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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

Ackerman's initial brief outlined the relevant factual and procedural history of the case as well as the flaws in the court's rulings in allowing both the State to introduce McClendon's text message to a third party as an offer of his then existing state of mind and in denying Ackerman's request that the jury be instructed on involuntary manslaughter.

As to the former, Ackerman argues that (1) in necessarily relying on what Haynie had told him, McClendon lacked personal knowledge of the contents of his text message meaning, even if he had been available, McClendon would not have been competent to testify thereto rendering the contents of his text likewise inadmissible as an exception to the hearsay rule; (2) McClendon's message described Haynie's state of mind, not his own, and a declarant's statement of *someone else's* state of mind is not a qualifying exception to the hearsay rule; and (3) Ackerman was prejudiced by the admission of the message due to its highly inflammatory nature and because it was used to improperly corroborate and enhance Haynie's opinion testimony. In response to these arguments, the State posits that (1) in drafting the text message, McClendon was not relying on what Haynie was telling him, but rather he possessed the requisite personal knowledge of the contents of his message because he was present while Haynie was receiving calls from or on the phone or with Ackerman and *may have* heard both sides of one of the calls placed several hours before the text was sent and/or *may have* heard Haynie's side of the conversation during another call allowing him to form independent, personal observations of Ackerman's actions and state of intoxication; (2) McClendon's statement in the text message was an expression of such independently formed personal observations of Ackerman, not of Haynie's observations of Ackerman; and (3) Ackerman was not prejudiced by the text's admission because it was cumulative

of the testimony and evidence already admitted. The State also argued that the text was admissible because Ackerman had opened the door to the issue of McClendon's state of mind by seeking to offer Ackerman's testimony to the contents of a phone call between himself and McClendon, as well as argued other bases for the text's alleged admissibility, including that (1) although used for its truth by the State at trial, the text message also would have been admissible for the purpose of demonstrating how McClendon reacted to his assessment of the situation regardless of whether his assessment was accurate; and (2) the message was also admissible as an alternative exception to the hearsay rule, Rule 803(1) of the South Carolina Rules of Evidence, as a present sense impression.

As to the issue of the instructional error, Ackerman argues in his opening brief that, when assessing whether his actions naturally tended to cause death or great bodily harm, the circuit court failed to give adequate consideration and weight to either the specific circumstances presented by the case or the statutory degree of the cited unlawful act, and that he was prejudiced by the court's refusal to instruct the jury on the lesser offense. On this issue, the State's responsive brief argues only that, if the court had engaged in an assessment the circumstances of the instant case, they would have demonstrated that Ackerman's actions naturally tended to cause death or great bodily harm. The State did not address whether it was erroneous for the court to fail to consider such circumstances. Nor did the State address whether the court erred in failing to address the statutory degree of the cited unlawful act(s) or offer argument on how such degree would affect the court's analysis had it been considered. The State likewise did not address the issue of prejudice resulting from the refusal of the instruction. Therefore, it must be assumed the State does not contest that the court's analysis was lacking in multiple respects and that they likewise concede that, if this

Court finds that the circumstances of this case and statutory degree of the cited offense do *not* demonstrate a natural tendency to cause death or great bodily harm, Ackerman was prejudiced by the court's refusal to give such instruction. *See Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008), citing *First Union Nat'l Bank v. FCVS Communications,* 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct). Accordingly, these factors are not further addressed herein.

For the reasons outlined at length in Ackerman's initial brief and expanded upon below, this Court must reverse Ackerman's convictions and remand the matter for a new trial.

ARGUMENT

I. McClendon did not possess personal knowledge of the contents of his text message, the message was not an expression of his own state of mind, nor was it otherwise admissible, and its use at trial by the State prejudiced Ackerman.

Contrary to the State's averments, the contents of the text message authored by McClendon and admitted at trial were hearsay not subject to any exception and to which McClendon would have been incompetent to testify due to a lack of personal knowledge of the subject matter thereof, and did not rebut or refute any aspect of the defense's case-in-chief. Therefore, the text was erroneously admitted. Moreover, the use of the text message was not harmless, requiring reversal of Ackerman's conviction.

A. McClendon did not possess personal knowledge of the contents of his text message.

"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." Rule 602, SCRE; *see also State v. Tennant*, 394 S.C. 5, 11, 714 S.E.2d 297, 300 (2011). "Personal knowledge" within the meaning of Rule 602 requires that the person testifying (or, here, whose text message is being introduced in lieu of testimony) personally saw or heard the information to which they are testifying; information obtained exclusively from communications with another is, therefore, not personally known to the testifier. *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).

