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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT MURPHY CIMBOLLEK,

APPELLANT

APPELLATE CASE NO. 2025-000516

INITIAL BRIEF OF APPELLANT

MOLLY M. KEEGAN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by charging the jury on the lesser included offense of voluntary manslaughter when there was no evidence appellant shot the decedent, his wife, in the sudden heat of passion upon sufficient legal provocation, rather the evidence showed appellant either acted with malice or in self-defense, and where appellant was prejudiced because the jury compromised and found him guilty of voluntary manslaughter?

II.

Whether the trial court erred by admitting evidence that appellant had previously threatened the deceased, where evidence of prior bad acts is limited pursuant to Rule 404(b), SCRE, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice?

III.

Whether the trial court erred by refusing to declare a mistrial after the state made an improper closing argument that asked the jury to send a message with its verdict and where the prejudicial effect could be removed no other way?

STATEMENT OF THE CASE

On December 8, 2022, the Union County grand jury indicted appellant for murder and possession of a firearm or knife during the commission of a violent crime. R *(Indictments). On February 24, 2025, appellant's case was called to trial before the Honorable R. Keith Kelly and a jury. Tr. I, p. 1.¹ John Anthony and Jennifer Williams represented the state. Tr. I, p. 2. Steven Hisker represented appellant. Tr. I, p. 2. The jury found appellant not guilty of murder. Tr. II, p. 223, ll. 15-19. The jury ultimately found appellant guilty of the lesser-included offense of voluntary manslaughter and the weapons offense. Tr. II, p. 223, l. 20 – 224, l. 8. Judge Kelly sentenced appellant to a total sentence of 35-years imprisonment, comprised of 30 years as to the voluntary manslaughter charge and a 5-year consecutive sentence as to the weapons charge. Tr. II, p. 232, ll. 11-20. Appellant filed a timely notice of appeal. R *(Notice of appeal).

This brief follows.

¹ For ease of reference, "Transcript I" refers to the transcript of the proceedings on February 24-27, 2025, while "Transcript II" refers to the transcript of the proceedings on February 28, 2025.

ARGUMENTS

I.

The trial court erred by charging the jury on the lesser included offense of voluntary manslaughter when there was no evidence appellant shot the decedent, his wife, in the sudden heat of passion upon sufficient legal provocation, rather the evidence showed appellant either acted with malice or in self-defense, and where appellant was prejudiced because the jury compromised and found him guilty of voluntary manslaughter.

Standard of review

“In criminal cases, appellate courts sit to review errors of law only.” *State v. English*, 443 S.C. 49, 55, 902 S.E.2d 385, 388 (2024); *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “Thus, this Court is bound by the trial court’s factual findings unless the appellant can demonstrate that the trial court’s conclusions either lack evidentiary support or are controlled by an error of law.” *State v. Niles*, 412 S.C. 515, 521, 772 S.E.2d 877, 880 (2015) (citing *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006)).

“The trial court must determine the law to be charged based on the evidence at trial.” *State v. Smith*, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005) (citing *State v. Crosby*, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003)). “When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given.” *Id.* (citing *State v. Cooley*, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000)).

Relevant facts

State’s case-in-chief

On February 3, 2021, officers responded to a 911 call for a shooting at Old Buncombe Road. Tr. I, p. 163, ll. 17-23. A dispatcher advised that someone called 911 who stated they

shot their wife. Tr. I, p. 164, ll. 1-3. The 911 call was played for the jury. On the call, appellant asked for an ambulance to his residence and stated that his wife attacked him and he shot her. Tr. I, p. 159, ll. 17-24. When Investigator Brad Woods arrived at the residence, he testified that appellant approached him, told him that he had shot his wife, and advised him where the dogs were located in crates in the house. Tr. I, p. 164, ll. 10-20. Woods testified that when he entered the bedroom he observed the deceased in bed, “half sitting up in bed covered up with blankets, with a remote control next to her hand.” Tr. I, p. 167, ll. 1-8. There were two handguns, as appellant had described them, on top of each nightstand. Tr. I, p. 167, ll. 18-25.

Captain Scott Coffey, the lead investigator, testified that he located six shell casings in the bedroom of the residence. Tr. I, p. 195, ll. 13-24; p. 231, ll. 18-19. Captain Coffey also took photographs of appellant’s injuries, which showed marks on the right side of his face. Tr. I, p. 225, ll. 8-23. Captain Coffey testified that he took a statement from Billie Hollifield² on February 3, 2021, he took a statement from the Goleco’s³ on February 11, 2021, and he took a statement from R.J., appellant’s son. Tr. I, p. 226, l. 10 – 227, l. 5. On cross-examination, Captain Coffey testified that no analysis was done on the deceased’s firearm or the book the firearm was found on. Tr. I, p. 235, ll. 5-22. He agreed that there were rings on the deceased’s fingers that were never examined or tested. Tr. I, p. 241, ll. 11-18. He agreed that no tests were done on the firearm found on the deceased’s nightstand and that the firearm was loaded. Tr. I, p. 244, ll. 15-24. Captain Coffey agreed that what appeared to be State’s Exhibit 36, which was a stun gun or cattle prod device, was on the headboard. Tr. I, p. 221, ll. 19-25; p. 245, ll. 17-21.

² Hollifield was a friend of the deceased. Tr. I, p. 322, ll. 4-14.

³ The Goleco’s were friends of appellant whom appellant called on the night of the incident to come to his residence to pick up his son, R.J. Further, on the night of the incident Department of Social Services (DSS) was called to determine placement of R.J., and DSS agreed for R.J. to go with the Goleco’s that night. See Tr. I, p. 268, l. 24 – 269, l. 25; p. 271, ll. 3-11.

