the facts." *Starnes*, 388 S.C. at 597, 698 S.E.2d at 608. "If the facts disclose any basis for the

³ 340 S.C. 266, 531 S.E.2d 512 (2000).

charge, the charge must be given." *Id.* "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009).

"Voluntary manslaughter is the unlawful killing of a human being in [a] sudden heat of passion upon sufficient legal provocation." *Shuler*, 344 S.C. at 632, 545 S.E.2d at 819. "[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. "'A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion' or 'merely because he was legally provoked.'" *Leggette v. State*, 440 S.C. 590, 602, 892 S.E.2d 153, 160 (Ct. App. 2023) (quoting *Starnes*, 388 S.C. at 596-97, 698 S.E.2d at 608), *cert. denied* Aug. 13, 2024. "Rather, 'there must be evidence that the heat of passion was caused by sufficient legal provocation.'" *Id.* (quoting *Starnes*, 388 S.C. at 597, 698 S.E.2d at 608).

"[A] person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion." *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609. "However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge." *Id.* "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation *and* cause the defendant to lose control and create an uncontrollable impulse to do violence." *Id.*; *see also Shuler*, 344 S.C. at 632, 545 S.E.2d at 819 ("Both heat of passion *and* sufficient legal provocation must be present at the time of killing to constitute voluntary manslaughter." (emphasis added)). Moreover, the "[p]rovocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." *State v. Locklair*, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000).

A. Heat of passion

We find the trial court correctly denied the voluntary manslaughter instruction because Clark failed to prove he acted under the sudden heat of passion such that he was overcome by an uncontrollable impulse to do violence.

In *Childers*, the defendant "testified he was provoked by the victim's former brother-in-law and he fired his gun in response to being first shot at by the ex-brother-in-law." 373 S.C. at 373, 645 S.E.2d at 236. The shot, however, hit and killed the victim. *Id.* at 370, 645 S.E.2d at 234-35. The defendant asserted that he did not intend to harm anyone and only fired because he was fired upon.

Id. at 370-71, 645 S.E.2d at 235. The concurrence by then-Chief Justice Toal would have held that the defendant was not entitled to a voluntary manslaughter instruction because it, "by definition, requires a criminal intent to do harm to another[.]" but he testified he did not mean to harm *anyone* and only wanted to make his ex-brother-in-law stop shooting at him. *Id.* at 375, 645 S.E.2d at 237 (Toal, C.J., concurring in result). Therefore, "according to [his] story, he had no criminal intent whatsoever." *Id.* As the concurrence observed, "[i]f, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate." *Id.* However, "[w]ithout any evidence supporting the view that the defendant fired the fatal shots while under an 'uncontrollable impulse to do violence,' the trial court properly declined to charge the law of voluntary manslaughter to the jury." *Id.* at 376, 645 S.E.2d at 237.

Similarly, in *State v. Niles*, the supreme court held the trial court did not err in refusing to give a voluntary manslaughter instruction because "there was no evidence Niles acted within a sudden heat of passion." 412 S.C. 515, 521-22, 772 S.E.2d 877, 880 (2015). The court noted, "Niles's own testimony [did] not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*." *Id.* at 522, 772 S.E.2d at 880.

Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of [his fiancée's safety] rather than of perpetrating violence upon the victim.

Id. at 522-23, 772 S.E.2d at 880. The supreme court stated that because "Niles, by his own testimony, lacked the intent to harm the victim, [it could] not see how a voluntary manslaughter charge would have been appropriate." *Id.* at 523, 772 S.E.2d at 881.

These cases closely match the scenario testified to by Clark—*he did not want to hurt anyone* and only fired because he wanted the shooting to stop. Thus, although Clark may have been understandably afraid, his testimony does not illustrate "an uncontrollable impulse to do violence." *See Starnes*, 388 S.C. at 598-99, 698 S.E.2d at 609 ("Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence."). Rather, Clark made a calculated decision to return fire in the direction that the shots were coming from, with a defined purpose of making the shooting stop. As *Starnes* explains, "[a] person may act in a deliberate, controlled manner,

notwithstanding the fact that he is afraid or in fear." *Id.* at 599, 698 S.E.2d at 609. "Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear." *Id.* However, only "[t]he latter situation constitutes sudden heat of passion." *Id.*

Because we find Clark failed to prove that he acted under the sudden heat of passion such that he was overcome by an uncontrollable urge to do violence, we affirm the trial court's refusal to give the voluntary manslaughter instruction. *See Brooks*, 428 S.C. at 625, 837 S.E.2d at 239 ("An appellate court will not reverse a trial court's decision regarding a jury instruction unless there is an abuse of discretion."); *Shuler*, 344 S.C. at 632, 545 S.E.2d at 819 ("The trial [court] determines the law to be charged on the presentation of evidence at trial."); *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (explaining the defendant's "fear must be the result of sufficient legal provocation *and* cause the defendant to lose control and create an uncontrollable impulse to do violence").