In their responsive brief, the State cites to McClendon being present during a FaceTime call between Haynie and Ackerman in support of their position that McClendon had personal knowledge of the contents of his text message to Smith. *See* Respondent's Br. at p. 18. The record reflects a FaceTime call between Haynie and Ackerman (during which Haynie spoke to their children) at 8:47:30 pm on May 6, 2023, which she took from inside of a vehicle in the parking lot of a restaurant while McClendon went inside. ROA 711-14. The record also reflects a second, approximately one-minute-long FaceTime call between Haynie and Ackerman at 9:10 pm, which Haynie took from inside of the restaurant, but did so with the "phone really close to her face." ROA 717-19. Haynie also testified that she had been trying to prevent Ackerman from knowing McClendon was with her (*see,* e.g., ROA 713-14), which she successfully achieved. *See* ROA 1296 (Ackerman testified he did not know McClendon was with Haynie at the time of the 9:10 p.m. FaceTime call). Therefore, although McClendon was also inside the restaurant at the time of the second call, there was no evidence that he was part of the call in anyway (*see* ROA 718-19), and, in fact, the evidence suggests the opposite – that Haynie was attempting to keep distance between

McClendon and the call. Therefore, the State's contention that "both [Ackerman's] and [Haynie's] statements during the FaceTime call were audible to [McClendon] personally" (*see* Respondent's Brief at p. 18), not only supposes facts that are not in the record, but is, in fact, refuted by Haynie's own testimony as to the circumstances of the FaceTime calls.

The State likewise cites McClendon's presence during a later non-video phone call between Haynie and Ackerman to suggest that McClendon "hear[d] [Haynie] accuse [Ackerman] of being drunk and her threats to call the police in real time." *See* Respondent's Br. at p. 18. However, this conclusion once again supposes facts not in evidence. Haynie's testimony was that, at 12:08 p.m., she called McClendon got separated, so she called McClendon to tell him Ackerman was "looking for [them]" (ROA 724-26), which was necessarily from a source other than Ackerman himself (additionally rendering it hearsay when Haynie heard it), as Haynie testified that, at that time, she had last spoken to Ackerman directly during the FaceTime call at 9:10 p.m. ROA 728. Haynie then spoke to Ackerman again from 12:38 a.m. to approximately 12:40 a.m. (for 1 minute and 39 seconds), when she answered his call while she and McClendon were socializing with others at a bar. ROA 729-31. It was only then that Haynie formed the opinion that Ackerman was "drunk," and that Ackerman allegedly told her he was "driving around" and "going to find [them]," so Haynie threatened to call the police. ROA 731-33. Again, there was no evidence of record whatsoever that McClendon could hear any part of this call, and certainly not that he could hear Ackerman's side of it, which was the portion of the call critical to determining the question of personal knowledge in this situation.

Nonetheless, at 12:42:14 a.m. – i.e., approximately two minutes after Haynie's call with Ackerman concluded – McClendon sent the text stating, "apparently [Ackerman] is drunk and out

trying to hunt [Haynie] down, she's wanting to call the cops…[.]" ROA 1349. However, even McClendon's own wording, i.e., "apparently," indicates his lack of personal knowledge to the contents of his message.[1]

The State has clearly presented nothing more than suppositions in support of its claim that McClendon personally heard any portion of Haynie's conversations with Ackerman. This proffer of hypothetical happenings is certainly does not amount to an offer of "evidence … sufficient support a finding" under Rule 602 of the South Carolina Rules of Evidence that McClendon had "personal knowledge" of Ackerman's movements, intentions, or state of intoxication at the time he authored the at-issue text message.

In fact, the South Carolina Supreme Court was faced with a situation analogous to that presented by the instant case in *State v. Tennant*, 394 S.C. 5, 714 S.E.2d 297 (2011). In that case, Tennant made statements to a doctor that the victim had visited him in jail, and such statements

[1] Although Ackerman maintains that there is not sufficient evidence of record that McClendon heard Haynie's earlier FaceTime call with Ackerman, to the extent that this Court questions whether McClendon may have heard the call, Ackerman offers the following additional argument:

The only logical conclusion that can be reached is that McClendon's text message was authored in response to the 12:38 p.m. phone call, *not* the earlier FaceTime call, as it discusses matters that were not even in play until the time of the later call. First, there was no evidence offered at all that Ackerman was "drunk" at 9:10 p.m., further contradicting the State's claim that McClendon could have garnered such information, which he later placed in his text, by hearing the 9:10 p.m. FaceTime call between Haynie and Ackerman. ROA 718. Nor was there any evidence offered that, at 9:10 p.m., Ackerman was out looking for anyone – the record shows that he was in his parents' home and finishing his bedtime routine with his children at that time. ROA 711-12, 771-76 (Ackerman was first noted to have left his parents' home at 10:06 p.m.) Moreover, Haynie made no reference to the police being called until the 12:38 a.m. phone call. Finally, McClendon's text message was not sent until 12:42:14 a.m. – i.e., over three and a half hours after the last FaceTime call concluded (ROA 1349), *cf.* the two minutes that had passed since the later phone call concluded – further suggesting the temporally remote FaceTime call did not have any bearing on his later message. ROA 623; ROA 1349.

were recorded in that doctor's notes. Tennant did not tell a second doctor, Dr. Schwartz-Watts, about the visits, but Dr. Schwartz-Watts read about them in the first doctor's notes. When Dr. Schwartz-Watts was asked to testify about the visits, the trial court excluded the testimony on the basis that Dr. Schwartz-Watts had no personal knowledge of the victim's alleged visits with Tennant. When this holding was challenged, the Supreme Court confirmed that Dr. Schwartz-Watts lacked personal knowledge of the visits, so her testimony regarding such visits was "properly excluded under Rule 602, SCRE." *Id.* at 12. Here, Ackerman (analogous to Tennant) made statements to Haynie (analogous to the first doctor) during their 12:38 a.m. phone call. Ackerman did not make such statements to McClendon (analogous to Dr. Schwartz-Watts), but McClendon nonetheless learned of Ackerman's statements from Haynie. Therefore, like in *Tennant,* McClendon lacked personal knowledge of the contents of his text message (analogous to Dr. Schwartz-Watts' testimony), and the message should have been excluded under Rule 602, SCRE.