He also agreed that State's 36 could be classified as a weapon. Tr. I, p. 242, ll. 22-24. On redirect examination, Captain Coffey testified that he did not have any information at the time that would suggest he should look for a stun gun. Tr. I, p. 261, ll. 14-23.

Investigator Scott Ruby testified that he responded to shooting call at 4:30 a.m. on February 3, 2021. Tr. I, p. 273, ll. 14-25. He obtained a statement from R.J. because he was in the house during the incident. Tr. I, p. 274, ll. 1-14. He spoke with Scott Goleco, who showed him his phone which provided that appellant called him at 1:43 a.m. Tr. I, p. 276, ll. 4-7. He obtained a gunshot residue (GSR) kit from appellant. Tr. I, p. 279, ll. 4-7. He also testified that a 9mm casing was discovered on the outside of the deceased's right arm, which was recovered. Tr. I, p. 279, ll. 10-22. He next testified that Captain Coffey requested a search warrant to go back to the house to obtain additional evidence, which he secured. Tr. I, p. 280, ll. 12-16. He observed a damp towel in the bathroom with what appeared to be blood stains, and he collected a laptop, the deceased's pocketbook, and her cellphone. Tr. I, p. 280, ll. 20-23; p. 282, ll. 17-25. He obtained a written statement from Mr. Geleco. Tr. I, p. 283, ll. 17-24. Investigator Ruby also testified that he obtained appellant's phone that he arrived at the jail with. Tr. I, p. 284, ll. 3-13. He conducted another interview with R.J. approximately a week later. Tr. I, p. 284, ll. 14-19.

On cross-examination, Investigator Ruby agreed that no GSR kit was taken from R.J. or Mr. Geleco. Tr. I, p. 289, ll. 17-21. He agreed that in his report he wrote that appellant said his wife was beating on him. Tr. I, p. 290, ll. 18-21. He also agreed that his report said that appellant shot his wife. Tr. I, p. 290, ll. 22-23. He agreed that he did not collect any type of stun pole or taser from the bedroom. Tr. I, p. 292, ll. 6-9. He agreed that in R.J.'s February 11, 2021, statement he said several other things that were not in his original statement like, "Mom

would get in daddy's face," "she would get violent," "she would scream at him and say, 'I hope you die,'" and "Mom was mentally unstable." Tr. I, p. 312, ll. 7-21.

An expert in latent print process, analysis, and comparison testified that a print was found on the 9mm Taurus that was not the deceased's print but could have been appellants. Tr. I, p. 376, l. 3 – 377, l. 13; p. 383, ll. 4-22. An expert in GSR analysis testified that she received two kits: one from appellant and one from the deceased. Tr. I, p. 397, ll. 1-5; p. 400, ll. 6-13. She found particles characteristic of primer GSR on appellant's samples but did not perform a test on the deceased's samples per a January 1, 2022, updated policy. Tr. I, p. 403, l. 2 – 404, l. 1.

An expert in digital forensics testified that he analyzed two phones: a Samsung cellphone and a Motorola cellphone. Tr. I, p. 408, l. 15 – 409 l. 4. A full Cellebrite extraction was completed for the Samsung phone. Tr. I, p. 411, ll. 6-8. The Cellebrite extraction provided the call log for the Samsung phone from February 2, 2021, at 8:04:38 p.m. until February 3, 2021, at 2:58:31 a.m. Tr. I, p. 417, ll. 3-12. The first call was at 8:04 p.m. and was rejected. Tr. I, p. 418, ll. 8-17. The second call on the log was on February 3, 2021, at 1:28:21 a.m., which was answered, and the duration was 11 minutes and 28 seconds. Tr. I, p. 418, l. 18 – 419, l. 1. The third call was at 1:40:53 a.m. and was not answered. Tr. I, p. 419, ll. 2-6. The fourth call was at 1:43:04 a.m. and was unanswered. Tr. I, p. 419, ll. 7-10. The fifth call was at 1:44:41 a.m. and was answered lasting approximately 50 seconds. Tr. I, p. 419, ll. 11-17. The sixth call was at 2:01:09 a.m., was answered, and lasted 29 seconds. Tr. I, p. 419, ll. 18-24. The seventh call was placed at 2:33:47 a.m. and lasted 31 seconds. Tr. I, p. 419, l. 25 – 420, l. 4. Finally, the eighth call was at 2:58:31 a.m., which was placed to 911 and lasted 1 minute and 20 seconds. Tr. I, p. 420, ll. 5-12. There was no name associated with the first call, the second call was placed to Bill

Elson, the third through seventh call was to Scott Noble, and the eighth call was to 911. Tr. I, p. 420, l. 21 – 421, l. 18.

An expert in DNA analysis testified that a DNA profile was developed from a swab of the area surrounding the trigger and edges of a 9mm handgun from appellant and the comparison was that the deceased contributed to the DNA profile. Tr. I, p. 463, ll. 8-25. He tested a tissue-like material and hair fragment from the swab of the area surrounding the trigger and edges of the 9mm handgun from appellant and the result was that it was 15 quintillion times more likely that the deceased contributed to the profile than if an unidentified unrelated individual contributed. Tr. I, p. 465, ll. 1-18. He testified that the deceased contributed to the DNA profile for a swab from the bottom of the gun, near the serial number and trigger area of the 9mm handgun for appellant. Tr. I, p. 467, ll. 2-11. He testified that swabs from the barrel of the 9mm handgun from appellant produced a partial DNA profile where it was 16 quintillion times more likely the deceased contributed than if an unidentified unrelated individual contributed to the profile. Tr. I, p. 467, ll. 13-22. He agreed that the deceased's DNA was found on various spots of the gun around the trigger, at the bottom, and on the barrel, which was consistent with her DNA being on the gun. Tr. I, p. 467, l. 23 – 468, l. 7.

