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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Appellate Case No. 2024-001749

The Honorable Donald B. Hocker, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

William Gray Ackerman, Jr.Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court judge erred in allowing the State to introduce a text message authored by McClendon and sent to a third party as an offer of McClendon's then existing state of mind per Rule 803(3) of the South Carolina Rules of Evidence, although McClendon lacked personal knowledge of the contents of the texts and the text did not fall within an exception to the hearsay rule?
2. Whether the trial court judge erred in denying Ackerman's request that the jury be instructed on involuntary manslaughter although there existed evidence in the record tending to reduce the offense from murder to manslaughter and Ackerman's actions in driving on the wrong side of the road, although unlawful, did not naturally tend to cause death or great bodily injury under the facts of the case?

STATEMENT OF THE CASE

William Gray "Bud" Ackerman, Jr. was indicted by a Greenwood County grand jury for one (1) count of murder relating to the May 7, 2023, death of Kenneth "Davis" McClendon. Following a preliminary mistrial due to defense counsel's health issues, Ackerman was tried before the Honorable Donald B. Hocker, Circuit Court Judge, and a jury over September 23 through 26, 2024 and October 2 through 5, 2024. He was convicted as charged and sentenced to 45 years' imprisonment in the State Department of Corrections. Ackerman was represented by Jack B. Swerling, and the State was represented by Assistant Attorney Generals John P. Meadors and John B. Conrad.

This appeal timely follows.

Relevant Facts

In the early morning hours of May 7, 2023, William Gray “Bud” Ackerman, Jr. struck Kenneth “Davis” McClendon with his Ford F-250 truck at the intersection of Avid Road and Sawgrass Place within the Hunters Creek subdivision in Greenwood, South Carolina. ROA 333, 800; ROA 1022, 1274. McClendon died as a result of the injuries sustained from the impact. ROA 1022. The trial presented only one true question for the jury – whether the act was intentional. While State alleged that Ackerman had intentionally hit McClendon, Ackerman adamantly maintained it was an accident. ROA 234-61; ROA 1269, 1275, 1277, 1281, 1333, 1342, 1361-1441. The jury ultimately found the State’s version of events to be accurate beyond a reasonable doubt, finding Ackerman guilty of the murder of McClendon. ROA 1455-56.

However, in securing this conviction, the State introduced improper and prejudicial hearsay evidence alleging Ackerman was “drunk” and trying to “hunt down” his estranged wife, Meredith Haynie, whom McClendon was dating at the time. ROA 623, 702-05; ROA 1232, 1347, 1349. This error was compounded by the fact that the trial court erroneously declined to instruct the jury on involuntary manslaughter instead of just murder despite the defense’s request for the instruction on the lesser included offense.¹ ROA 1351-1352.

The May 7, 2023 12:42:14 a.m. Text from McClendon to Brandon Smith

At trial, the State sought to introduce a text message purportedly authored by McClendon and sent to Brandon Smith at 12:42:14 a.m. on May 7, 2023, saying:

FYI, apparently Bud is drunk and out trying to hunt Meredith down. She’s wanting to call the cops. I was hoping maybe you could get his dad to rope him in.

¹ *State v. Scott*, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (“Involuntary manslaughter is a lesser included offense of murder.”)

ROA 623; ROA 1347, 1349.

The State acknowledged McClendon's text was hearsay, but offered it under South Carolina Rules of Evidence, Rule 803(3) as a statement of McClendon's then existing state of mind. ROA 623-24. The State argued that video footage showing both McClendon sending the text, as well as Haynie showing McClendon her phone as calls were incoming from Ackerman, supported their position. ROA 625-26.

The defense objected, arguing, in pertinent part, that the text to Smith was sent prior to any conversation between McClendon and Ackerman that night, so McClendon would not have had any personal knowledge of what was reflected in his text; it was mere assumption, speculation, conjecture, or opinion on his part. ROA 626. Defense counsel further argued that the statement failed meet the requirements of Rule 803(3) to be an offer of McClendon's then existing state of mind. ROA 628.

The trial court concluded that the text was not admissible, as it did not fit within any exception to the hearsay rule under Rule 803 or 804 of the Rules of Evidence. ROA 629. The court expounded upon its holding, noting that in the State's cited case law in support of its position, *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006), the statement offered applied to the victim's own state of mind, and in the instant case, the text went possibly to Haynie's state of mind, but definitely not to McClendon's state of mind. ROA 629. Accordingly, the text did not come in at that time.

The defense later sought to introduce, through Ackerman's testimony, the contents of McClendon's 2 minute and 18 second phone call with Ackerman enduring from 12:51:15 a.m. until

approximately 12:53 a.m. on May 7, 2023. ROA 687-88; ROA 1257-58. Specifically, the defense wished to introduce Ackerman's testimony as follows:

DEFENSE COUNSEL: [A]t that time, the nature of the conversation was what?

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

DEFENSE COUNSEL: So what was your communication to him about, was it talking?

ACKERMAN: That's correct.

DEFENSE COUNSEL: You wanted to talk?

ACKERMAN: Correct. That's why I said meet at my house.

DEFENSE COUNSEL: And what, was he expressing to you an aggressive tone?

ACKERMAN: He was.

DEFENSE COUNSEL: Alright. And did you, were you clearly able to identify his voice at that time?

ACKERMAN: Oh, yeah.

...

DEFENSE COUNSEL: Did his communication with you affect the alter events between yourself and him?

ACKERMAN: It did.

DEFENSE COUNSEL: And was that something that led to what your state of mind was at this time?

...

ACKERMAN: Yes, sir.

DEFENSE COUNSEL: And based upon the communication he had with you, do you believe it was expressing his state of mind at that time?

ACKERMAN: Oh, yeah.

ROA 1258-59.

The defense offered this testimony as an exception to the hearsay rule and argued that the State's own references to this phone call between McClendon and Ackerman throughout their case in chief gave Ackerman's testimony to the call's contents an additional degree of reliability. ROA 1259-60.

The State objected to the admission of this testimony, stating that if McClendon's text with Smith was excluded, the trial court was required to reach the same result as to contents of the Ackerman-McClendon call - the offered testimony did not amount to an exception to the hearsay rule. ROA 1260.

Defense counsel countered that the court had made the proper ruling as to the text and the State's attempt to analogize McClendon's text to Ackerman's testimony was misplaced, as McClendon's knowledge of the contents of the text was derived from hearsay (i.e., based on Haynie's knowledge, not his own), whereas Ackerman's knowledge of McClendon's statements was firsthand (i.e., derived from his own conversation with McClendon). ROA 1261.

The prosecution replied arguing again that video footage showed both that McClendon was present when Ackerman was calling Haynie and that McClendon drafted the text to Smith, which they opined made the situations comparable. ROA 1261, 1263.

The trial court ultimately concluded that Ackerman could testify to the contents of his telephonic conversation with McClendon from 12:51 a.m. to 12:53 a.m. on May 7, 2023, as a state of mind exception to the hearsay rule, offered for the purpose of showing McClendon's emotional or mental state at the time of the call. ROA 1262. However, the court then also rescinded its earlier ruling regarding McClendon's text to Smith, noting that it should also be allowed to come in, because the court "consider[ed] both [of] those to be very, very similar." ROA 1262.

The defense objected to this rescinded ruling, reiterating that the situations were different due to McClendon's lack of firsthand knowledge that Ackerman was purportedly "drunk" and trying to "hunt" Haynie down, as he was relying on what Haynie was telling him. ROA 1262. The court responded, "Right. I understand. But again, I think it's close enough to where I'm going to rescind my ruling on that and allow it in." ROA 1262-63.

When the topic of McClendon's text to Smith came up on the State's cross examination of Ackerman, defense counsel renewed his objection, and the court confirmed it was preserved. ROA 1311. Defense counsel once again objected when the State called Lieutenant Matthew Womak as a reply witness to read McClendon's text to Smith into the record, and the court noted the objection on the record. ROA 1345-47.