The only reasonable conclusion to be draw from the record is that there is not sufficient evidence to demonstrate that McClendon possessed personal knowledge of the contents of his texts and the State's attempts to claim otherwise are merely musings which push the bounds of reason in light of the record.

B. McClendon's text message was an expression of Haynie's observations of Ackerman, not his own, meaning it does not qualify as a hearsay exception under Rule 803(3).

The State next argues that McClendon authored his text based on his "personal[ ] observ[ation]" of Ackerman's repeated, unwanted calls to Haynie, which McClendon experienced "in tandem" with Haynie, meaning the text was an expression of his own state of mind under Rule

803(3) of the South Carolina Rules of Evidence.[2] *See* Respondent's Br. at p. 18. However, as argued in Ackerman's opening brief, McClendon's text did not discuss the number or frequency of Ackerman's calls, nor his alleged "harass[ing]" of Haynie. *Id*. Rather, it alleged Ackerman was "drunk" and trying to "hunt [Haynie] down" (ROA 1349), none of which could have been garnered from a mere direct observation of repeated phone calls. The text message plainly does not discuss McClendon's own, direct observations.

C. The text message was not admissible as reply testimony because it did not refute or rebut evidence offered by Ackerman's testimony in his own defense.

It is well established under South Carolina law that reply testimony offered by the State should be narrowly limited to that which refutes or rebuts evidence presented by the defendant. *State v. Prather*, 429 S.C. 583, 602-03, 840 S.E.2d 551, 561 (2020), quoting *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010) ("'Reply testimony should be limited to rebuttal of matters raised by the defense.'"); *see also State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975) (reply testimony may not "go beyond a refutation of that which the [defendant]'s witness had asserted"); *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (rebuttal testimony must be "properly limited … strictly to a reply to [the appellant]'s evidence" and "related only to the specific issues raised by [the appellant's witness]"). However, reply testimony may *not* be used to complete the State's case-in-chief. *Huckabee*, 388 S.C. at 242.

[2] In making this argument, the State apparently does not quarrel with Ackerman's position (*see* Appellant's Initial Br. at p. 29) that Rule 803(3), SCRE would not apply to McClendon's statement of Haynie's state of mind, only his own.

At 12:42:14 a.m., McClendon sent the text stating, "apparently [Ackerman] is drunk and out trying to hunt [Haynie] down, she's wanting to call the cops, I was hoping maybe you could get his dad to rope him in." ROA 1349. Then, at 12:51:15 a.m., i.e., 9 minutes later, McClendon called Ackerman. ROA 686-87. In the defense's proffer to the court regarding the contents of Ackerman's testimony to this phone call, Ackerman confirmed that, when McClendon called him, McClendon expressed that he was "trying to be patient with [Ackerman]" but McClendon was "upset that [Ackerman] was trying to call [Haynie] so many times that evening to locate her." ROA 1258. Per the State's responsive brief, the posited value of the text message to the State was to demonstrate that, around the same time McClendon placed the call to Ackerman, he was "calm, concerned, and seeking merely to get [Ackerman] to end his search for [Haynie] and go home." *See* Respondent's Br. at p. 20.

Initially, the State's claim that the text message was offered for its alleged refuting or rebutting value is directly contradicted by the record. The State did not seek to introduce this text in response to the defense's use of Ackerman's testimony. In objecting to Ackerman's testimony regarding his call with McClendon, the State merely referenced the court's ruling on the text message suggesting that, if the text was inadmissible, the contents of the call should be inadmissible for the same reason. ROA 1260-61. However, the court then, *sua sponte,* rescinded its earlier ruling as to the text and permitted both the text message and the testimony regarding the call into evidence. ROA 1262. Following this ruling, the State only then said, "that would mean we'd have to call a witness in reply, I guess?" ROA 1262. The State clearly did not even suggest that the court should allow the text to be admitted in response to Ackerman's testimony and any suggestion to the contrary is a mischaracterization of the record.

Moreover, even had the State made such an argument, Ackerman had confirmed that McClendon called him from a place of patience and for the purpose of discussing the number of contacts Ackerman attempted to initiate with Haynie that evening. Ackerman's testimony that McClendon grew angry as the call continued (*see* ROA 1258-59) was not pertinent to what his mindset was at the time he sent the text and initiated the call with Ackerman. Had the State sought to admit this same text message sent shortly *after* McClendon's conversation with Ackerman, it might have possessed refuting or rebutting value. However, McClendon's state of mind *before* he called Ackerman, which matched that to which Ackerman testified McClendon possessed at the start of their call, did not have any similar significance. Because the text did not rebut or refute Ackerman's testimony regarding McClendon's state of mind prior to their conversation, it was not admissible as reply testimony. *See Prather*, 429 S.C. at 602-03, quoting *Huckabee*, 388 S.C. at 242. The State's use of the text in its reply was nothing more than an improper completion of the State's case-in-chief (*see Huckabee*, 388 S.C. at 242), which is demonstrated by the fact that the prosecution did not seek introduction of this message in response to Ackerman's testimony, but rather had been vying for its use since early in the trial. *See* ROA 623-626, 628. It was evidence that, once admitted, transformed the State's theory of their case, and which they used to argue Ackerman was on a predatory search with his foot on the "trigger" of his "weapon" (truck), *see* ROA 1362, 1367, 1369-70, 1372-73, 1375, 1377, 1430, 1441, as discussed in more detail on the issue of prejudice below.