An expert in firearms analysis testified that the fired projectiles and cartridges were consistent with the firearm. Tr. I, p. 480, l. 3 – 482, l. 7. After a question from a juror, defense counsel stipulated that the firearm was the weapon identified as appellant's weapon, bullets were in the gun, and appellant fired them. Tr. I, p. 482, ll. 9-19.

An expert in forensic pathology testified that she performed the deceased's autopsy on February 4, 2021, and the deceased was 5'10 and roughly 280 pounds. Tr. I, p. 488, ll. 1-24. She explained that five gunshot wounds were very close together in a tight grouping on the head.

Tr. I, p. 492, ll. 3-11. She testified that all the gunshot wounds had stippling and soot was around others. Tr. II, p. 493, ll. 1-2. She explained that soot is typically deposited within 12 inches and stippling does not occur beyond 24 inches. Tr. I, p. 493, l. 2 – 494, l. 24. She testified that the five tightly grouped wounds were likely within 6 inches but no further than 24 inches from the barrel. Tr. I, p. 496, ll. 7-11. She testified that the wounds were, in her opinion, consistent with someone who turned their head to the left. Tr. I, p. 498, ll. 1-10. She explained that the sixth gunshot wound was high on the neck to the right and had stippling. Tr. I, p. 498, ll. 16-22. She further testified that the deceased did not have any defensive wounds and that it was her opinion that the deceased was not aware the attack was taking place. Tr. I, p. 501, ll. 8-18. On cross-examination, the pathologist testified that she believed it was most probable that the deceased was asleep. Tr. I, p. 510, ll. 1-10. She explained that because of the grouping of the wounds it was more probable the deceased was stationary. Tr. I, p. 511, ll. 1-11.

Agent Todd Crosby testified concerning the blood spatter analysis he conducted in appellant's case. Tr. I, p. 526, l. 24 – 527, l. 2. Looking at crime scene photos, Crosby testified that it was his opinion based on the position of the blood stains that the deceased did not move to reach for the firearm. Tr. I, p. 535, ll. 1-13. He testified that based on the directionality of the blood stains, there was no indication that the left or right hand was reaching for the firearm. Tr. I, p. 537, ll. 7-24. He concluded that the blood flow was not consistent with the deceased reaching in the direction to reach for a firearm. Tr. I, p. 539, ll. 3-9. On cross-examination, Agent Crosby testified that he listened to the 911 call. Tr. 540, l. 19 – 541, l. 5. He testified that based on his training and experience he would have been looking for other weapons in the immediate vicinity. Tr. I, p. 541, ll. 6-19. He explained that he knew where the hands were located and where the head was turned but prior to that he did not know what the deceased's

body was doing. Tr. I, p. 541, l. 24 – 542, l. 6. He agreed that on a secondary check of the crime scene he would have been interested in State's 36, the stun gun, because it could have been used as a weapon. Tr. I, p. 542, l. 14 – 543, l. 12. He would have inspected the stun gun for blood. Tr. I, p. 544, ll. 3-4. He also testified that the deceased's firearm "definitely would've left the crime scene," with him. Tr. 544, l. 13 – 545, l. 10. He agreed that a ring was present on the deceased's hands and it could have caused the injuries to appellant's face as could the RIP ammo that was used. Tr. I, p. 549, ll. 2-15. He would have been interested in collecting the rings. Tr. I, p. 549, ll. 16-19. He agreed that injuries may have been caused from the stun gun. Tr. I, p. 550, ll. 1-5. He agreed he would have had the stun gun tested. Tr. I, p. 552, ll. 17-18. He also agreed he would have tested the pistol from the deceased's nightstand. Tr. I, p. 553, ll. 17-23.

The state rested its case. Tr. II, p. 12, l. 13. Defense counsel moved for a directed verdict, which the trial court denied. Tr. II, p. 7, l. 13 – 9, l. 4.

Defense's case-in-chief

Dr. James Jewell testified that he treated appellant while he was in York County jail. Tr. II, p. 13, ll. 18-24. Appellant's complaints were blurred vision, an area of his right arm that was burned, and that his back was hurting. Tr. II, p. 14, ll. 7-11. Dr. Jewell testified that appellant had a vitreous detachment in his right eye which could have been from blunt force trauma or aging. Tr. II, p. 14, ll. 12-22; p. 17, ll. 15-25. He testified that the burn to appellant's arm took several months to heal and was consistent with being tased. Tr. II, p. 14, l. 23 – 15, l. 4.

Appellant's son, R.J., testified that he was home the night his mom was killed. Tr. II, p. 28, ll. 10-12. He was woken up by appellant. Tr. II, p. 29, ll. 16-20. R.J. reviewed his statement, which refreshed his memory. Tr. II, p. 49, ll. 14-16. He went to bed around 10:00 p.m. and he did not hear any arguments before he went to bed. Tr. II, p. 49, ll. 17-21.

Appellant told him to stay in his room that night. Tr. II, p. 51, ll. 3-7. He agreed that in his prior statement he said that his mom made him and his dad “feel like crap.” Tr. II, p. 56, ll. 1-5. He agreed that he said he heard his mom accuse appellant of cheating. Tr. II, p. 58, ll. 23-25. On cross-examination, he testified that he was 16 when he gave his statement to law enforcement. Tr. II, p. 74, ll. 16-23. He testified that before he went to bed on the night of the incident he heard arguing in the distance. Tr. II, p. 77, ll. 18-22. He would have gone to bed around 10:00 p.m. Tr. II, p. 78, ll. 4-12. He noticed scratches and blood on appellant’s face when appellant woke him up. Tr. II, p. 78, ll. 13-18. He testified that his mom had a stun stick she would use on the dogs and he had seen her use it on the dogs. Tr. II, p. 79, l. 19 – 80, l. 1. He testified that his mom had a pistol she kept on the nightstand. Tr. II, p. 80, ll. 12-18.