B. Provocation by the victim

Additionally, Clark relies on *Fennell* to assert that transferred intent applies to voluntary manslaughter; essentially, he argues transferred intent operates to shift the assailant's provocation as if it originated *from* the victim, and, in return, his non-malice intent towards the assailant is also shifted *to* the victim. *See Fennell*, 340 S.C. at 272, 531 S.E.2d at 515 ("[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent."). At first glance, *Fennell* appears to support Clark's position and resolve the question. However, multiple cases decided after *Fennell* have held the provocation must originate from the victim. Moreover, although our supreme court has stated that "the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina," it has never overruled the post-*Fennell* line of cases. *See Wharton*, 381 S.C. at 215, 672 S.E.2d at 789 (declining to reach the issue of whether "the doctrine of transferred intent was inapplicable to voluntary manslaughter"). Thus, we find the trial court properly denied Clark's request for a voluntary manslaughter instruction because provocation must come from the victim, not a third party.

In *Locklair*, which was decided only months post-*Fennell*, the supreme court reaffirmed that the victim must be the source of the provocation. 341 S.C. at 362, 535 S.E.2d at 425 ("Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute

sufficient legal provocation."). In that case, "Locklair argue[d] that the trial [court] erred by refusing to charge voluntary manslaughter because: (1) there was evidence of a domestic dispute between Locklair and [the victim]; and (2) [the victim's] mother threw a cigarette case at him immediately before he shot [the victim]." *Id.* at 359, 535 S.E.2d at 424. Our supreme court affirmed the trial court's decision not to give the charge, noting the "overt act" of throwing the cigarette case "was made by a third party, not the deceased, and *South Carolina has not recognized sufficient legal provocation from a third party that can be transferred to the victim.*" *Id.* at 363, 535 S.E.2d at 425 (emphasis added).

Next, in *Childers*, which was decided seven years after *Fennell*, our supreme court considered a similar factual scenario to that presented in this case and ultimately held the defendant was not entitled to a voluntary manslaughter instruction because the provocation did not originate with the victim.⁴ *See Childers*, 373 S.C. at 373-74, 645 S.E.2d at 236. In that case, the plurality held, "[v]iewing the evidence in the light most favorable to Childers, this factual scenario [was] completely void of any evidence supporting a charge of voluntary manslaughter" *because* "the overt act that produces the sudden heat of passion must be made by the victim." *Id.*

Finally, in *Leggette*, this court affirmed the trial court's decision to give a voluntary manslaughter charge, which Leggette opposed in part because he was not "engaged in any argument or altercation with [the victim]" and "the evidence did not show [the victim] committed an overt act or provoked [Leggette] into firing his weapon."⁵ 440 S.C. at 601, 892 S.E.3d at 159. In that case, Leggette shot at two men with whom he had a history of previous altercations, after they followed and approached him outside of a bar; one man, Ingram, was injured, and the other, Tisdale, was killed. 440 S.C. at 594-96, 892 S.E.2d at 156-57. The trial court gave a voluntary manslaughter instruction, and this court affirmed because although the testimony established the "main provocation" for the shooting came from Ingram, Tisdale accompanied Ingram in following and approaching Leggette in a threatening manner. *Id.* at 604, 892 S.E.2d at 161. *Leggette* is an example of how *Fennell's* statement that "a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred

⁴ We acknowledge that *Childers* was a plurality opinion, with one justice concurring in result only and two justices dissenting. 373 S.C. at 374, 645 S.E.2d at 236.

⁵ *Leggette* was a post-conviction relief case, and the issue was raised in the context of whether trial counsel was ineffective for failing to object to the trial court's instruction. 440 S.C. at 604, 892 S.E.2d at 161.

intent" may be harmonized with the requirement that the provocation come from the victim, rather than a third-party. *Fennell*, 340 S.C. at 272, 531 S.E.2d at 515. Leggette's testimony indicated he was firing at Ingram, as Ingram was the one who moved toward him and made a motion like he was pulling a gun; however, because Tisdale at least contributed to the provocation by accompanying Ingram, the voluntary manslaughter instruction was proper despite Tisdale not being the intended target. *Leggette*, 440 S.C. at 604, 892 S.E.2d at 160-61.