The Court's Refusal to Instruct the Jury on Involuntary Manslaughter

The defense requested that the jury be charged on involuntary manslaughter, and the trial court denied such request. ROA 1351-52. In doing so, the judge indicated that, "involuntary

manslaughter can be an unlawful act not tending to cause death or great bodily injury,” but based on Ackerman’s testimony and the testimony of the defense’s own expert in accident reconstruction, Ackerman was “driving on the wrong side of the road and ... while it’s a very less traveled road, it’s still a public road and ... that was an unlawful act and that act does tend to cause death or great bodily injury when a vehicle crosses the center line or goes over into the other lane of travel, so ... involuntary manslaughter would not apply.” ROA 1352. As to the alternate theory of involuntary manslaughter – i.e., a lawful act conducted with a reckless disregard for the safety of others – the court concluded that, because it had ruled “as a matter of law ... [that] there was an unlawful act, ... involuntary manslaughter would not apply” under that theory either.² ROA 1352 (italics added).

In support of its position that an involuntary manslaughter instruction was appropriate in the instant case, the defense argued that the instruction was required if there was any evidence at all of the lesser offense, and there was evidence of involuntary manslaughter in the instant case.

² However, the court did agree to give the charge of accident at the defense’s request, acknowledging that this was at odds with his ruling on the involuntary manslaughter charge because “the language in the accident charge does refer to a lawful act.” ROA 1352. Judge Hocker nonetheless found it appropriate to “allow the jury to make that determination whether or not there was a lawful act notwithstanding the fact that [the court had] ruled as a matter of law in the involuntary manslaughter request that there was an unlawful act.” ROA 1352. The following accident instruction was read to the jury:

An act may be excused on the ground of accident if it is shown that the act was unintentional, that the Defendant was acting lawfully, and that reasonable care was used by the Defendant in the operation of his vehicle. The burden is on the State to prove beyond a reasonable doubt to prove that the act was not an accident but was caused by the negligence or carelessness on the part of the Defendant in the operation of his vehicle or by unlawful activity by the Defendant.

ROA 1450.

ROA 1354-55. Defense counsel further expressed that case law reflected that the location of the crash was a critical factor regarding the applicability of the manslaughter charge and whether Ackerman's unlawful behavior tended to cause death or serious bodily injury in this case. ROA 1355-56. Specifically, counsel noted that, while Avid Road was a public road, its intersection with Sawgrass Place, i.e., where the incident occurred, was not a through road, but instead a dead end road, and therefore, the defense should be entitled to the involuntary manslaughter charge to allow the jury to consider the circumstances – rather than the trial court merely considering the literal language of the charge – and whether, in that situation, crossing the middle line could cause death or serious bodily injury. ROA 1355-56. In support of this argument, Attorney Swerling analogized the situation in the instant case to that in *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999), where the Supreme Court concluded that the circumstances of the unlawful act in that case did not intrinsically be of a level likely to cause death, meaning the involuntary manslaughter charge was appropriate there, and should also be given in this case. ROA 1357. Counsel concluded with the defense's position that, at “that location,” i.e., the intersection of Avid Road and Sawgrass Place, it “would not be a situation where it would intrinsically rise to a level likely to cause death by being on the wrong side of the road.” ROA 1357.

The defense also argued that the jury should be entitled to consider the following additional circumstances of the case in determining whether the situation posed a risk of death or great bodily injury: (1) Ackerman's description of pulling up beside McClendon's car provided an explanation for why he was on the wrong side of the road; and (2) that Ackerman's position on the road would not be classified a felony violation. ROA 1357-59.

Attorney Swerling concluded by stating, “there is existence of ... evidence and the jury should determine the weight of it, and I ask the court to consider charging [involuntary manslaughter].” ROA 1359.

The State did not offer argument on the matter, and Judge Hocker rendered his final ruling, reiterating that the charge would not be given as requested by the defense, referencing the following factors in support of its position: (1) with regard to whether the defendant’s act tends to cause death or great bodily harm, in this case a death did, in fact, occur from the conduct; (2) Ackerman acknowledged that he had been driving on the wrong side of the road; and (3) the defense’s expert also confirmed Ackerman was in the wrong lane of travel. ROA 1360.

The State argued in both their closing and reply that Ackerman acted illegally by driving on the wrong side of the road. ROA 1380, 1431, 1435. In his closing, Attorney Swerling did not directly contest this, but made note of the fact that the intersection of Avid Road and Sawgrass Place, although consisting of two lanes, was a dead end with no through traffic. ROA 1411, 1413, 1416.

The Arrest, Indictment, and Trial

On May 7, 2023, Ackerman was arrested in connection with McClendon's death. ROA 399; ROA 1035-1036, 1279. He was thereafter indicted for murder per Greenwood County Indictment No. 2023-GS-24-958, as follows:

William Gray Ackerman, Jr. did, in Greenwood County on or about May 7, 2023, unlawfully kill with malice aforethought, either express or implied, Kenneth Davis McClendon, to wit, by driving a 2019 Ford F-250 and ramming it into the body of Kenneth Davis McClendon, and that Kenneth Davis McClendon did die as a proximate result thereof, in violation of Section 16-3-10 of the Code of Laws for South Carolina.

ROA 79.

On June 10, 2024, the case of the State of South Carolina versus William Gray Ackerman, Jr. was called for jury selection. S.ROA 3-96. A jury was selected, admonished, and ordered to return in two weeks for the trial. S.ROA 96-101. The matter came back before Judge Hocker and the jury on June 24, 2024, as scheduled but was pushed back to the week of July 8, 2024, after defense counsel experienced a medical issue during his opening argument. S.ROA 106, 126-129. The trial resumed as scheduled and continued until July 10, 2024, when a mistrial was declared after defense counsel's health issues recurred. S.ROA 292-97.

After Attorney Swerling's health had improved, a new trial date was set and, on September 23, 2023, a second jury was selected. ROA 220. On September 24, 2023, the parties delivered their opening arguments, and the State began presenting its case. ROA 234-61, 268. The State's case continued through September 25 and 26, 2024, and then picked back up on October 2 and 3, 2024. ROA 268-803; ROA 815-1055. In support of their case, the State offered the testimony of Terry Cummings and Roderick Maceda, each of whom were used to introduce surveillance video recordings from their homes near the site of the collision. ROA 268-325. Mary Alice Poole, one

owner of the Key West Club, and Patrick Hensarling, general manager of the Break on the Lake restaurant, were similarly called to assist in the introduction of video footage from their respective establishments. ROA 402-17, 527-31. A custodian of records for Verizon Wireless, Anthony Knecht, validated the cell phone records introduced by the State. ROA 532-46.

The prosecution also presented testimony from Meredith Haynie, who was Ackerman's wife at the time (soon to be ex-wife), McClendon's girlfriend at the time of his death, and a percipient witness to both the events in the weeks, days, and hours leading up to the crash on May 7, 2023, as well as one of the first persons to arrive at the scene following the incident. ROA 698-760. They additionally called Megan McGovern, another one of the first individuals to the scene, as well as the individual who called 911 (ROA 325-47), and Abigail Mohajer, who offered percipient testimony regarding the events earlier in the evening of May 6, 2023, and into the night of May 7, 2023 (ROA 815-830).

Moreover, several first responders, investigators, and other law enforcement personnel also testified and, through their testimony assisted the State introducing photographs, body camera footage, maps, reports, text messages, digital data, and other information into evidence. These individuals included the following: Greenwood County paramedic Andrew Kight; Northwest Fire Department volunteer fireman Arsenio Lewis; Greenwood County Sheriff's Office Captain John Murdock, Lieutenant Matthew Womack, Corporal Michael Mejia, Investigators Patrick Durkin and Michael Dixon, and evidence technician Greg Allison; Greenville County Sheriff's Office Investigator Michael Bryan; South Carolina Law Enforcement Division ("SLED") forensic scientists Rachel Nguyen and Samuel Stewart, forensic serologist Samanth Selden, and Special Agent Brian Hudak; South Carolina Highway Patrol Corporal Christopher Bratcher and Trooper

David Andis; and City of Greenwood Police Department Officer Benjamin Baker. ROA 348-402, 420-525, 547-619, 635-94, 760-803; ROA 830-934, 938-981, 1032-55, 1345-50. Finally, the State called Dr. Kyle Shaw, a forensic pathologist who completed the autopsy of McClendon, to testify to his findings. ROA 990-1030.