Appellant testified in his own defense. He testified that the last thing he heard his wife say to him was, “I’m going to kill you and the little fucker down the hall.” Tr. II, p. 90, ll. 2-5. He testified that he grabbed the gun on the spot and fired. Tr. II, p. 90, ll. 10-11. He did not know how many times he fired. Tr. II, p. 90, ll. 14-15. He testified that he was afraid for his safety and for his son’s safety. Tr. II, p. 90, ll. 16-18. He described an incident in 2015 where his wife shot him. Tr. II, p. 91, ll. 12-18. He testified that on the night of the incident, related to his back, the deceased put her knee in his back while he was rolling away from her. Tr. II, p. 100, ll. 7-11. He did not hit her back and did not leave because she pulled a gun off the nightstand and told him he was not going anywhere. Tr. II, p. 100, ll. 12-20. He described injuries he suffered to his eye because the deceased hit him on the right side of his face. Tr. II, p. 100, l. 21 – 101, l. 4. He described that the deceased struck him with a taser during the argument. Tr. II, p. 101, ll. 13-23. He testified that the deceased was going through his phone. Tr. II, p. 102, ll. 18-25. He did not feel like he could have gotten out of the room. Tr. II, p. 103,

ll. 1-6. He testified that he sent his wife a “sexy” text on the night of the incident. Tr. II, p. 108, ll. 3-5. Shortly after they were together, “she got on that thing about what I was doing while we were separated.” Tr. II, p. 108, ll. 6-10. He testified that he was sure he did not do anything to provoke his wife. Tr. II, p. 111, ll. 4-6. He explained that he heard a clank over his head, but he did not know what it was, which was immediately after she made threats to his life and their sons. Tr. II, p. 111, ll. 7-13. He explained that he was facing the wall, with his back to her, lying on his side. Tr. II, p. 111, ll. 22-24. He explained that, “She threatened my son, I acted. I couldn’t take a chance.” Tr. II, p. 112, ll. 3-4.

On cross-examination, appellant testified that the shooting incident happened after the deceased made a threat and he was laying right beside her when she threatened him. Tr. II, p. 112, l. 18 – 113, l. 9. He reached down and got his gun. Tr. II, p. 114, ll. 1-20. He explained that at the time he shot the deceased she was not beating him with a stun stick and she was not assaulting him. Tr. II, p. 115, l. 21 – 116, l. 1. He agreed that when he shot the deceased, the stun stick was on the headboard of the bed, and her gun was on the nightstand. Tr. II, p. 116, ll. 13-18. He agreed that he testified the deceased hurt his back with her knee, but she was not doing that when he shot her. Tr. II, p. 116, ll. 19-24. The state inquired, “I’m just wanting to establish at the time that you shot her, there’s nothing going on, and you – you [weren’t] being assaulted at all, and you just grabbed the gun and shoot her in the head?” Tr. II, p. 118, ll. 12-16. Appellant agreed that he was not being assaulted. Tr. II, p. 118, ll. 21-23. He agreed that the TV was on. Tr. II, p. 119, l. 2. He approximated that he shot her around 1:15 or 1:20 a.m. Tr. II, p. 119, l. 7. He clarified that they were both in bed, and had been for three hours, when the incident occurred. Tr. II, p. 123, l. 24 – 124, l. 3. They had a sexual encounter around 8:00 p.m. Tr. II, p. 124, ll. 5-15. He testified that his wife had tased him earlier in the night when they were

“discussing stuff and she got agitated.” Tr. 125, ll. 11-23. He agreed that he stayed in bed with her after she tased him. Tr. II, p. 125, l. 24 – 126, l. 1. He testified that prior to her tasing him, she made threats with the firearm for him not to leave the room. Tr. II, p. 126, ll. 10-22.

Thereafter, the defense rested and renewed his motion for a directed verdict. Tr. II, p. 166, l. 20; p. 168, ll. 3-25. The trial court denied defense counsel’s renewed motion for directed verdict. Tr. II, p. 169, ll. 1-5.

Objection to voluntary manslaughter charge

Defense counsel objected to the verdict form and the charges on voluntary manslaughter. Tr. II, p. 169, ll. 6-7. He cited *State v. Sims*, 426 S.C. 115, 825 S.E.2d 731 (Ct. App. 2019), and argued that no testimony was in the record that appellant “got mad,” or “saw red,” instead, he testified that he shot his wife because he feared for his sons life. Tr. II, p. 169, ll. 7-16. He asserted that the state had not shown sufficient legal provocation or any evidence of heat of passion. Tr. II, p. 170, ll. 1-3.

The state responded that based on appellant’s testimony that he was assaulted and some forensic corroboration of that “a jury could think in spite of his testimony that he had been assaulted by his wife that put him – that would be provocation, that could trigger heat of passion, and a killing in that context would be voluntary manslaughter and not murder.” Tr. II, p. 170, ll. 10-20. The trial court stated that appellant’s case differed from *Sims* because there was an intent to cause harm by his own testimony. Tr. II, p. 172, ll. 1-4. The trial court stated appellant was protected on the record. Tr. II, p. 172, ll. 13-14.