Although *Wharton* stated that the applicability of transferred intent in this situation "remains an unsettled question[,]," it declined to rule on the issue. 381 S.C. at 215, 672 S.E.2d at 789. However, we cannot ignore other precedent which has stated that provocation must come from the victim, nor can we reconcile *Wharton*'s statement with *Locklair*'s proclamation that "South Carolina *has not recognized* sufficient legal provocation from a third party that can be *transferred to the victim*." 341 S.C. at 363, 535 S.E.2d at 425 (emphases added); *see also State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court."), *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014); S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Thus, because it is undisputed that Victim was an innocent bystander who was not the source of the provocation, we hold Clark was not entitled to a voluntary manslaughter instruction. *See Locklair*, 341 S.C. at 363, 535 S.E.2d at 425; *see also Brooks*, 428 S.C. at 625, 837 S.E.2d at 239 ("An appellate court will not reverse a trial court's decision regarding a jury instruction unless there is an abuse of discretion."); *Shuler*, 344 S.C. at 632, 545 S.E.2d at 819 ("The trial [court] determines the law to be charged on the presentation of evidence at trial.").

CONCLUSION

Based on the foregoing, the decision of the trial court is **AFFIRMED**.

WILLIAMS, C.J., and GEATHERS, J., concur.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

Opinion No. 6123

THE STATE,

RESPONDENT,

V.

QUAYSHAUN XZANDER CLARK,

APPELLANT

APPELLATE CASE NO. 2022-000962

PETITION FOR REHEARING

On September 24, 2025, this Court issued an opinion in the above referenced matter concerning the propriety of charging the jury on the lesser included offenses of involuntary and voluntary manslaughter in connection with the above referenced matter. Pursuant to Rule 221(a), SCACR, Quayshaun Xzander Clark requests that this Court grant rehearing on both issues based upon the arguments and facts set forth below. Appellant respectfully asserts that this Court's opinion misapprehends both the facts and the law that would support both charges under the facts presented to the jury.

As to Involuntary Manslaughter.

As to the Court's ruling that the Record lacks any evidentiary support for a jury charge on involuntary manslaughter, appellant concedes that his *initial* shots fired were voluntary and in self-defense, which this Court's Opinion properly ruled removes involuntary as an appropriate charge for the initial discharge of appellant's firearm, *unless* such discharge was deemed reckless. This Court's Opinion failed to address whether, in returning fire in the manner presented here (firing multiple rounds towards his assailant and at a home with potential bystanders and occupants in danger) constituted such reckless conduct that involuntary manslaughter would apply since appellant was lawfully engaged in self-defense but did so in a reckless manner. See R. 1389. This is a version of the imperfect self-defense argument that has not been acknowledged to date in South Carolina but logically flows from the definition of involuntary manslaughter. See State v. Scott, 414 S.C. 482, 779 S.E.2d 529 (2015). In contrast to Scott, where there was no evidence that Scott acted with reckless disregard for the safety of others, in the present case the solicitor argued at length on the reckless nature of appellant's actions in his argument to the jury that self-defense would not apply:

Number two and three, would a man of ordinary prudence, firmness and courage act in this way? You know, you heard the testimony of that Secret Service agent, Agent Beeler, early in the case last week. He has guarded presidents and vice presidents for over twenty years. Multiple, multiple presidents during his work for the Secret Service. And even when guarding a president in imminent danger, you identify your target, you take cover, you don't spray fifteen rounds in a confined neighborhood where he knows that homes are directly in the vicinity of his target. He's firing at and into that dwelling intentionally and willingly because he wants to hit anybody over there.

R. p. 1280, ll. 4 – 16.

For self-defense to apply, all four elements must be present. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) (“It is an axiomatic principle of law that the defense has not been established if any one element is disproven.”). The jury was thus able to reject self-defense based solely on its belief that appellant was reckless in the discharge of his firearm and in the way he engaged his assailants. It logically follows that involuntary manslaughter should have been charged since the jury could have believed all the elements of self-defense were present except that the response was reckless. As this Court noted in its Opinion in this case, involuntary manslaughter applies when one acts lawfully but with a reckless disregard for the safety of others. As there is evidence in the Record supporting that very theory, as opposed to the record before our Supreme Court in *Scott*, the charge was appropriate and should have been given. It is fundamentally unfair to allow the jury to reject self-defense on the ground that some of the shots appellant fired were reckless and, in the same breath, prevent the jury from considering that reckless conduct may justify a verdict of involuntary manslaughter as opposed to murder.