The defense then presented its case over October 3 and 4, 2024, calling Ackerman (ROA 1228-1345), as well as two accident reconstruction experts, David Torres (ROA 1056-1106) and Jonathan Nelson, who has a focus in visibility and conspicuity (ROA 1109-1222), to testify.

Through the parties' offered evidence and testimony, the following was elicited at trial:

William "Bud" Ackerman, Jr. and Meredith (Haynie) Ackerman³ met in 2006, dated for six years before marrying in February 2012, and had three children together. ROA 700-01; ROA 1231. The family resided at 115 Tally Ho Drive in the Hunters Creek subdivision in Greenwood, South Carolina. ROA 329, 701-02; ROA 1238. However, after ten years of marriage, the couple separated in May of 2022 and thereafter initiated divorce proceedings. ROA 701-03, 707; ROA 1232, 1334, 1336. Haynie remained in the family home and Ackerman moved in with his parents at 1714 Old Abbeville Highway, located near the subdivision. ROA 703, 707; ROA 1233-34, 1248-49.

On December 23, 2022, Haynie met McClendon, a longtime friendly acquaintance of Ackerman, at the Key West Club, a private bar in Greenwood. ROA 404, 703-04, 706; ROA 1242. The two thereafter started dating but kept their relationship private initially. ROA 704-05.

On or about April 29, 2023, Ackerman learned that Haynie and McClendon were rumored to be dating; Haynie confirmed they were. ROA 705; ROA 1242-43. Ackerman was emotional upon

³ While Meredith's surname was legally Ackerman at the time of the incident at issue, she is referred to by her current last name, her maiden name of Haynie (*see*, e.g., ROA 1034, 1404), throughout this brief both out of respect and for the sake of clarity.

learning this information and, also on April 29, 2023, he both texted his friend to vent about what he had learned, as well as called McClendon to tell him that he did not appreciate that McClendon was dating his wife while they were still legally married. ROA 679-83, 705-06; ROA 1243-44, 1290-91. The conversation between McClendon and Ackerman was civil and, at the conclusion of the call, Ackerman believed that McClendon had agreed to discontinue his relations with Haynie until after the divorce was finalized. ROA 1246.

However, Haynie and McClendon continued to see each other and, on the night of May 6, 2023, went out to several bars and parties publicly. They started their evening at Break on the Lake restaurant in the nearby town of Lake Greenwood, South Carolina, arriving at approximately 8:44 p.m. and staying there until 9:42 p.m. ROA 527-29, 708, 713, 720-21. The couple later went to a Kentucky Derby party at the home of one of McClendon's friends. ROA 721, 723. Haynie and McClendon eventually decided to leave the house party and went to the Key West Club, arriving at approximately 12:34 a.m. on May 7, 2023. ROA 408, 728-29; ROA 826-27.

Also on the evening May 6, 2023, Ackerman left his parents' home in his Ford F-250 truck at 10:06:29 p.m., went to a nearby gas station, and arrived at the Key West Club at 10:39:29 p.m. ROA 771-76, 780-84; ROA 818-20, 1252. While he was there, he saw a friend of both Haynie and McClendon, Abigail Mohajer, and asked her where "her girl" was, which she took as a reference to Haynie; at 11:48 p.m., Mohajer called Haynie to tell her about the interaction. ROA 816-17, 819-20, 822, 824-25, 1299. Ackerman stayed at the Club until 12:07:43 a.m. on May 7, 2023, leaving before Haynie and McClendon arrived, and then drove around for approximately an hour. ROA 728, 784-85; ROA 826, 960, 975-76. During this hour, Ackerman admittedly drove to various locations in hopes of seeing Haynie to discuss the status of their relationship – the former marital

residence at 115 Tally Ho Drive in Greenwood, Lakeshore Drive on Lake Greenwood (the road McClendon lived on), the parking lots of Break on the Lake and Port Grille restaurants each on Lake Greenwood, and then again entered to the Hunters Creek subdivision in Greenwood before returning to his parents' home down the road on Old Abbeville Highway at 1:08 a.m. ROA 826, 961-65, 967-69, 1045-49, 1054-56, 1295-1301, 1308, 1315.

Over the course of the night of May 6, 2023, and into the morning of May 7, 2023, Ackerman also called Haynie several times. Initially, at 8:47:30 p.m. on May 6, their children, who were with Ackerman at the beginning of the night, called Haynie on FaceTime to say goodnight. ROA 711, 714. Ackerman and Haynie thereafter exchanged texts and, at 9:10 p.m., spoke directly on a FaceTime call for just over a minute, discussing the status of their relationship and communications with each other, with Ackerman asking about Haynie's plans for the evening and if he could talk to her in person. ROA 715-20; ROA 1251, 1295-1296. Ackerman did not contact Haynie again until after he had left the Key West Club, calling her several times between 12:16 and 12:18 a.m. in hopes of further discussing their relationship and communications, but Haynie did not pick up. ROA 726-28; ROA 1253, 1293, 1298, 1336. Ackerman again called Haynie for the same reason at 12:38 a.m. and she answered. ROA 730-31. They spoke for 1 minute and 39 seconds and during the call Ackerman again asked to meet in person, expressing that he had been driving around with the hopes of finding her. ROA 731-32. Believing that Ackerman was "drunk" or "not sober" while driving around, Haynie told Ackerman she was going to call the police. ROA 731-32. However, instead of involving law enforcement, Haynie attempted to contact several members of Ackerman's family and a friend of hers, as she just wanted Ackerman to get home safely and stop trying to meet up with her. ROA 733-37, 740; ROA 827. While Haynie was making these calls,

Ackerman called her twice, at 12:45:11 a.m. and 12:45:54 a.m. ROA 738. She stepped outside of the Key West Club and answered the second call. ROA 737. The two spoke for 2 minutes and 40 seconds, with Ackerman again asking Haynie where she was so they could speak in person. ROA 739-40. After the call ended, Ackerman called Haynie several more times between 12:48 a.m. and 12:50 a.m., but she did not answer. ROA 741-43.

When Haynie reentered the Key West Club, she told McClendon about her call with Ackerman. ROA 740, 743. In response, McClendon, despite drinking over several hours and being above the legal limit, left the Key West Club in his BMW. ROA 743-45, 749-50; ROA 827-28, 1018, 1024-27. He also began repeatedly calling Ackerman. ROA. 687, 690-92; ROA 978, 908, 1256-57. Ackerman finally answered at 12:41:15 a.m. and the two men spoke for 2 minutes and 18 seconds. ROA 687-88. During the call, McClendon told Ackerman that he was “trying to be patient” with him regarding Ackerman’s repeated calls to Haynie, but he then grew aggravated, hostile, and aggressive, threatening to “kick [Ackerman’s] ass.” ROA 1265. The two instead agreed to meet at Ackerman’s parents’ house to talk. ROA 1265-66, 1337.

McClendon hung up with Ackerman and called Haynie at 12:55:22 a.m.; they spoke for 3 minutes and 43 seconds. ROA 665-66, 692, 745. Haynie told McClendon he and Ackerman were not to meet at Ackerman’s parents’ home because the children were there, so McClendon thereafter called Ackerman again at 12:59:18 a.m. and they instead agreed to meet at the intersection of Avid Road and Sawgrass Place within the Hunters Creek subdivision. ROA 665-66, 688, 693-94, 745-46, 749; ROA 980, 1266-67, 1310, 1340.

McClendon entered the intersection at 1:01 a.m. and turned his vehicle around with his headlights on and pointing up Avid Road. ROA 281-83, 291-93. As described above, Ackerman

initially entered the subdivision and drove by the start of Avid Road without turning down toward the meeting spot at approximately 1:07 a.m., but did not initially see McClendon's vehicle, so he returned to his parents' home nearby at 1:08 a.m. ROA 967-969, 1314-15.