Closing arguments

During its closing argument, while addressing self-defense, the state argued that the deceased’s position in bed, where the shots were on her head, and the blood spatter patterns,

showed that she was just lying in bed, “probably asleep when she was shot six times in the head.” Tr. II, p. 177, ll. 2-6. The state argued that “the storm had passed,” and the deceased “wasn’t doing anything to make him do anything when he shot her, and there was no reason for him to be in any kind of fear.” Tr. II, p. 177, ll. 9-11. The state argued the deceased was tucked in, she was not reaching for the gun, and she was not reaching for the headboard. Tr. II, p. 178, ll. 5-12. The state asserted that there were no defensive wounds and “she never threw her arms up, which indicates that she never knew it was coming.” Tr. II, p. 179, ll. 5-6.

The state argued that the evidence was “inconsistent with her posing any kind of threat to him. She’s all tucked into bed.” Tr. II, p. 180, ll. 16-20. The state continued that, “if it is okay to shoot somebody who’s just lying in bed based on nothing more than what they say they’re going to do, which is all essentially said . . . a person in this position said something to threaten, that’s in essence of his testimony.” Tr. II, p. 180, l. 24 – 181, l. 4. The state argued that R.J. testified that he had heard an argument but “this crime scene clearly shows [] that [the deceased] had gotten over it,” and she “was turning in for the night, but [appellant] had – got – and he decided for – that he was going to kill.” Tr. II, p. 181, ll. 5-12. The state asserted that “if you can kill somebody who is just lying in bed, solely based on nothing more than something you say they said, well, life has got to be pretty cheap.” Tr. 181, ll. 13-15.

Voluntary manslaughter instruction

During its charge on the law, the trial court gave the following instruction as to the lesser-included offense of voluntary manslaughter:

If you find the State has failed to prove that the Defendant is guilty of murder of . . . the decedent, you must consider whether the State has proven that the Defendant is guilty of voluntary manslaughter.

To convict a defendant of voluntary manslaughter, [] the State must prove beyond a reasonable doubt that he unlawfully killed

another person without malice, while the Defendant was in a state of sudden heat of passion, and it was caused by a sufficient legal provocation. Both a state of heat of -- of passion and sufficient legal provocation must be present to constitute voluntary manslaughter. Heat of passion is the same as an uncontrollable impulse to do violence. The provocation to trigger heat of passion must have come from some act by the -- by the decedent.

The provocation must be enough to deprive one of self-control. It must be severe to instantly produce such an extreme degree of rage, sudden resentment or terror that a reasonable person would be incapable of cool reflection. Words alone, no matter how offensive, are not enough to qualify as sufficient provocation. But words accompanied by the assault or appearance of the assault by the decedent, may be sufficient to constitute provocation if you believe so. In determining whether a heat of passion which was caused by sufficient [] legal provocation existed, the surrounding circumstances of the Defendant and the decedent at the time of the killing must be taken into account.

Tr. II, p. 214, l. 8 – 215, l. 9.

Verdict and sentencing

The jury acquitted appellant of murder. Tr. II, p. 223, ll. 15-20. The jury found appellant guilty of the lesser-included offense of voluntary manslaughter and the weapons charge. Tr. II, p. 223, l. 19 – 224, l. 11. Judge Kelly sentenced appellant to a total sentence of 35-years imprisonment, comprised of 30 years as to the voluntary manslaughter charge and a 5-year consecutive sentence as to the weapons charge. Tr. II, p. 232, ll. 11-20.

Discussion

The trial court erred by charging the jury on the lesser-included offense of voluntary manslaughter because there was no evidence that appellant shot his wife in the sudden heat of passion upon sufficient legal provocation. Instead, the evidence showed that appellant either acted with malice or in self-defense. The result is that appellant was prejudiced because the jury ultimately compromised and found him guilty of the lesser-included offense of voluntary manslaughter.

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as “the unlawful killing of another *without malice*, express or implied.” See S.C. Code Ann § 16-3-50 (emphasis added). “Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) (citing *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009)). “Both heat of passion and sufficient legal provocation must be present at the time of the killing.” *Sims*, 426 S.C. at 131, 825 S.E.2d at 739 (quoting *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014)). “A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion.” *Starnes*, 388 S.C. at 596-597, 698 S.E.2d at 608. “Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked.” *Id.* “Rather, there must be evidence that the heat of passion was caused by sufficient legal provocation.” *State v. Clark*, 446 S.C. 640, 650, 922 S.E.2d 239, 244 (Ct. App. 2025) (internal quotation marks omitted).

“The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render

the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” *State v. Holland*, 385 S.C. 159, 166, 682 S.E.2d 898, 901 (Ct. App. 2009) (citing *State v. Cole*, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000)). “Mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon.” *Id.* at 166, 682 S.E.2d at 902 (citing *State v. Rogers*, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996)). “Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation.” *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

“[A] person’s fear *immediately* following an attack or threatening act may cause the person to act in the sudden heat of passion.” *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (emphasis added). “However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge.” *Id.* “[I]n order to constitute sudden heat of passion upon sufficient legal provocation, the fear must be the result of sufficient legal provocation *and* cause the defendant to lose control and create an uncontrollable impulse to do violence.” *Id.* (internal quotations and alterations omitted, emphasis in original).

In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing.” *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011) (citing *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969)).