Moreover, even if this Court rejects that evidence supporting a finding of recklessness in the intentional discharge of a firearm in self-defense falls within the scope of involuntary manslaughter, the Record also contains evidence that some of the shots fired by appellant were reflexive and unintentional. Appellant described his emotional and physical state during the shootout:

Q. Okay. Can you describe a little bit how you felt in that moment, please?

A. It was more like I kind of -- I was scared and lost, my train of thought, almost like everything around me just kind of -- I don't know. Like it was Like just kind of like a blur.

Q. Okay. So a blur. Did your hands tense up?

A. Yeah.

R. 1177, ll. 3 – 10. The Record contains appellant's testimony that he tensed and lost focus on the events, further supporting that at least some of the rounds he fired were involuntary. Again, the state during closing argument focused the jury on the fact that it did not matter which shot struck the victim, the first or the last, when pushing the jury to find malice aforethought:

I submit there is sufficient evidence in this case knowing that he's armed, knowing that this is a planned shootout, that if he had only fired one bullet and that bullet enters that home and takes 's life, that is malice aforethought, but it's not one bullet or two or three or four or five. It's fifteen. Over and over and over again he has the intent and the mindset to fire that gun and he knows where he's firing it.

Malice can also include conduct showing a total disregard for human life. There can be no greater manifestation of malice in the form of total disregard for human life than this. Twenty homes at Rocky Lane. Twenty homes less than a football field apart is Lot 7 from where he is. Fifteen rounds go out. A total disregard for human life and the safety of those moms, those children, those families in their own homes where they should have been. All those other things you can also consider as evidence of malice; that he fled the scene, that he concealed evidence, but it goes back to this.

R. p. 1291, l. 16 – 1292, l. 10. The jury was specifically told that it did not matter which of the numerous rounds appellant fired was the fatal one, as his malice traveled with each bullet. The same logic applies when at least some of the rounds are fired without intent to fire the weapon, due to involuntary tension on the trigger or losing conscious thought of one's actions. The jury was entitled to consider that at some point in the chaotic shootout, appellant lost control and at least some of the shots fired were involuntary in nature. As there is some evidence in the Record that factually supports that conclusion, this Court's Opinion failed to address the impact of appellant's switch from voluntarily pulling the trigger when the shootout started to his

involuntary actions that resulted from the stress of the moment. Appellant described his reaction to the chaotic and stressful scene:

Q. Okay. And while you're shooting at him, are you scared?

A. Yeah, very.

Q. Have you ever been shot at before?

A. No, ma'am.

Q. Have you ever been trained in what you're supposed to do if someone shoots at you?

A. No, ma'am.

R. 1176, ll. 18 – 25.

As our Supreme Court warned in State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), the fact that evidence in the Record would contradict or not support an involuntary action does not negate that evidence and the jury charge should be given based upon the presence of the evidence, not the weight provided by the reviewing court or the trial judge, when the record is reviewed as a whole:

In our view, the only evidence which appears to directly support the Court of Appeals' ruling is Crosby's statement to police in which he stated he closed his eyes and pulled the trigger. However, this ignores the fact that Crosby immediately added that he didn't even know he had pulled the trigger. The effect of the Court of Appeals' holding is that if there is any evidence a shooting was intentional, all evidence from which any other inference is may be drawn is negated. This is not the law of this state. *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993) (charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence). We hold Crosby was entitled to a jury charge on the law of involuntary manslaughter.

Crosby, 355 S.C. at 53, 584 S.E.2d at 112–13.

This case mirrors Crosby in that there is at least some evidence in the Record that some of the shots fired by appellant were involuntary, and this Court's Opinion has taken pieces of contrary testimony to negate the impact of that evidence rather than look for its existence. This Court should reconsider its Opinion and find that the trial court erred in failing to charge involuntary manslaughter.

As to Voluntary Manslaughter.