While McClendon was waiting for Ackerman, he was on the phone with Haynie. ROA 668-69, 751-52. However, at 1:09 a.m., Ackerman called McClendon, so McClendon put Haynie on hold. ROA 668-70, 692-93, 752. Ackerman initially told McClendon he was not going to meet him after all, but after talking further, Ackerman changed his mind and agreed to meet as planned. ROA 1267-1269.

Therefore, at 1:10:30 a.m., Ackerman backed out of his parents' driveway, pulled onto Old Abbeville Highway, and turned onto Rivers Run, which connected with Avid Road, at 1:11:07 a.m. ROA 792; ROA 969-970, 1269. At 1:11:16 a.m., Ackerman turned onto Avid Road and proceeded toward its intersection with Sawgrass Place. ROA 970, 1269-70. As he approached, Ackerman then observed the headlights from McClendon's BMW pointing out toward him. ROA 1270. Ackerman pulled his truck slightly across the center divide so that he could pull up next to the BMW and speak to McClendon out the window from inside of their respective vehicles. ROA 1272, 1285, 1287, 1320, 1341. However, when Ackerman was right in front of McClendon's BMW, he realized that McClendon was actually outside of his car, standing in the road. ROA 1270-1271, 1317-18, 1341. With only a couple of seconds, at most, to react, Ackerman jerked the wheel of his truck as hard as he could to the left, toward McClendon's parked car and away from him in the road, attempting to avoid striking McClendon. ROA 1272, 1277, 1281, 1318, 1343-44. Between 1:11:31 a.m. and 1:11:32 a.m., Ackerman lost control of his truck as it struck McClendon's BMW and then his body, and then quickly decelerated while the wheel slipped and spun. ROA 796-97; ROA 949,

1273-1274, 1342. The truck then came to a stop, was put in park, and at 1:11:34 a.m., the driver's door opened. ROA 801; ROA 949, 971, 1274. Ackerman got out of his Ford and began hysterically yelling and touching McClendon's face, trying to get a response from him, as he was laying on the ground, bleeding. ROA 309, 312-13, 322; ROA 1274-76, 1321-23, 1326, 1328-30.

While in a state of panic, shock, and disbelief, Ackerman got back into his truck, backed out of the intersection at approximately 1:13:31 a.m., and drove back to his parents' house, arriving at 1:14:52 a.m. ROA 315; ROA 865-868, 870, 972-973, 1275-78, 1323, 1342.

Meanwhile, Haynie left the Key West Club with Mohajer and went to the nearby home of Mohajer's friend. ROA 750-51; ROA 828-829. Haynie used Mohajer's phone to call Megan McGovern, who was a long-time babysitter for the Ackerman family. ROA 327-29, 344, 752-53; ROA 829. McGovern thereafter drove herself and a friend, Drew Strickland, to pick Haynie up. ROA 331, 753-54. Once Haynie was in McGovern's car, she directed McGovern to the intersection of Avid Road and Sawgrass Place, where Haynie believed McClendon and Ackerman to be meeting. ROA 332-33, 756. Because McClendon had not returned to their call after he put Haynie on hold, at 1:12 a.m. Haynie hung up and then tried to call McClendon back several times between 1:22:33 a.m. and 1:32:04 a.m. ROA 668-69, 752, 754-55. Haynie also tried to call Ackerman once at 1:33:48 a.m. ROA 756-57. She was unable to reach either of the men.

The group also arrived at the intersection at approximately 1:33 a.m. ROA 755. They initially only saw McClendon's BMW at the location. ROA 334-35, 337-38, 346, 756-57. McClendon was not inside the vehicle, but the airbags in his car had been deployed, and his left front tire, fender, and quarter panel had been hit. ROA 335-36, 338, 371-72, 429, 434-41, 461, 757; ROA 870-71, 876-77, 905. McGovern, Strickland, and Haynie exited the vehicle and started to look

around. ROA 336. McGovern observed McClendon's injured body on the ground. ROA 336, 340-41, 757. He had suffered significant injuries to his head and right leg, as well as additional injuries to various parts of his body. ROA 373-74; ROA 998-1016. McClendon did not have a shirt on and one of his shoes was off, and there was a log under his head. ROA 342, 357-58, 446, 488. McGovern called 911. ROA 336.

Members of the Northwest Fire Department responded and began CPR on McClendon until Greenwood County paramedics arrived to assume care and continue to attempt life-saving measures. ROA 352-54, 357-58. However, McClendon was not breathing, did not have a pulse, and had a significant amount of blood coming from his ears, nose, and mouth, along with instability of his right leg and chest. ROA 352-53. McClendon succumbed to his injuries, and his cause of death was later determined to be multiple blunt force injuries due to being a pedestrian struck by a motor vehicle. ROA 1022.

Members of the Greenwood County Sheriff's Office also responded to the intersection of Avid and Sawgrass, determined it would be treated as a homicide investigation, and began to process the scene and interview McGovern, Haynie, and Strickland. ROA 365, 376, 423-24; ROA 1033-35. During their survey of the scene, investigators noticed an oil trail on the ground and leading away from the scene of the incident and to Ackerman's truck where it was parked at his parent's house. ROA 374, 379-80, 430-32, 448, 462-63, 468-69.

At 1:54 a.m., investigators from the Greenwood County Sheriff's Office arrived at Ackerman's parents' home to continue their investigation. ROA 376-79, 462; ROA 1331. Ackerman was at the residence when they arrived. ROA 380-81. The investigators executed search warrants of Ackerman's F-250 and the home. ROA 384, 394, 462; ROA 1035. They observed

damage to the exterior of the truck, including a significant dent in the front of the hood, a “circular-type smudge” in the shape of a hand on the grille, a scrape on the bumper under the driver’s side headlight, and oil kicked up in its undercarriage. ROA 387-91, 469-73, 476-78.

As part of their ongoing investigation, investigators canvased the neighborhood in the area of Avid Road and Sawgrass Place and obtained recordings from security cameras of two nearby homes (ROA 270-322; ROA 1036-1052), sent various evidence to SLED for forensic testing (ROA 554-615), obtained extraction reports from Ackerman, McClendon and Haynie’s cell phones (ROA 645-46), requested the assistance of the South Carolina Highway Patrol’s Multi-Disciplinary Investigation Team (“MAIT”) to perform a collision reconstruction (ROA 831-931) and Greenville County Sheriff’s Office’s Internet Crimes to extract and analyze the data recorded inside the infotainment center of Ackerman’s Ford (ROA 498-769), utilized officers from the Investigations Division of the City of Greenwood Police Department to generate digital mapping of the events of May 6, 2023 into May 7, 2023 using the data collected from the infotainment center and cell phone extractions (ROA 938-951), and requested an autopsy and toxicology work up of McClendon (ROA 993-1027). Based on their preliminary and follow-up investigations, the State averred that Ackerman intentionally hit McClendon, “sideswiping” his BMW and striking him while he was standing just outside of the driver’s side door of his vehicle. ROA 234-46; ROA 878, 885-886, 893, 896, 898-899, 918, 924-925, 1361-87, 1428-41.

The defense conducted its own investigation, retaining two experts in accident reconstruction, one of whom is a specialist in visibility and conspicuity. ROA 1062, 1126-1127, 1132. Based on their own review of the State’s evidence, the defense investigation, and Ackerman’s testimony, the defense believed that McClendon was struck while standing near the center of the

road, he would have only become visible to Ackerman mere seconds prior to the impact, and the collision was “angular,” which was consistent with Ackerman position that he was trying to avoid striking McClendon, indicating the collision was accidental in nature. ROA 247-61; ROA 1076-77, 1082, 1087-88, 1103, 1169, 1172-80, 1184-85, 1221, 1269, 1275, 1277, 1281, 1333, 1342, 1388-1427.

After the parties concluded the two-week long process of presenting their cases and delivering their closing arguments, the jury was instructed and sent out on October 5, 2023. ROA 1361-1454. The jurors returned with their verdict after deliberating for only 22 minutes, finding Ackerman guilty of the murder of McClendon. ROA 1454-56, 1460.