Accordingly, McClendon's text message was neither offered as nor properly used as reply testimony.

D. There was no other legal basis for McClendon's text to be admitted into evidence.

Further, McClendon's text is not only inadmissible under Rule 803(3) of the South Carolina Rules of Evidence, but it is also not admissible upon any other grounds. While the State claims that the communication would have been admissible as either non-hearsay for the purpose of demonstrating "how [McClendon] reacted to the circumstances he believed to be the truth…[,] regardless of whether they were the truth," or alternatively, for its truth under Rule 803(1) of the South Carolina Rules of Evidence as a present sense impression, each of these claims necessarily fails. *See* Respondent's Br. at p. 21.

First, the State's argument that McClendon's text was not hearsay requires analysis of what the primary probative value of the text message was. *See State v. Hendricks*, 408 S.C. 525, 532-33, 759 S.E.2d 434, 438 (Ct. App. 2014). Even where there "may have been some minimal probative value in admitting the statement for [a non-hearsay] purpose…," if the non-hearsay purpose "was not a significant issue at trial" and the greater "probative value … was in the truth of what is asserted in the statement…, [the] statement is hearsay." *Id.* at 533 (citation omitted) (holding that a 911 call reporting an assault had "minimal probative value" in explaining the insignificant question of why law enforcement responded to the hospital, that the call's true probative value was to prove the defendant was the assailant, and, therefore, the call's contents were hearsay).

The State claims that the text message possessed value for the purpose of demonstrating McClendon's reaction to hearing that Ackerman was allegedly intoxicated and looking for Haynie – regardless of whether this information was true or not – was to attempt to dissuade Haynie from calling the police and to instead reach out to Ackerman's family for assistance in deterring Ackerman's search efforts. However, even if the text had "some minimal probative value" in

proving McClendon and Haynie's reaction to Ackerman's efforts, the nature of their reaction was "not a significant issue at trial." *See Hendricks*, 408 S.C. at 533. Haynie offered extensive testimony which was corroborated by phone records – and which Ackerman additionally confirmed was accurate – that she had said she was going to call the police, but members of Ackerman's family were contacted instead. ROA 732-37; ROA 1311-1313. Therefore, like in *Hendricks,* "[t]he probative value in [McClendon's text] statement was in the truth of what was asserted in the statement" – i.e., that Ackerman was "drunk" and trying to "hunt [Haynie] down" (ROA 1349). *Id.* at 533.

Additionally, the evidence is not admissible as a present sense impression. Rule 803(1) of the South Carolina Rules of Evidence provides that a declarant's "present sense impression" is an exception to the hearsay rule. The rule "defines a present sense impression as a 'statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.'" *Prather*, 429 S.C. at 611, quoting Rule 803(1), SCRE. "To qualify as a present sense impression: '(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.'" *Id.,* quoting *Hendricks*, 408 S.C. at 533.

Even if the first two prongs of this exception could be satisfied in this case, the third certainly cannot. For the same reason McClendon's lack of personal knowledge of the contents of his text message would have prevented him from being competent to testify to its substance even if he were available (which also should have precluded the State's use of the message at trial), the personal perception requirement for admissibility under Rule 803(1), SCRE likewise cannot be satisfied on the facts of this case. *See,* e.g., *King,* 412 S.C. at 412 (to satisfy the personal knowledge

requirement under Rule 602, SCRE, the declarant must have seen or heard the information to which they are testifying); *Hendricks*, 408 S.C. at 533 (citation omitted) (personal perception as required by Rule 803(1), SCRE mandates direct observation of the event in question). While the State summarily argues that McClendon was "with [Haynie] witnessing … [her] conversations [with Ackerman] as they were happening" (*see* Respondent's Brief at p. 21), as described throughout Ackerman's initial brief and this instant reply, there is nothing in the record which supports the conclusion that McClendon witnessed anything more than Haynie's phone ringing; there is no support for the State's position that McClendon was directly apprised of the contents to Haynie's phone conversations. Learning of the contents of the call from Haynie will not satisfy the personal perception prong of the test for the present sense impression exception. *See,* e.g., *Hendricks*, 408 S.C. at 533 (where a daughter told her mother she was assaulted, the mother then told a 911 operator of her daughter's assault, and the State wished to use the contents of the 911 call at trial as a present sense impression exception to the hearsay rule, the Court of Appeals concluded that the required element of personal perception could not be satisfied). Therefore, McClendon did not "personally perceive[ ] the event[s]" offered for their truth, i.e., that Ackerman was "drunk" and trying to "hunt [Haynie] down" (ROA 1349) precluding the use of the contents of his text message for their posited truth.

E. Ackerman was prejudiced by the State's use of the text at trial.

The State additionally avers that Ackerman was not prejudiced by the text's admission because the evidence was "'merely cumulative'" of other evidence offered at trial. *See* Respondent's Br. at pp. 19-20 (citation omitted). In doing so, they argue that Haynie's testimony, coupled with video evidence of Ackerman drinking, established that Ackerman was "intoxicated."