In *Cook v. State*, 415 S.C. 551, 555, 784 S.E.2d 665, 667 (2015), Cook objected to the state’s request for a voluntary manslaughter instruction. The trial judge relied on the following

facts in determining that a charge on voluntary manslaughter was supported by the evidence: (1) the defendant was in fear, (2) he shot the decedent twice, and (3) he stated, “before I knew it, I fired a shot.” *Id.* at 557, 784 S.E.2d at 668. However, our Supreme Court held Cook’s actions did not suggest he was acting in the sudden heat of passion. *Id.* at 559, 784 S.E.2d at 669. The Court explained, “We do not believe the fact that Cook shot Victim twice or his statement ‘before I knew it, I fired a shot’ is evidence that Cook’s fear manifested in an uncontrollable impulse to do violence.” *Id.* at 558, 784 S.E.2d at 668. The Court further stated:

Here, Cook stated he tried to walk away from Victim, but Victim kept cutting him off. The fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off. In addition, Bridges testified that Cook and Victim were talking softly and that he could hardly tell they were arguing. This too does not suggest that Cook was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during Cook’s statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest Cook shot Victim either with malice or in self-defense.

Id. at 557, 784 S.E.2d at 668.

Similarly, in *Starnes*, our Supreme Court concluded there was no evidence of sudden heat of passion and thus upheld the trial court’s refusal to charge the jury on voluntary manslaughter. *Starnes*, 388 S.C. at 599-600, 698 S.E.2d at 609. Starnes and the two decedents, Bill and Jared, were engaged in a drug purchase with a fourth individual, Jody, at Starnes’ home when Jared “pulled a gun on” Jody. *Id.* at 595, 698 S.E.2d at 607. Starnes testified Jared’s action “scared” him, and he went into his bedroom to retrieve his gun. *Id.* at 595, 698 S.E.2d at 607. As Starnes exited his bedroom, “Bill said ‘whoa’ and was pointing a gun at him.” *Id.* at 595, 698 S.E.2d at 607. Starnes then shot Bill and Jared. *Id.* On appeal, our Supreme Court acknowledged the evidence of Starnes’ fear but concluded there was no evidence Starnes was “out of control as a

result of his fear or was acting under an uncontrollable impulse to do violence.” Id. at 599, 698 S.E.2d at 609 (emphasis added). Our Supreme Court also held the evidence showed Starnes “deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense.” *Id.*

Moreover, in *Sims*, cited by defense counsel to the trial court, this Court held there was no evidence Sims shot her husband, David, in the sudden heat of passion, and, therefore, agreed with Sims that the trial court erred by charging the jury on voluntary manslaughter. 426 S.C. at 137, 825 S.E.2d at 742. Sims testified that “she was in the bathroom alone when David entered with pliers and a knife and began calling her a liar.” *Id.* Sims said David then “got physical with her over control of her phone.” *Id.* David then began threatening her and taunting her with the knife, and, out of fear, Sims grabbed a gun she had placed in the bathroom vanity. *Id.* “Even though she was afraid, Sims said she held the gun by her side and asked David to stop what he was doing, indicating she did not want to use the gun.” *Id.* “Sims also told police she grabbed the gun hoping to ‘scare’ David so he would stop his threatening behavior, adding that she had never meant to shoot him.” *Id.* at 138, 825 S.E.2d at 743. “According to Sims, David became even angrier, continuing to threaten her as she tried to back out of the bathroom.” *Id.* “As she tried to back out, Sims testified that David lunged at her and ‘my hand went up and I shot, and I shot out of reaction. I didn’t think, nor did I ever want to do that, but it was a reaction because I was scared.’” *Id.* Like the defendants in *Starnes* and *Cook*, this Court held “the only evidence in the record [was] that Sims deliberately and intentionally shot David and that she either shot him with malice aforethought or in self-defense.” *Id.* Accordingly, our Supreme Court held the trial court erred by charging the jury on the lesser included offense of voluntary manslaughter because there was no evidence to support the charge.

In appellant's case, the trial court erred by overruling appellant's objection to a voluntary manslaughter charge thereby charging the jury on the lesser-included offense of voluntary manslaughter where the record did not contain evidence to support giving the charge. Tr. II, p. 169, ll. 6-7; p. 172, ll. 1-4, 13-14; p. 214, l. 8 – 215, l. 9; *Smith*, 363 S.C. at 115, 609 S.E.2d at 530. Specifically, there was no evidence that appellant shot his wife in the sudden heat of passion upon sufficient legal provocation. First, the record did not contain evidence of sufficient legal provocation to warrant a voluntary manslaughter charge. Appellant testified that his wife threatened to kill him and their son and he grabbed the gun and fired. Tr. II, p. 90, ll. 2-5, 10-11. However, "[w]here death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (citing *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951)).

The state presented evidence throughout trial to suggest that the deceased was stationary during the shooting. For example, the state's forensic pathologist testified that the deceased did not have any defensive wounds, that it was her opinion that the deceased did not know the attack was taking place, and that it was her opinion that the deceased was asleep. Tr. I, p. 501, ll. 8-18; p. 510, ll. 1-10; p. 511, ll. 1-11. Likewise, another state's expert, Agent Crosby, testified that it was his opinion based on the position of the blood stains that the deceased did not move to reach for the firearm. Tr. I, p. 535, ll. 1-13. He also testified that based on the directionality of the blood stains there was no indication that the left or right hand was reaching for the firearm. Tr. I, p. 537, ll. 7-24; p. 539, ll. 3-9. Investigator Brad Woods also testified that he found the deceased "half sitting up in bed covered up with blankets, with a remote control next to her hand." Tr. I, p. 167, ll. 1-8. The state emphasized this point by showing State's Exhibit 15A, a crime scene

photo of the deceased, numerous times during its case-in-chief. *See generally* Tr. I, p. 172-184, 196-212; R *(State's Exhibit 15A).