The court thereafter proceeded to the sentencing phase of the case. ROA 1461. After hearing statements from counsel and members of both McClendon’s and Ackerman’s families (ROA 1464-1480), Judge Hocker thereafter imposed a sentence of 45 years’ commitment to the State Department of Corrections. ROA 1484-85.

STANDARD OF REVIEW

Rulings on the admissibility of evidence and refusal to give jury instructions are both reviewed for an abuse of judicial discretion. *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008), citing *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (as to rulings on the admissibility of evidence); *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010), citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (as to refusal to give a requested jury instruction). However, even if the trial court did err in either regard, to warrant reversal, the error must also be prejudicial to the defendant. *Weston*, 367 S.C. at 288 (citations omitted) (as to the improper admission of evidence); *Mattison*, 388 S.C. at 479, citing *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) (as to the erroneous denial of a jury instruction).

“When reviewing the [trial] court’s refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant.’” *State v. White*, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018), quoting *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012).

ARGUMENT

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

The analysis of the admissibility of evidence begins with the question of relevance. *See* Rule 402, SCRE (“All relevant evidence is admissible...”); *see also State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000), citing Rule 401, SCRE (describing relevance as the “threshold test of admissibility”). However, even “relevant evidence may be excluded ‘as otherwise provided by ... [the] rules’ or another provision of law.” *State v. Perry*, 430 S.C. 24, 29, 842 S.E.2d 654, 657 (2020).

Specifically, even if relevant, “[h]earsay is not admissible except as provided by the [R]ules [of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute.” Rule 802, SCRE. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE; *see also Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997) (“Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted.”). A

statement of the declarant's then existing state of mind will not be excluded by the hearsay rule, regardless of the declarant's availability. Rule 803(3), SCRE.

In the instant case, the State sought to introduce a text authored by McClendon at 12:42:14 a.m. on May 7, 2023, stating, in pertinent part, "Bud is drunk and out trying to hunt Meredith down." ROA 623; ROA 1347, 1349. While the prosecution acknowledged that text was unquestionably hearsay, the State nonetheless continued, arguing that the text fell under an "exception to the hearsay rule, [Rule] 803(3), then existing state of mind." ROA 623. The prosecution specifically indicated that the text was an offer of McClendon's state of mind, not Haynie's mindset. ROA 628. The State asked the court to consider that McClendon could be seen drafting the text to Smith in surveillance footage from the Key West Club in support of the reliability of such statement, and also argued that McClendon had knowledge of the information contained in his text to Smith because "McClendon had been with ... Hainey at Key West bar earlier in the evening..., [there were] several phone calls coming in from the Defendant to [Haynie] ... [and she was] actually showing them to Davis McClendon. ... [L]ater on, the Defendant was also calling again ... and she's showing [McClendon] those phone calls." ROA 625-26.

The defense objected to the text's introduction, arguing both that McClendon had not spoken with Ackerman yet at the time of the text, meaning he had no personal knowledge of what was reflected in his text, and that the text did not meet the requirements of Rule 803(3) to be an offer of McClendon's then existing state of mind. ROA 626, 628.

The court concluded the text did not fit into any exception to the hearsay rule, including Rule 803(3) as an offer of McClendon's then existing state of mind. ROA 629. Specifically, the

Court noted that the text “really doesn’t apply to [McClendon’s] state of mind. Maybe [Haynie’s] state of mind, but not [McClendon’s].” ROA 629. This was the proper ruling.

However, when the defense late sought to introduce, via Ackerman’s testimony, the contents of a phone conversation directly between Ackerman and McClendon, the State objected and, in ruling on the objection, Judge Hocker revisited the issue of McClendon’s text to Smith. ROA 1259-1261. The State again argued that McClendon’s text to Smith was based upon his observation of Haynie receiving calls from Ackerman, meaning it was analogous to testimony regarding the contents of Ackerman and McClendon’s phone call, and the same result was required to be reached as to both pieces of evidence. ROA 1260-61. The defense countered, arguing that the comparison was misplaced, as McClendon’s knowledge of the contents of the text was derived from hearsay (i.e., based on Haynie’s knowledge, not McClendon’s own), whereas Ackerman’s knowledge of McClendon’s statements was firsthand. ROA 1261.

The trial court agreed with the State, finding that the text and the call were “very, very similar.” ROA 1262. But instead of excluding Ackerman’s testimony regarding his call with McClendon as it had done regarding the text, the judge instead rescinded his earlier ruling excluding the text and found both the text and the contents of the call qualified as exceptions to the hearsay rule under Rule 803(3), the declarant’s then existing state of mind. ROA 1262. The defense again objected, reiterating that the situations were different due to McClendon’s lack of firsthand knowledge and reliance on what Haynie was telling him. ROA 1262; *see also* ROA 1311, 1345-47 (contemporaneous objections when text was offered). However, the court replied, “I think it’s close enough to where I’m going to rescind my ruling on [the text] and allow it in.” ROA 1262-63. The State thereafter called Lieutenant Matthew Womak to read McClendon’s text to Smith

into the record. ROA 1345-47. The court's decision to rescind its earlier ruling and admit this evidence was erroneous.

A. McClendon lacked personal knowledge of the contents of his text, meaning he would not have been competent to testify to the contents himself had he been available, and the contents of his text were improperly introduced as hearsay falling within an exception.

“Rule 601(a) of the South Carolina Rules of Evidence provides: ‘Every person is competent to be a witness except as otherwise provided by statute or these rules.’” *State v. King*, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005), quoting Rule 601(a), SCRE. One requirement to be competent is that the witness must “have personal knowledge of the matters testified to.” *State v. Tennant*, 394 S.C. 5, 12, 714 S.E.2d 297, 300 (2011), citing Rule 602, SCRE. Specifically, Rule 602 states, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” *State v. Gibbs*, 438 S.C. 542, 549, 885 S.E.2d 378, 382 (2023), citing Rule 602, SCRE. Personal knowledge is derived to the witness’ own observations, e.g., what the witness personally sees and/or hears. *State v. Anderson*, 413 S.C. 212, 221 n.6, 776 S.E.2d 76, 80 (2015); *State v. King*, 412 S.C. 403, 412, 772 S.E.2d 189, 194 (Ct. App. 2015), disapproved on other grounds in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). This means that, if a witness obtained his knowledge of a fact exclusively from the statements of others, he does not possess the requisite personal knowledge to testify to such information. *See, e.g., King*, 412 S.C. at 412 (A witness who did not personally hear or see any shots fired, but testified to the number of shots based exclusively on the information she gathered from neighbors, did not have the required personal knowledge to testify as to the number of shots fired.)

“The admission of hearsay under an exception to the rule presupposes the declarant is possessed of the qualifications of a witness in regard to competency, personal knowledge, and the like. Thus, the declarant’s competency is a precondition to the admission of his hearsay statements on grounds of unavailability.” *S.C. Dep’t of Soc. Servs. v. Doe*, 292 S.C. 211, 219-20, 355 S.E.2d 543, 548 (Ct. App. 1987). “Generally, if the declarant was not competent at the time of making the statement, it may not be admitted into evidence through hearsay repetition.” *Id.* (citation omitted).

In the instant case, the State introduced the statement of the declarant, McClendon, through his text to Smith, acknowledging that it was unquestionably hearsay. Therefore, it was presupposed that, if McClendon were personally present to testify, he would have possessed the necessary qualifications to testify to the information that Ackerman was “drunk” and trying to “hunt” Haynie down. *S.C. Dep’t of Soc. Servs.*, 292 S.C. at 219-20. This assumes that he possessed personal knowledge of these averments because, if he did not have such personal knowledge, he would not have been able to testify to such matters himself, if available. *Id.*; Rule 602, SCRE.

The defense argued that McClendon did not possess the required personal knowledge of the information contained in the texts (ROA 626), but the State posited that he did because Haynie had showed him her phone at the times Ackerman was calling (ROA 625-26, ROA 1261). While the court initially agreed with the defense, it later rescinded that holding and agreed with the State. This was in error, as the prosecution’s claim was not supported by the evidence.