This Court's opinion seems to accept appellant's testimony that he was actively engaged in lawful self-defense when he initially fired his weapon as excluding a charge based upon acting with sudden heat of passion upon sufficient legal provocation. This holding focuses solely on the testimony of appellant, which this Court's Opinion apparently deems as the only evidence available to the jury to find that he was acting under sudden heat of passion upon sufficient legal provocation. However, the evidence before the jury was that someone other than appellant fired the initial shots, and that the scene was tense and chaotic. R. 609, l. 1 – 610, l. 22. That multiple firearms were involved. R. 609, l. 1 – 610, l. 22; 1389. Numerous people, both as bystanders and participants, were involved. R. 609, l. 1 – 610, l. 22; 1175, l. 3 – 1176 l. 25; 1389. Appellant claimed he fired what he thought may have been 10 to 12 times in the direction of his assailants until the weapon was empty. R. 1177, ll. 12-23. The Record actually shows fifteen rounds were fired by appellant's weapon. R. 985. Even after he ran out of ammunition in his gun, appellant still heard shooting. R. 1178, l. 1 - 1179, l. 15; 1216, ll. 1-3. Appellant's frantic behavior and the manner in which he discharged his firearm support a finding of sudden heat of passion. Even after leaving the scene, appellant had to drive around to calm down and regain his composure. R. 1179-80.

The jury was free to believe some or all of appellant's testimony. The jury was free to believe, for example, that he was initially entitled to act in self-defense since there is no dispute that he did not fire first. However, the jury was likewise free to reject appellant's testimony that he continued to fire multiple rounds towards occupied dwellings as the shootout grew out of control solely to engage a visible assailant. The jury was free to find that appellant's conduct was reckless and moved into sudden heat of passion upon sufficient legal provocation in this chaotic setting.

In Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015), our Supreme Court found a lack of evidence of heat of passion based upon Cook's attempt to walk away, the lack of direct confrontation with victim before the fatal shots were fired, and the controlled manner of the shooting itself, with only two shots being fired failed to support any conclusion that Cook lacked control over his actions.

By contrast, here appellant fired numerous rounds at generic shapes in the dark and towards residences with numerous bystanders around. R. 1175, l. 3 – 1176, l. 25; 1389. Appellant either came out of a trailer already armed for combat just before the shooting started¹ or armed himself in response to the gunshots being fired in his direction. R. 1174, l. 5 – 1175, l. 25. The jury could have believed either scenario. If the jury believed appellant only armed himself in response to the initial shots, they certainly could have found his resulting actions in firing multiple rounds at his assailants was prompted by his fear and, while reckless, were the result of sudden heat of passion based upon an uncontrollable impulse to do violence rather than malice aforethought.

¹ This was the state's theory supported by the testimony of Nokia Tolen. R. 695, ll. 6 – 24.

The present case is much closer to the facts this Court reviewed in State v. Payne, 434 S.C. 121, 862 S.E.2d 81 (Ct. App. 2021). In Payne, the victim and defendant had a verbal altercation and exchanged physical blows, with the victim eventually firing a weapon and then turning and fleeing. Payne returned fire, shooting at the fleeing victim and continuing to fire as victim was running away. Id., 434 S.C.at 156–57, 862 S.E.2d at 99. This Court held that the record, when viewed as whole, required the voluntary manslaughter charge. Much like in Payne, the record, when viewed as a whole, contains facts which required the trial court to charge voluntary manslaughter. This Court’s Opinion, respectfully, pulls portions of appellant’s testimony that he engaged only in self-defense and ignores the other evidence in the record, including appellant’s statements about fear, lack of training, and having never been involved in a shooting before. This is contrary to the guidance of the Supreme Court which expressly requires that the evidence be reviewed as a whole, not merely the isolated statements of one witness, even if it is the appellant. *See* State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003).

This Court’s opinion also notes that, even if sudden heat of passion existed, voluntary manslaughter would not apply since the sufficient legal provocation did not come from the victim. Respectfully, this holding is an error of law. As this Court opinion notes, the question of transferred intent in this context is unsettled in South Carolina. *See* State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) (“[T]he applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina.”); *see also* State v. Brooks, 428 S.C. 618, 627, 837 S.E.2d 236, 240 (Ct. App. 2019) (acknowledging the unsettled nature of this legal issue since Wharton). This unsettled question was affirmed by our Supreme Court in Jamison v. State, 410 S.C. 456, 471, 765 S.E.2d 123, 131

(2014) (“The transferability of intent in a self-defense claim has not been recognized in South Carolina, *and Respondent does not ask this Court to recognize it now.*”) (emphasis added). Unlike Jamison, appellant respectfully requests that this Court recognize that transferred intent applies to all homicide cases since the *mens rea* element of the crime is formed at the moment of the action, not when the victim is impacted.