Id. at p. 19. As to McClendon's claim that Ackerman was trying to "hunt" Haynie down, the State argues that Haynie and Ackerman's testimony confirmed that Ackerman had been looking for Haynie on the night in question and they further argue that McClendon's verbiage was not prejudicial. *Id.* at p. 19, n. 11.

While, as cited by the State (*see* Respondent's Brief at pp. 19-20), "[i]mproperly admitted hearsay which is merely cumulative to other evidence *may* be viewed as harmless," *State v. Jennings,* 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (emphasis added), this is a patently incomplete statement of the law. The cumulative nature of improperly admitted hearsay does not, alone, render it harmless. *See,* e.g., *id.* at 478-79 (describing circumstances where improper hearsay evidence was cumulative of other evidence at trial but nonetheless could not be viewed as harmless). Rather, the improper admission of hearsay "'is deemed harmless [only] when it could not have reasonably affected the result of trial[.]'" *State v. Brewer*, 411 S.C. 401, 408-09, 768 S.E.2d 656, 660 (2015), quoting *Jennings,* 394 S.C. at 478. "'Whether an error is harmless depends on the circumstances of the particular case. *No definite rule of law governs this finding*; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.'" *Id.* at 409, quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (emphasis added). Therefore, the State's apparent claim that, as a "rule of law" improperly admitted hearsay evidence is always harmless if it is cumulative is a manifestly inaccurate representation of the status of the law.

As described in Ackerman's initial brief, an assessment of the improper hearsay in relation to the entirety of the case requires the conclusion that its use was not harmless. The sole issue before the jury in this case was one of intent – was the collision accidental or intentional? In their

opening arguments the jury, before they knew whether McClendon's text would be admitted, the State argued that intent had only been formed in the moments immediately prior to the collision, as Ackerman traveled down Avid Road toward McClendon. *See,* e.g., ROA 237-38 (Malice can be "[i]nferred by not breaking…, your truck running at somebody as they're standing, waiting to talk to you. … You don't have to plan, decide in advance, 'I'm going to kill somebody.' … Premeditation is not required. Malice only has to exist at the time the fatal blow is inflicted…, when the gas is on the truck, at the time when it's not on the brake…, [a]t the time where the truck runs into [McClendon's] body.") However, once the text was admitted, the State shifted their entire theory of the case to argue that Ackerman had been "out looking for [McClendon] … with his foot on the trigger, [and] as he's driving, he was hunting." ROA 1367. The State used the word "hunt" four separate times in their closing arguments – including once in nearly directly quoting McClendon's text message – and, further, made repeated additional hunting references in their final statements to the jury (e.g., Ackerman was driving around with his "foot … on the trigger" of his "7,000-pound weapon" with his level of malice escalating as the night continued on). ROA 1362, 1367, 1369-70, 1372-73, 1375, 1377, 1430, 1441. The State similarly never mentioned Ackerman drinking in their opening statements (*see* ROA 234-46), but in their closing argued Ackerman had used alcohol as "liquid courage" to fuel his alleged mission. ROA 1370.

The value of this text message to the State's theory of the case cannot be understated. It transformed the prosecution's case from one of attempting show that Ackerman experienced a fleeting moment of intent in the seconds prior to striking McClendon, into a claim that Ackerman had engaged in an hours' long malicious, predatory and vengeful pursuit of McClendon. The State viewed this text message as so impactful that it repeatedly brought it up throughout trial even after

its admissibility had been rejected by the court, and once it was granted use of the message, allowed it to permeate their entire theory of their case against Ackerman. Even if McClendon's text message was cumulative of other evidence, under the circumstances of the instant case, it nonetheless undoubtedly impacted the result of the trial. *See Brewer*, 411 S.C. at 408-09 (quotations omitted). Moreover, the State's averment that the use of the word "hunt" in McClendon's text was colloquial only is directly contradicted by the prosecution's own decision to latch on to the word and use it to imply predation and maliciousness to the jury. Therefore, because McClendon's posthumous message conveyed to the jury that Ackerman was allegedly "drunk" and on the "hunt" can in no way be viewed as harmless.

The State also claims that, not only was Ackerman not prejudiced by the text's admission, but, in fact, he "benefited greatly" from the court's decision to admit his testimony to the contents of his conversation with McClendon under Rule 803(3), SCRE. *See* Respondent's Br. at pp. 19-20, n. 12. What the State misses in this assessment is that the rulings as to these two separate pieces of evidence were not – or at least should not have been – contingent upon each other. As outlined in Ackerman's initial brief and argued by the defense at trial, Ackerman possessed personal, firsthand knowledge of the contents of his testimony, as he was a direct party to the conversation, and his testimony was to the state of mind of the other party to that conversation – McClendon – bringing it within the scope of Rule 803(3), SCRE. *See* Appellant's Initial Br. at pp. 27-28. Conversely, McClendon's text message was authored absent personal knowledge and described Haynie's, not his own, state of mind, rendering it subject to exclusion under both Rules 602 and 803(3) of the Rules of Evidence.