Haynie and McClendon were together from at least 8:44 p.m. on May 6, 2023 and continuing until approximately 12:48 a.m. on May 7, 2023. ROA 713, 737-40, 743. Over the course of these four hours, Haynie received a number of calls and texts from Ackerman and spoke with

him several times. ROA 529, 711, 713-18, 720, 726-28, 730-31, 737-39, 741-43; ROA 1253, 1295-96, 1298.

During one of these calls, at 9:10 p.m. on May 6, 2023, Ackerman allegedly asked Haynie where she was and told her, “I’ll see you later tonight.” ROA 719-20. There was no testimony or other evidence offered that McClendon was a part of this conversation.

At approximately 11:11 p.m. on May 6, 2023, Ackerman allegedly saw Abigail Mohajer at the Key West Club and asked her where “her girl” was, which Mohajer took to be a reference to Haynie. ROA 822, 1299. McClendon was not alleged to have been present during this conversation. Mohajer called Haynie at 11:48 p.m., but again, it was not alleged that McClendon was part of this call. ROA 824-825. In fact, no evidence was offered that McClendon ever had any discussion with Mohajer at all. *See, e.g.,* ROA 729-30; ROA 826-827 (describing that Mohajer, McClendon, and Haynie were all at the Key West Club at the same time).

Ackerman left the Key West Club by 12:07:43 a.m. on May 7, 2023. ROA 784-85; ROA 826, 960. McClendon and Haynie did not arrive at the Club until 12:34 a.m., so there was no indication McClendon and Ackerman crossed paths at that establishment either. ROA 408, 728-29; ROA 826-27.

Haynie spoke with Ackerman telephonically again for 1 minute and 39 seconds, beginning at 12:38 a.m. on May 7, 2023. ROA 730-31. It was during this call that Haynie reportedly formed her opinion, based on her past phone calls with Ackerman over the course of their relationship, that Ackerman sounded “not sober” or “drunk” during the call. ROA 731-32. She alleged that Ackerman was again asking her where she was and told her that he was “driving around” and going

to “find” her. ROA 732. Again, no evidence was offered that McClendon was personally involved in the call or even heard Ackerman speak during the call.

It was then at 12:42:14 a.m. on May 7, 2023, that McClendon sent the text at issue to Smith, stating:

FYI, apparently Bud is drunk and out trying to hunt Meredith down. She’s wanting to call the cops. I was hoping maybe you could get his dad to rope him in.

ROA 623, 733-34, 737; ROA 827, 1347, 1349.

However, as described above, Ackerman’s only pertinent communications up to that point in time had been with Haynie and Mohajer, *not* McClendon. Rather, McClendon and Ackerman only directly spoke for the first time at 12:51:15 a.m. on May 7, 2023, i.e., 9 minutes *after* McClendon’s text had been sent to Smith. ROA 687-88.

Accordingly, any information McClendon would have had at 12:42:14 a.m. (i.e., when he sent the text to Smith) about Ackerman’s locations, movements, or him purportedly seeking Haynie out, would have been garnered through Haynie’s statements, *not* McClendon’s own conversations or interactions with Ackerman.

Moreover, while South Carolina law permits witnesses to testify to “whether or not, in [the witness’] opinion, a person was drunk or sober on a given occasion on which [the witness] observed him” (*State v. Ramey*, 221 S.C. 10, 13-14, 68 S.E.2d 634, 635 (1952) (citations omitted)), it is again clear that *personal observation* of the person alleged to be intoxicated is a mandatory requirement for a witness to offer an opinion on whether the individual was drunk at a given time. As no testimony was offered that Ackerman ever stated that he was intoxicated to anyone, and, in fact, Ackerman consistently maintained he was not impaired on May 6, 2023 or May 7, 2023 (ROA 1302), any claim to the contrary would necessarily be opinion based. Yet, not only was no evidence

was elicited that McClendon heard or saw Ackerman prior to drafting his text to form such an opinion, but there is also no evidence that he had ever even seen or spoken to Ackerman, with whom he was merely “acquaintances” (ROA 1242), on any *prior* occasion while Ackerman was drinking to know what he sounded like when under the influence. Therefore, any impression McClendon had regarding Ackerman’s sobriety – or lack thereof – would have also been based on Haynie’s beliefs, not his own.⁴

Had McClendon’s text said something in the vein of, “Bud won’t stop calling Meredith,” the State’s assertion that Haynie showed McClendon her phone as the calls came in, which she testified to and was observed on the surveillance footage offered by the State, would reflect that McClendon had personally observed the information contained in his text to Smith. However, the text instead contained information pertaining to the *contents* of such calls, i.e., that Ackerman was “drunk” and trying to “hunt” Haynie down (ROA 623, 733-34, 737; ROA 827, 1347, 1349), of which McClendon lacked personal knowledge. McClendon necessarily received that information from Haynie, who was the only party to the calls other than Ackerman, not his own perception.

Therefore, McClendon would not have been competent to testify to either Ackerman’s state of sobriety or what Ackerman’s objectives were on the night of May 6 into the morning of May 7, 2023 due to his lack of personal knowledge. The text could not be introduced via a hearsay exception for this reason. *S.C. Dep’t of Soc. Servs.*, 292 S.C. at 219-20. The trial court erred in ultimately concluding otherwise.

⁴ Mohajer did not offer an opinion regarding Ackerman’s sobriety, but only noted she observed him drinking at the Key West Club. ROA 821.

B. The contents of McClendon’s text described, at best, Haynie’s then existing state of mind, not his own, and as much does not qualify as an exception to the hearsay rule under Rule 803(3).

As noted above, “[h]earsay is not admissible except as provided by [the South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute.” See Rule 802, SCRE. Rules 803 and 804 of the South Carolina Rules of Evidence outline the general exceptions to Rule 802’s prohibition on hearsay evidence. The rule relevant herein, Rule 803(3), outlines the exception for then existing state of mind and provides in pertinent part that the following evidence is not excluded by the hearsay rule, regardless of the declarant’s availability:

A statement of the *declarant’s* then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed ... [.]

Rule 803(3), SCRE (italics added); see also *Turner v. Thomas*, 431 S.C. 527, 544, 848 S.E.2d 297, 302 (2011), citing *Tennant*, 394 S.C. at 16 (“The declarant’s present state of mind is admissible as an exception to hearsay...[.]”)

By its very definition, this rule applies only to the *declarant’s* own state of mind; a declarant’s statement about someone else’s state of mind does not fall within the plain language of Rule 803(3).

For the reasons described above, McClendon had no personal knowledge of Ackerman’s sobriety status, nor of his movements or objectives on May 6 into May 7, 2023. Any information he had was derived from another source, namely Haynie. Accordingly, when the State sought to introduce the contents of McClendon’s text to Smith as an offer of McClendon’s own state of mind under Rule 803(3) of the South Carolina Rules of Evidence, Judge Hocker properly initially concluded that, at best, the contents of the text reflected on Haynie’s state of mind, not McClendon’s state of mind. ROA 629. The court likewise properly held in its initial ruling that,

accordingly, the text did not fall within the State's cited exception, as Rule 803(3) goes to the declarant's – i.e., McClendon's – own state of mind only. ROA 629. Even if the State were attempting to offer the text regarding Haynie's state of mind, as much is not an exception to the hearsay rule. *See* Rules 803 & 804, SCRE (outlining the exceptions to the hearsay rule). Therefore, when the trial court later rescinded this ruling and admitted the McClendon's text to Smith under Rule 803(3), it also erred on this basis.

C. Ackerman was prejudiced by the admission of McClendon's text.

“The improper admission of hearsay is reversible error only when the admission causes prejudice.” *Weston*, 367 S.C. at 288 (citations omitted). Prejudicial impact must be assessed in light of the challenged evidence's relationship to the entire case. *State v. Whisonant*, 335 S.C. 148, 156, 515 S.E.2d 768, 772 (Ct. App. 1999). The error is harmless only if it “could not reasonably have affected the result at trial.” *Id.*, citing *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985).