In addition, the state pressed appellant on the timeline surrounding the night of the incident on cross-examination. Appellant testified that at the time he shot the deceased she was not beating him with a stun stick, she was not assaulting him, and she was not hurting his back with her knee during the shooting incident. Tr. II, p. 115, l. 21 – 116, l. 1; p. 116, ll. 13-24. Particularly, the state inquired, “I’m just wanting to establish at the time that you shot her, there’s nothing going on, and you – you [weren’t] being assaulted at all, and you just grabbed the gun and shoot her in the head,” *see* Tr. II, p. 118, ll. 12-16, to which appellant agreed that he was not being assaulted, *see* Tr. II, p. 118, ll. 21-23. Although “[w]ords accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter,” *see Byrd*, 323 S.C. at 322, 474 S.E.2d at 432 (citing *State v. Mason*, 115 S.C. 214, 105 S.E. 286 (1920)), “opprobrious words must be accompanied by the appearance of an assault,” *Sims*, 426 S.C. at 132, 825 S.E.2d at 739-740 (citing *State v. Locklair*, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000)). The deceased’s words, therefore, did not constitute sufficient legal provocation. *See e.g.*, *State v. Pittman*, 373 S.C. 527, 573-574, 647 S.E.2d 144, 168 (2007) (determining that the trial court did not err by charging voluntary manslaughter and explaining that although Pittman claimed his grandmother beat him, there was no evidence to show that his grandmother used the paddle on him); *Wharton*, 381 S.C. at 214, 672 S.E.2d at 788 (holding that the trial court erred by charging voluntary manslaughter where there was no evidence the victim provoked Wharton, and although there was evidence that Wharton and Shaw argued and exchanged words, there was no evidence Shaw posed a threat to Wharton either by possessing a weapon or through hostile acts). Nor did the deceased’s actions, or, based on the state’s

evidence, inaction. *See State v. Wood*, 362 S.C. 135, 142, 607 S.E.2d 57, 60 (2004) (“Where there are no actions by the deceased to constitute legal provocation, a charge on voluntary manslaughter is not required.”). Therefore, the record did not contain evidence of adequate legal provocation to support that a voluntary manslaughter charge should be given. *Clark*, 446 S.C. at 650, 922 S.E.2d at 244; *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608.

Because both “heat of passion and sufficient legal provocation must be present at the time of the killing,” *Sims*, 426 S.C. at 131, 825 S.E.2d at 739, the trial court erred by charging voluntary manslaughter because no evidence of sufficient legal provocation existed. Nonetheless, the record also failed to contain evidence that appellant was in a sudden heat of passion to support charging the jury on the lesser-included offense.

Thus, as to sudden heat of passion, while appellant acknowledged that he shot his wife out of fear she would harm their son based on her statement, appellant never indicated that he lost control or was overcome with an uncontrollable impulse to do violence. Tr. II, p. 90, ll. 2-5, 10-11, 16-18; *see Starnes*, 388 S.C. at 599, 698 S.E.2d at 609 (“A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear.”); *Id.* at 598, 698 S.E.2d at 609 (“[T]he fear must . . . cause the defendant to lose control and create an uncontrollable impulse to do violence.”); *Cook*, 415 S.C. at 557, 784 S.E.2d at 668 (“[A]t no point during Cook’s statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest Cook shot Victim either with malice or in self-defense.”); *Sims*, 426 S.C. at 138, 825 S.E.2d at 743. Moreover, as discussed, appellant testified that the physical altercation he had with his wife occurred before the shooting incident, and agreed with the state’s questioning on cross-examination that he was not being assaulted at the time of the shooting. Tr. II, p. 115, l. 21 – 116, l. 24; p. 118, ll. 12-16, 21-23.

The state's argument in support of a voluntary manslaughter charge that appellant's testimony he was assaulted along with "some" forensic corroboration "would be provocation, and "could trigger heat of passion," therefore falls flat. Tr. II, p. 170, ll. 10-20. Particularly, "even when a person's passion is sufficiently aroused by legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." *State v. Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010) (citing *State v. Knoten*, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001)). Although appellant testified that his wife had tased him, put her knee in his back, and threatened him with her gun, he also testified that they had been in bed together for three hours when the incident occurred. Tr. II, p. 123, l. 24 – 124, l. 3; p. 125, ll. 11-23; 126, ll. 10-22. Moreover, testimony in the record supports the fact that any altercation between appellant and his wife happened earlier in the night as R.J. testified that he heard arguing around 10:00 p.m. when we went to bed. Tr. II, p. 77, l. 18 – 78, l. 12. Thus, any passion that may have existed had cooled given the time that elapsed between the earlier altercation and the shooting incident. *See e.g., Hernandez*, 386 S.C. at 661-662, 690 S.E.2d at 585-586 (explaining that evidence demonstrated that Hernandez had cooled off between his ejection from the party and the shooting); *Cole*, 338 S.C. at 102, 525 S.E.2d at 513 (explaining that even if Cole had been in the heat of passion during the confrontation in his apartment, three to five minutes had passed in which he had time to go to his mother's apartment and find his gun . . . "Far from passion, these actions indicate 'cool reflection.'"); *Smith*, 363 S.C. at 166, 825 S.E.2d at 530-531 (Our Supreme Court reversing a voluntary manslaughter conviction because the voluntary manslaughter charge was not supported by the evidence where there was a long enough period to render Smith capable of cool reflection

as he learned of the allegation of sexual assault earlier in the morning, went to work, and engaged in several other actions before arriving at the victim's home in the evening). The record therefore does not contain evidence that appellant was overcome by a sudden heat of passion.