II. The circumstances of the instant case do not demonstrate that Ackerman's alleged traffic violation(s) naturally tended to cause great bodily harm or death.

One theory of involuntary manslaughter is the unintentional killing of another, without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm. *Bozeman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1996). Where it is conceded that an unlawful act occurred but contested whether such act posed a natural tendency to result in death or great bodily harm, the statutory nature of the offense alone will not be conclusive. Rather, assessment of the circumstances surrounding the alleged unlawful act is required. *See State v. Chatman,* 336 S.C. 149, 152-53, 519 S.E.2d 100, 101-02 (1999). While Ackerman concedes he violated the traffic laws of this State by driving at least partially on the wrong side of the road, the circumstances under which he did so did not pose a natural tendency to cause death or great bodily harm.[3] Therefore, the trial court erred in denying him the requested instruction on involuntary manslaughter.

A. Analysis of the circumstances surrounding the alleged traffic violation is mandated by the law.

As noted in both Ackerman's initial brief and the State's response thereto, in denying Ackerman's request for an involuntary manslaughter instruction, the circuit court summarily concluded that "driving on the wrong side of the road … [is] an unlawful act" and it "does tend to cause death or great bodily injury when a vehicle crosses the center line or goes over into the

[3] As noted in Ackerman's initial brief at note 5 found on page 33, evidence of the elements of (1) an unintentional killing, and (2) the absence of malice, was necessarily present in the record, as the court never cited any absence of evidence of these elements in denying Ackerman's request for the instruction. ROA 1352.

other lane of travel."[4] ROA 1352. In their brief, the State adopts the same position to argue that the trial court was correct in denying the instruction because "crossing over into the opposing lane of traffic on a public road … 'naturally' risks circumstances where the vehicle may then strike vehicles in the oncoming lane…[,] [s]uch circumstances tend[ ] to cause death or great bodily injury and the law exists specifically to avoid that inherent danger." *See* Respondent's Br. at pp. 23-24; *see also id.* at p. 24 (describing the "natural danger contemplated by the law"). Notably, this conclusory "argument" is devoid of any citation or other legal support,[5] likely because is directly contrary to the on-point case law cited by Ackerman in his brief – *State v. Chatman,* 336 S.C. 149, 519 S.E.2d 100 (1999) – which unequivocally provides that the commission of unlawful act alone cannot support a finding that such act poses a "natural tendency to cause death or great bodily harm," even if, in some circumstances, such harm might result from the violation. *Id.* at 152-153.

Therefore, to the degree that the State's summary conclusion based exclusively on the nature of the unlawful act of driving on the wrong side of the road is a suggestion that no analysis of the circumstances surrounding the act is required in reaching such conclusion, the South Carolina Supreme Court has made clear this is inaccurate and, therefore, the State's position is wholly unsupported by the law.

B. Assessment of the circumstances of Ackerman's case requires the conclusion that his unlawful act of crossing the center of the roadway did not pose a natural tendency to cause death or serious bodily harm.

[4] The State's responsive brief, at page 22, describes the trial court's finding as follows: "the unlawful act of driving on the wrong side of the road … naturally tend[s] to cause death and great bodily injury."

[5] An argument is deemed abandoned if it is "conclusory and contains no citation support." *State v. King*, 349 S.C. 142, 157, 561 S.E.2d 640, 648 (Ct. App. 2002).

The State's brief does then go on to analyze the circumstances of the case to reach the conclusion that, had the trial court engaged in the proper analysis, it still would have concluded that such circumstances did pose a natural tendency to result in death or great bodily injury. *See* Respondent's Br.at pp. 24-25. In arguing the court did not err in denying the requested charge, the State cites that Ackerman crossed a lane of traffic while knowingly approaching another visible vehicle and a gated dead end, with limited visibility, while driving 35 miles per hour, as circumstances which demonstrate his act of driving on the wrong side of the road naturally tended to result in death or great bodily harm. *Id.*

However, the State's analysis is erroneous under the law. First, the State scrutinizes the circumstances in the light most favorable to itself, which is improper. Rather, the evidence must be considered in the light most favorable to Ackerman. *See State v. White,* 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018), quoting *State v. Williams,* 400 S.C. 314, 733 S.E2d 605, 608-09 (Ct. App. 2012) (an appellate court's review of a trial court's refusal to deliver a jury instruction requires that the evidence be considered in the light most favorable to the defendant). Further, the State does not argue that it "'very clearly appear[s] that there is *no evidence whatsoever* 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. Gardener,* 219 S.C. 97, 64 S.E.2d 130 (1951) (emphasis added), and instead merely cites that they believe there to have been *some* evidence to support the charge's denial. However, this is not the proper test. *See State v. Crosby,* 355 S.C. 47, 53, 584 S.E.2d 110, 112-13 (2003) (citation omitted) (admonishing and reversing lower court's implicit conclusion that "if there is any evidence [supporting rejection of an involuntary manslaughter charge], all evidence from which any other inference is may be drawn is negated," as such conclusion "is not the law of

this state"). On the contrary, "'[i]f there is *any* evidence to support a[n] [involuntary manslaughter] jury charge, the trial [court] should grant the request.'" *State v. Brewton*, 437 S.C. 44, 55, 876 S.E.2d 141, 147 (Ct. App. 2022), quoting *State v. Brown,* 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (emphasis added). When analyzed properly, both in the light most favorable to Ackerman and in reviewing the record for any evidence supportive of the involuntary manslaughter instruction, it becomes immediately clear that the circuit court erred in refusing to instruct the jury on the lesser included offense.