Initially, it must be noted that the language McClendon used in his text that Ackerman was trying to “hunt” Haynie down was highly inflammatory, especially because it was used in a murder trial where intent was the only true issue to be decided, and the comment tended to present Ackerman in a malicious and predatory light. Further, the only evidence that Ackerman was drunk was Haynie's opinion testimony (ROA 732), and McClendon's text was improperly used to corroborate that opinion. Even if the challenged evidence is cumulative, that does not render it harmless if the cumulative effect improperly corroborates and enhances the impact of the other evidence in the case. *Whisonant*, 335 S.C. at 156 (citations omitted). The State used the text in its closing argument for this very corroborating purpose, and in doing so, argued that the fact that

Ackerman was allegedly “drunk” supported its claim as to the sole issue in the case – i.e., that the fatal crash was intentional:

[T]he Judge will tell you voluntary intoxication is not a defense to a crime. [Ackerman] was drinking, liquid courage, he’s drinking.

...

That’s his intent, direct evidence of intent. Gets in the bar, he’s calling, he’s calling..., Meredith tells Bud I’m going to call the police, you’re drinking, I know you, do you know if somebody’s drinking if you lived with them and married with them and on the phone, my wife sure knows when I’ve had a few. And she got on the phone, he’s drunk, I’ve heard him before, I’ve talked to him before. And now intent, think about this, she’s worried about him and she tells him stop it, go home, then she says I’m going to call the police, I’m going to call the police.

What’s Davis say, we can’t look in his mind, did you hear what Davis said, let’s talk about intent, he texted a cousin of his, “FYI, apparently Bud is drunk and out trying to hunt Meredith down, she’s wanting to call the cops, I was hoping maybe you could get his dad to rope him in[.]”

ROA 1370-72.

Accordingly, the trial court not only erred in admitting McClendon’s text despite his lack personal knowledge of the contents of the text and because it did not describe his own state of mind, meaning it fell outside of the scope of Rule 803(3) of the South Carolina Rules of Evidence, but such error was also prejudicial.

Therefore, Ackerman is entitled to a new trial as a result of the prejudicial admission of such hearsay evidence. *See State v. Mizell*, 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998) (a new trial is warranted based on the erroneous admission of evidence when the appellant demonstrates both error and prejudice).

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

“The law to be charged must be determined from the evidence presented at trial.” *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010), citing *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001). In a homicide case, “[i]t has long been the law in this State that ‘to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatever* tending to reduce the crime from murder to manslaughter.’ *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969), citing *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951) (emphasis added). Moreover, our cases consistently hold that a request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. *See State v. Goldenbaum*, 294 S.C. 455, 365 S.E.2d 731 (1988).” *Casey v. State*, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991); *see also Chatman*, 336 S.C. at 152, citing *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994); *Rivera*, 389 S.C. at 404 (citations omitted) (“Where there is evidence from which the jury could infer that the defendant committed a lesser offense, the trial judge must submit the lesser included offense to the jury.”)

“Manslaughter is the unlawful killing of another without malice.” *Casey*, 305 S.C. at 447, citing S.C. Code § 16-3-50. “Involuntary manslaughter is (1) 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 (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.” *Chatman*, 336 S.C. at 152, citing *Bozeman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1996).

In the instant case, as noted above, the defense requested, and the court declined to give, an instruction on involuntary manslaughter. ROA 1351-52. Specifically, the trial court concluded that “driving on the wrong side of the road” was an unlawful act and such act “does tend to cause death or great bodily injury when a vehicle crosses the center line or goes over into the other lane of travel...[,]” so neither theory of the lesser offense would apply.⁵ ROA 1352. Therefore, the only substantive offense the jury was instructed on was murder. ROA 1451. The trial court’s refusal to instruct the jury on the lesser included offense as requested was erroneous because, as described below, the court failed to adequately consider and give appropriate weight to the specific circumstances of this case, as Ackerman’s actions did not, in fact, amount to “activity naturally tending to cause death or great bodily harm.” *Chatman*, 336 S.C. at 152 (citation omitted). Therefore, there existed evidence presented at trial which could be viewed by the jury as tending to reduce the offense from murder to the lesser included offense of involuntary manslaughter, requiring that the jury be given such charge. *Casey*, 305 S.C. at 447 (citations omitted).

In *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999), the Supreme Court clarified that, where a defendant requested a jury instruction on involuntary manslaughter despite the fact that the evidence reflected that he was engaged in an unlawful act at the time of the victim’s death, it was not the statutory nature of the offense alone that should be considered in deciding whether or not such unlawful act “naturally tend[ed] to cause death or great bodily harm,” but rather the more

⁵ The trial court did not claim that the record was devoid of evidence of an unintentional killing or the absence of malice. Rather, the instruction was denied exclusively due to the court’s finding that the defendant committed an unlawful act, and such act tended to result in death or great bodily injury. ROA 1352. Accordingly, it must be presumed that the court agreed that there existed evidence in the record of an “unintentional killing ... without malice” (*Chatman*, 336 S.C. at 152 (citation omitted)), and such elements are, therefore, not further addressed herein.

appropriate question was whether the specific circumstances of the situation would naturally tend to lead to such outcome. In *Chatman*, the defendant met with the victim to talk, but the interaction turned physical. During the fight, the victim grabbed the defendant and would not let go, while the defendant was face-to-face with the victim with his shoulder pressed into the victim's neck. After several minutes, the victim and defendant released each other. The defendant got up and started to walk away, but the victim did not get up; he died as a result of asphyxiation due to manual strangulation. 336 S.C. at 151. At trial, the defense requested an instruction on involuntary manslaughter, but the trial court refused to give it. *Id.* at 152. The Supreme Court found this was in error. *Id.* The Court noted that there was evidence introduced reflecting that the death was unintentional. *Id.* at 153. The Court further held that, while the defendant was undoubtedly "engaged in an assault and battery" at the time of the victim's death, an act which is unlawful in South Carolina,⁶ it was improper to only consider the unlawfulness of the of act and whether such offense, in some situations, tended to cause death or great bodily harm, but rather the proper inquiry was whether *under the facts of the case at issue*, the unlawful act was "such that naturally

⁶ The offense of assault and battery and its varying degrees are presently codified at S.C. Code § 16-3-600, with the felonious degrees which address conduct "likely to produce death or great bodily injury" being codified at (B)(1) – assault and battery of a high and aggravated nature, and (C)(1) – assault and battery in the first degree. However, the other two degrees, (D)(1) and (E)(1) – assault and battery in the second and third degrees, respectively, are misdemeanors that involve conduct not likely to result in great bodily injury or death.

However, prior to 2010 (2010 Act No. 273, § 6.B, eff. June 2, 2010), there were no common law degrees of assault and battery, but the offense was "divided in this State through common usage into three degrees, according to the gravity of the act: (1) assault and battery with intent to kill and murder; (2) assault and battery of a high and aggravated nature, or (3) simple assault and battery." *State v. Hill*, 254 S.C. 321, 329, 175 S.E.2d 227, 231 (1970) , citing *State v. Jones*, 133 S.C. 167, 130 S.E. 747 (1925) . The first two applied to acts likely to cause serious bodily injury or death, while the third did not. *State v. Johnson*, 187 S.C. 439, 441-42, 198 S.E. 1, 1-2 (1938). At the time the *Chatman* case, this was the state of the law.

tends to cause death or great bodily harm.” *Id.* The Supreme Court ultimately found that, in *Chatman*, the facts did not reflect such an outcome was likely. *Id.* The Court also cited to various authorities and other jurisdictions that concurred with the conclusion that an unintentional killing resulting from an assault and battery, not of a character of itself to cause death, is involuntary manslaughter, and such instruction should therefore be given to the jury. *Id.* at 152-53.