Logically, transferred intent imparts criminal liability based upon the *mens rea* of the defendant at the moment of the action. As our Supreme Court has noted:

The defendant's mental state, or *mens rea*, whatever it may be at the time he allegedly commits a criminal act, is contained within the defendant's brain when he commits the act. That mental state never leaves the defendant's brain; it is not “transferred” from the defendant's brain to another person or place. A more apt description might be that the mental state is like a spotlight emanating from its source—the defendant's mind—to its target—the intended victim.

State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000).

Here, there was evidence before the jury that appellant’s mental state was an uncontrolled impulse to do violence upon sufficient legal provocation when he fired the fatal round. That the provocation was from a source other than the victim does not alter or change appellant’s mental state. If his malice aforethought, if present, was formed the moment the trigger was pulled and followed the bullet to strike the unintended victim, as the law dictates it must, then the same applies to his lack of malice aforethought if the trigger was pulled under sudden heat of passion.

In Fennell, our Supreme Court noted that a “person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.”

Id., 340 S.C. at 276, 531 S.E.2d at 517. This applies the general rule that attached criminal responsibility based upon the *mens rea* existing when the action is performed regardless of the criminal act impacting the intended target or an unintended target.

Courts have extended this rule to cover all classes of criminal homicide as the mental state formed when that action occurs dictates the offense, not whether the intended victim was struck down or if the fatal action mistakenly hits an unintended victim.

The fact that the homicidal act is directed against or intended to effect the death of one other than the person killed does not relieve the killer of criminal responsibility. Such a homicide partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander. *Under this rule, the fact that the bystander is killed instead of the victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the result intended had been accomplished.* The intent is transferred to the person whose death has been caused, or as sometimes expressed, the malice or intent follows the bullet. *The result is that the killer, according to the attendant circumstances, will be held guilty of murder, manslaughter, or excusable or justifiable homicide.*

40 Am. Jur. 2d Homicide § 10 (emphasis added).

The logical approach applies transferred intent so that the criminal act takes the form of whatever crime would have been committed had the action struck the intended victim.

If, as to the intended victim, the homicide would have constituted murder, the defendant is guilty of murder as to the bystander who was the actual victim. *Similarly, if the homicide would have constituted voluntary manslaughter as to the intended victim, the defendant is guilty of voluntary manslaughter as to the bystander who was the actual victim;* and if the homicide, as to the intended victim, would have been justifiable, as in self-defense, the defendant is deemed the author of a justifiable homicide as to the bystander, at least in the absence of criminal negligence.

§ 21:8. Transferred intent, 2 Wharton's Criminal Law § 21:8 (16th ed.) (emphasis added). This Court should reconsider its Opinion and find that the trial court erred in failing to charge voluntary manslaughter.

CONCLUSION

For the reasons stated above, appellant petitions for rehearing pursuant to Rule 221(a) SCACR, and requests this Court reconsider its opinion of September 24, 2025, and grant appellant a new trial with proper instruction to the jury on both voluntary and involuntary manslaughter as lesser included offenses.



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ATTORNEY FOR APPELLANT

This 9th day of October 2025.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Oct 09 2025
SC Court of Appeals

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

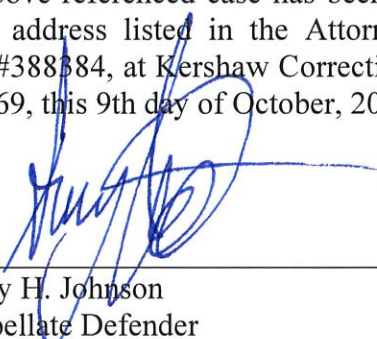
QUAYSHAUN XZANDER CLARK,

APPELLANT

APPELLATE CASE NO. 2022-000962

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Quayshaun Xzander Clark, #388384, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 9th day of October, 2025.



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ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

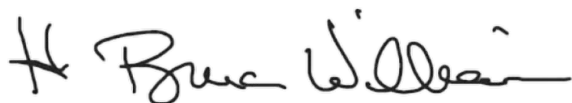
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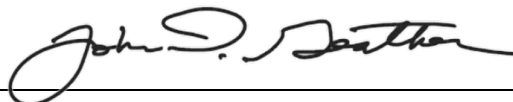
Quayshaun Xzander Clark, Appellant.

Appellate Case No. 2022-000962

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Melody Jane Brown, Esquire

J. Anthony Mabry, Esquire

Gary Howard Johnson, II, Esquire

Donald J. Zelenka, Esquire

FILED
Nov 19 2025

Samuel R. Hubbard, III, Esquire
The Honorable Debra R. McCaslin