As outlined in Ackerman's initial brief, the evidence at trial demonstrated that the road at issue bore no center lines, culminated in a dead-end which was not open to through traffic and was closed off by a gate, and the road was "very less traveled," not receiving "a lot of traffic." ROA 281, 290, 294, 306, 321, 339, 440-41, 493-94; ROA 863, 1270, 1288, 1341, 1352. It cannot reasonably be said that crossing the unmarked center of a roadway as it approaches its end, in a rarely traveled and quiet area, during the early morning hours while the neighborhood is asleep, would naturally tend to cause death or great bodily harm to another.

Further, even when adding Ackerman's knowledge that McClendon's vehicle was parked at the dead-end intersection into the analysis, the same result must be reached. Ackerman testified that, in approaching Avid Road's junction with Sawgrass Place, he believed McClendon to be inside of his BMW, so he intended to pull alongside McClendon's car so they could speak through the windows of their respective vehicles. ROA 1272-1273, 1320. The soundness of Ackerman's belief that McClendon was in the vehicle was supported by the record, which reflects that McClendon *was* in the vehicle until the three seconds – or less – prior to the collision, as follows:

- At 1:09:10 a.m.:

McClendon was at the intersection of Avid Road and Sawgrass Place. ROA 282-83, 291, ROA 1316 (McClendon arrived at the intersection around 1:01 a.m. and did not leave).

McClendon's phone was plugged into his vehicle's wireless charger. ROA 675. (McClendon's phone was plugged into the charger from 12:55:20 a.m.)

Ackerman was at his parents' home. ROA 969 (Ackerman was at his parents' home between 1:08 a.m. and 1:10 a.m.)

Ackerman called McClendon, who answered his call. ROA 669; ROA 1316.

Therefore, at 1:09:10 a.m., McClendon answered the call from inside his BMW.

- The two men spoke from 1:09:10 a.m. to 1:10:40 a.m. ROA 1316. McClendon's phone remained plugged into the car's wireless charger. ROA 675-77.

  Therefore, from 1:09:10 a.m. through 1:10:40 a.m., McClendon spoke to Ackerman from inside his BMW.

- At 1:10:40 a.m., Ackerman left his parents' address while still speaking to McClendon on the phone. ROA 792; ROA 1316. McClendon's phone remained plugged into the car's wireless charger. ROA 675-77.

  Therefore, at 1:10:40 a.m., McClendon continued to speak to Ackerman from inside his BMW.

- Per the testimony elicited by the State, the two men continued to speak as Ackerman entered the Hunters Creek subdivision by turning onto River Road at 1:11:07 a.m. ROA 970, 1316. McClendon's phone remained plugged into the car's wireless charger. ROA 675-77.

  Therefore, at 1:11:07 a.m., McClendon continued to speak to Ackerman from inside his BMW.

- Per the testimony elicited by the State, the two men continued to speak as Ackerman turned onto Avid Road at 1:11:16 a.m. ROA 970, 1316. McClendon's phone remained plugged into the car's wireless charger. ROA 675-77.

  Therefore, at 1:11:16 a.m., McClendon continued to speak to Ackerman from inside his BMW.

- Per the testimony elicited by the State, the two men continued to talk while Ackerman was traveling "down Avid Road." ROA 1316.[6]

  McClendon's phone remained plugged into the car's wireless charger. ROA 675-77.[7]

  Therefore, as Ackerman was traveling down the Avid Road approaching McClendon, McClendon continued to speak to Ackerman from inside his BMW.

- As indicated by the State, McClendon's BMW made a steering change enduring from 5 seconds before the collision to 3 seconds before the collision, which was caused by the person in the vehicle. *See* Respondent's Br. at p. 11; *see also* ROA 848 (describing a steering input change enduring from 5 to 3.5 seconds before the collision).

  Therefore, McClendon was unquestionably in the vehicle in the 3 seconds prior to the impact, meaning he exited the BMW, *at the earliest,* at 1:11:28 a.m.

- As also indicated by the State, the collision occurred over 1:11:31 a.m. to 1:11:32 a.m. *See* Respondent's Br. at p. 8, citing ROA 795 (describing the State's cited "suspected collision" event as occurring over the course of 1:11:31 and 1:11:32 a.m.); *see also* ROA 970 (Ackerman's truck was at the intersection by 1:11:31 a.m. and was past the intersection by 1:11:32 a.m.)

Accordingly, Ackerman's intention to pull his truck next to McClendon's vehicle, while he rationally believed McClendon to be inside thereof, is also not a circumstance which would present a natural tendency to result in death or serious bodily harm.

Further, that McClendon was not, in fact, in his vehicle as expected also does not alter the outcome of the analysis. In *Chatman,* the Supreme Court expressed that, if the death in question occurred in a non-traditional manner as compared to deaths ordinarily and rationally contemplated to occur because of engaging in the at-issue unlawful act, such an atypical scenario would not be of

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[6] The call between Ackerman and McClendon concluded after the collision, at 1:14:37 a.m. ROA 692-693 (call lasted for 3 minutes and 28 seconds).