Several years later, the Supreme Court indicated that the statutory degree of the cited unlawful act was another pertinent consideration regarding the question of whether an offense tends to result in death or great bodily injury. *State v. Cabrera-Pena*, 361 S.C. 372, 381, 605 S.E.2d 522, 526 (2004). Specifically, the Court suggested that the felonious nature of the offense (as compared to a misdemeanor or infraction) tended to reflect a greater likelihood that the offense was of a nature tending to cause great bodily injury or death. *Id.* However, the Court ultimately confirmed that, in assessing the applicability of an involuntary manslaughter instruction under the first theory, it was not the statute purportedly violated, but rather the potential “harmfulness” of the specific conduct engaged in by the defendant, that was the critical inquiry. *Id.*

In the case before this Court, the trial judge cited “driving on the wrong side of the road” as the unlawful offense that supported his decision to deny Ackerman’s request for an involuntary manslaughter instruction. ROA 1352. The Uniform Act Regulating Traffic on Highways, codified at Title 56, Chapter 5 of the South Carolina Code of Laws, prescribes the rules for travel on roadways consisting of multiple lanes of travel. For example, South Carolina Code § 56-5-1810 requires vehicles to be “driven on the right half of the road,” South Carolina Code § 56-5-1880 outlines “further limitations on driving to the left of center of the roadway,” and South Carolina Code § 56-5-1900(a) requires that “[a] vehicle shall be driven as nearly as practicable entirely

within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.” Ackerman did not deny that he was driving at least partially on the incorrect side of the road immediately prior to and at the time he struck McClendon. ROA 1272, 1285, 1287, 1318, 1320, 1341. In fact, he even presented the testimony of an expert who confirmed he was not on the correct side of the road. ROA 1077, 1088, 1103. Therefore, Ackerman admits that he did, in fact, act in violation of the rules outlined in the Uniform Act Regulating Traffic on Highways by crossing the center line on Avid Road as he approached its intersection with Sawgrass Place, as alleged by Judge Hocker.

However, Ackerman does contest the trial court’s conclusion that his action in crossing the center line of the road was unequivocally an act which tended to cause death or great bodily injury. ROA 1352. While the *Chatman* Court addressed a different offense, and the specific violation of driving on the wrong side of the road, as relied upon by the trial court here, has not been assessed for its natural tendency to cause death or great bodily injury in an involuntary manslaughter case, the Supreme Court has long found that, in a civil setting, it cannot be said that “a person, being on the wrong side of the road, and injuring another, as a matter of law, is absolutely liable. While it raises a strong presumption of law that he is, it does not as a matter of law make him absolutely liable. It depends upon all of the facts and circumstances of the situation at that particular time, the positions of each, whether on the right or wrong side of the road, whether the circumstances are capable of explanation.” *Sims v. Eleazer*, 116 S.C. 41, 45-46, 106 S.E. 854, 855 (1921). Through his testimony, Ackerman provided rationale and context as to why he was on the improper side of the road, namely that he was intending to meet McClendon, whom he believed to be inside of his vehicle that was pointed the opposite direction of Ackerman’s truck, so he was planning to pull his

truck next to McClendon's BMW so they could talk from inside of their respective vehicles. ROA 1272. Ackerman additionally indicated that he steered his vehicle even further out of the proper lane of traffic in an attempt to avoid impact with McClendon once he realized he was instead outside of his car and standing in the near center of the roadway. ROA 1272. Moreover, extensive testimony and evidence was elicited that, at its intersection with Sawgrass Place, Avid Road was not open to through traffic, but rather was a dead-end street, with no center lines, which was closed off by a gate. ROA 281, 290, 294, 306, 321, 339, 440-41, 493-94; ROA 863, 1270, 1288, 1341. Further, the violation of the law cited by Judge Hocker would, at most, be a misdemeanor offense (if not a non-criminal traffic infraction), but certainly not a felony, further indicating it would *not* tend to cause death or great bodily injury. *See* S.C. Code § 56-5-730; *Cabrera-Pena*, 361 S.C. at 381.

Like the assault and battery in *Chatman*, while driving on the incorrect side of the road could, in some situations, cause death or great bodily injury, under the circumstance presented by this case, death or great bodily injury would not be the natural result.

In reaching his conclusion to the contrary, the trial judge acknowledged that the road at issue was "a very less traveled road" before expressing he did not believe that circumstance to matter in his assessment, as it was "still a public road" and Ackerman was driving on the incorrect side. ROA 1352. The trial court merely continued to cite that, regardless of the circumstances, Ackerman was on the wrong side of the road, that act was unlawful, and such behavior could tend to cause death or great bodily injury. ROA 1352, 1360. The court's refusal to consider the circumstances outlined above, or the degree of Ackerman's purported unlawful act, was in direct contravention of the law as outlined by the Supreme Court and, therefore, in error.

Moreover, when the defense attempted to argue that the trial court was required to consider not only the unlawful act, but the circumstances and whether, in this specific case, Ackerman's actions tended to cause death or great bodily injury, the trial court replied by applying improper and circular logic, expressing that, because "a death did, in fact, occur from the conduct," such conduct naturally tended to cause death or great bodily injury. ROA 1360. However, the court's logic would entirely do away with the theory of involuntary manslaughter based on an unintentional killing without malice resulting from the defendant's unlawful conduct which does not tend to cause death or great bodily injury. In every case in which an involuntary manslaughter charge is requested, a death has occurred. Therefore, if a judge considering a request for the instruction could simply conclude that, because the defendant's unlawful act resulted in a death that time, it was necessarily of nature that tends to cause death or great bodily injury, it would have the effect of saying that being engaged in *any* unlawful act precludes instruction on involuntary manslaughter. Not only would this eradicate the Supreme Court's mandate that the circumstances of the specific case be considered in determining whether an act is of a nature tending to cause great bodily injury or death, but the entire rule of involuntary manslaughter would be rewritten to apply only while the defendant was engaged in a lawful act. Accordingly, the trial court also erred in relying on the fact that McClendon died to support its finding that Ackerman's action of driving on the wrong side of the road naturally tended to result in death, and to use such rationale to deny a charge on involuntary manslaughter. All of the judge's other reasons for declining to give the instruction were based solely on the fact that Ackerman and his expert admitted he was on the incorrect side of the road, which, as described above, is not enough, on its own, to warrant denial of the instruction.

Accordingly, although Ackerman admitted to driving on the wrong side of Avid Road as he approached its intersection with Sawgrass Place – and the defense’s accident reconstruction expert concurred with Ackerman’s description of events – the trial court erred in concluding that this admission required a finding, as a matter of law, that Ackerman’s behavior was both unlawful *and* likely to cause death or serious bodily harm, precluding him from possibly being found guilty of the lesser offense of involuntary manslaughter instead of the greater offense of murder. Viewing the evidence in the light most favorable to the defendant, *White*, 425 S.C. at 311 (citation omitted), there existed evidence presented at trial which could be viewed by the jury as tending to reduce the offense, requiring that the jury be given the charge on the lesser offense. *Casey*, 305 S.C. at 447 (citations omitted). Accordingly, it was error for the trial court to deny Ackerman’s request that the jury be instructed on involuntary manslaughter as a lesser included offense of murder. *Mattison*, 388 S.C. at 479.

Moreover, Ackerman was prejudiced by this error. In South Carolina, a court’s erroneous refusal to give a requested jury instruction is not prejudicial if the instructions given to the jury, taken as a whole, “adequately cover[] the law” and “afford the proper test for determining issues.” *State v. Burkhardt*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). However, here, although there was evidence in the record that supported giving the involuntary manslaughter instruction, the court refused to give it, instead only instructing the jury on the substantive offense of murder, meaning the law was not adequately covered by the instructions. Moreover, the jury was effectively prohibited from considering the lesser offense meaning they did not have the proper test for determining the issues. Instead, the jurors were placed in an all-or-nothing situation – either find Ackerman guilty of murder or acquit him. However, had the jury been given the instruction on the

lesser included offense, a different verdict – specifically a finding of guilt as to the lesser offense rather than the murder charge – might have been reached, meaning the error was also prejudicial. *See, e.g., State v. Harrison*, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000) (if a different verdict might have been reached had the proper instruction to the jury been given, the refusal to give the requested instruction amounts to prejudicial and reversible error).

Accordingly, Ackerman should be afforded a new trial based on the trial courts erroneous and prejudicial denial of an instruction on involuntary manslaughter. *Mattison*, 388 S.C. at 479 (a trial judge’s erroneous and prejudicial refusal to give a requested jury charge warrants reversal).

CONCLUSION

This Court should reverse Ackerman’s convictions and remand for a new trial.

Respectfully submitted,

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