[7] McClendon's cell phone never left his vehicle. It was still inside at the time of the collision, as well as at the time law enforcement responded to the scene. ROA 675-77 (phone was unplugged from the wireless charger at 1:11:34 a.m. as a suspected result of the airbag's deployment); ROA 458-60 (phone found on passenger seat following unplugging event).

the type to "naturally tend" to cause a death or serious bodily harm. *See Chatman,* 336 S.C. at 153 (where the defendant testified that he did not intend to "traditionally" strangle the victim with his hands and the fatal act of strangulation instead occurred due to defendant pressing his shoulder into the victim's neck, it was "not the traditional strangulation type situation" and the defendant's actions, therefore, did not "naturally tend to cause serious bodily injury or death"). With Ackerman's vehicle approaching him in at least the partial darkness of night, McClendon suddenly decided to jump out of his vehicle and into the pathway of Ackerman's oncoming truck when it was mere seconds away from reaching the intersection. When Ackerman realized that McClendon had suddenly exited his car at or after 1:11:28 a.m., as cited by the State in their own brief (*see* Respondent's Brief at p. 8), Ackerman immediately (at 1:11:29 a.m.) initiated a hard braking event, resulting in his deceleration by over 12 miles per hour (from 38 mph to 25.9 mph), followed by another decrease down to 14.2 miles per hour caused by "heavy braking" as the suspected collision was occurring (1:11:31 to 1:11:32 a.m.) *See also* ROA 793-96, 800.[8] Ackerman testified that, although

[8] *Cf.* Respondent's Br. at p. 9, arguing (in contradiction to their own statements earlier in the brief) that Ackerman "testified at trial that he didn't hit the brakes prior to striking [McClendon] because 'he didn't have time.'" However, this was an overstatement of the contents of the record. While cross-examining Ackerman, the State repeatedly asked Ackerman suggestive question which directly contradicted the above-cited earlier testimony to the data pulled from the vehicles. Specifically, the State's attorney insinuated to Ackerman, "You didn't hit the brakes before you hit him, did you?" to which Ackerman replied, "I didn't have time." The State responded, "You didn't have time to hit the brakes?" Ackerman replied, "Not in that quick moment." ROA 1319. Shortly after, the State again expressed, in what was more of a statement than a question, "Heading toward him, heading toward his car, 35 miles an hour, no brakes because you didn't have time, and then you hit him? You don't dispute that, do you? That was you in that truck that hit him?" (Italics added.) In response, Ackerman merely replied, "I dispute that I hit him on purpose, that's correct." ROA 1320. Therefore, the State is largely citing its own attorney's statements and suggestions to Ackerman, which directly contradict the record, *not* Ackerman's own original statements about his braking. In fact, Ackerman also specifically testified that he did not remember each of the braking events involved in the split-second collision. ROA 1273, 1320.

everything "happened so fast" and he only had "a couple of seconds at the most" to react from the time he saw McClendon in the road until there was impact, he nonetheless not only slammed on his brakes, but also jerked his truck to the left, toward McClendon's parked car, in an unfortunate failed attempt to avoid striking McClendon. ROA 1272-74; *see also* ROA 1082-83 (Ackerman's testimony to pulling his truck toward the car was confirmed by his expert, David Torres.) Certainly, this situation is far from the "traditional … situation" in which a death or serious injury would tend to occur as the result of someone driving on the wrong side of the road. As there was no logical reason for the defendant in *Chatman* to believe pinning the victim's body down with his shoulder would be fatal, there was likewise no logical reason for Ackerman to have anticipated that, while he was telephonically speaking to and approaching McClendon's parked car with the intention of pulling beside it, McClendon would suddenly exit his vehicle, requiring Ackerman to react in mere seconds. The evidence of record supports that McClendon's presence in the roadway was a completely unexpected occurrence, which Ackerman immediately attempted to negate once it suddenly and unexpectedly presented itself. Therefore, Ackerman's actions in approaching the intersection slightly off center so he could speak to McClendon from inside his vehicle did not pose a natural tendency to result in McClendon's death or bodily harm, even though Ackerman's assessment of what McClendon's location would be was flawed by McClendon's last-second decision to relocate.

C. The trial court's denial of an involuntary manslaughter instruction was erroneous and prejudicial, warranting reversal of Ackerman's conviction.

As described above, the State has conceded the issue of prejudice resulting from the trial court's failure to give the Ackerman's requested involuntary manslaughter instruction. *See Turner,* 377 S.C. at 547 (citation omitted). Further, viewing the evidence in the light most favorable to

Ackerman, *see White,* 425 S.C. at 311 (citation omitted), the circuit court's refusal to give such instruction was clearly erroneous, as there was undoubtedly evidence of record supporting the charge. *See Brewton*, 437 S.C. at 55, quoting *Brown,* 362 S.C. at 262. Because both error and prejudice have been demonstrated, the court's ruling must be reversed. *See id.,* quoting *Brown,* 362 S.C. at 262 ("'To warrant reversal, a trial [court]'s refusal to give a requested [involuntary manslaughter] jury charge must be both erroneous and prejudicial to the defendant.'")

CONCLUSION

For the reasons outlined in Ackerman's initial brief and expanded upon herein, this Court should reverse Ackerman's convictions and remand for a new trial.

Respectfully submitted,

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