Accordingly, the only evidence in the record is that appellant either shot the deceased with malice or in self-defense. Charging voluntary manslaughter was error as there was no evidence either of sufficient legal provocation by the deceased or that appellant lost control or was overcome with an uncontrollable impulse to do violence to constitute a sudden heat of passion. Therefore, because there was no evidence that appellant shot the deceased in the sudden heat of passion upon sufficient legal provocation, this Court should hold that the trial court erred by charging the jury on voluntary manslaughter and reverse appellant's conviction and sentence.

II.

The trial court erred by admitting evidence that appellant had previously threatened the deceased, where evidence of prior bad acts is limited pursuant to Rule 404(b), SCRE, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Standard of review

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *see also State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, . . . determine whether the proffered evidence is relevant." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895; *see State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia*, the existence of intent or the absence of mistake or accident. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

Relevant facts

Before the state called Billie Marie Hollifield to testify, defense counsel noted that her testimony would be subject to a Rule 404(b) objection. Tr. I, p. 319, ll. 10-13. He explained that Hollifield would testify about a prior statement she heard which included, “When I get ready to kill you, you would never even see it coming and I’ll blow your a** away.” Tr. I, p. 319, ll. 15-19. He argued it was a prior bad act and objected under Rule 404(b) and Rule 403. Tr. I, p. 320, ll. 3-8. He argued it was remote in time and “clearly prejudicial” based on appellant’s charges. Tr. I, p. 320, ll. 8-9. The state responded that the statement was a threat made by appellant in 2019 and argued it was “completely relevant.” Tr. I, p. 320, ll. 13-19. The state argued it went to their burden to prove a malicious act, and, if subject to Rule 404(b), it showed a criminal intent. Tr. I, p. 320, ll. 19-23.

Proffer of Hollifield

Hollifield testified that she knew the deceased since they were teenagers and they were best friends. Tr. I, p. 322, ll. 4-14. She heard appellant make a threat to his wife in November 2019 at their home. Tr. I, p. 322, l. 24 – 323, l. 8. She testified it was Thanksgiving, she stopped by after shopping, and appellant and his wife were arguing. Tr. I, p. 323, ll. 9-16. She heard the deceased saying that appellant had treated everyone badly. Tr. I, p. 324, ll. 13-19. She testified that appellant eventually said, “When I get ready to kill you, I will blow your a** away and you’ll never see it coming.” Tr. I, p. 325, ll. 4-5.

Rule 404(b) ruling

The trial court explained that evidence of other bad acts is generally inadmissible but may be admissible to show motive, identity, and the existence of a common plan or scheme. Tr. I, p. 336, ll. 12-15. The court stated that the bad act must logically relate to the crime charged and

must be proved by clear and convincing evidence if not convicted. Tr. I, p. 336, ll. 15-18. The trial court found that by clear and convincing evidence that testimony would be allowed because it did not violate Rule 404. Tr. I, p. 336, ll. 18-20. The court clarified that intent and absence of mistake applied. Tr. I, p. 337, ll. 3-7.

Defense counsel also requested a Rule 403 ruling because it happened two years before the shooting and the circumstances were “highly different.” Tr. I, p. 337, ll. 8-11. He argued it was unknown what was said to elicit the statement and was a conversation that occurred in an argument in front of someone else. Tr. I, p. 337, ll. 12-18. He argued that under Rule 403 the statement was not relevant and should be excluded because the probative value was substantially outweighed by the danger of unfair prejudice. Tr. I, p. 337, l. 23 – 338, l. 3. The court inquired whether the state wished to be heard, to which the state replied, “we obviously agree with the Court’s ruling.” Tr. I, p. 338, ll. 4-6. The trial court thus ruled that the statement did not violate Rule 403. Tr. I, p. 338, l. 9.

Hollifield trial testimony

Hollifield testified that she knew the deceased during the course of her marriage with appellant. Tr. I, p. 340, ll. 5-7. The deceased had one son with appellant named R.J. and she met appellant around 2003. Tr. I, p. 340, ll. 18-23. She testified that appellant and the deceased had separated in July of 2020. Tr. I, p. 342, ll. 14-21. R.J. moved back into the marital house in October or November 2020, and appellant came back approximately a week later. Tr. I, p. 344, ll. 9-14. At the time of the shooting, appellant, R.J. and the deceased lived in the house. Tr. I, p. 346, ll. 23-25. Hollifield testified that the deceased had four dogs and that she used a long black stun gun to keep her animals under control. Tr. I, p. 347, l. 1 – 348, l. 3.

She then testified that in November of 2019, on Thanksgiving, she was at the residence on Old Buncombe Road when she observed a verbal argument between appellant and the deceased. Tr. I, p. 350, ll. 14-21. She stopped at their home after shopping. Tr. I, p. 350, l. 23 – 351, l. 2. When she arrived, they were arguing about how the day had gone. Tr. I, p. 351, ll. 3-10. She testified that appellant said, “When I get ready to kill you, I will shoot . . . I will . . . I will blow your a** away and you’ll never see it coming.” Tr. I, p. 352, ll. 3-6. On cross-examination, Hollifield testified that it was a verbal argument being pursued by the deceased. Tr. I, p. 355, ll. 5-9. She agreed that she gave a statement to law enforcement in 2021 after the shooting. Tr. I, p. 359, ll. 7-15. She agreed her statement was the first time she mentioned the threat to anyone in law enforcement. Tr. I, p. 359, ll. 23-25.

Additional argument

Defense counsel supplemented his earlier argument concerning evidence of a prior threat made by appellant for the record. Tr. I, p. 392, ll. 11-12. He cited *State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009), and *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). Tr. I, p. 392, ll. 12-14. The trial court stated that as to Rule 404, evidence is admissible to show mood, identity, existence of a common plan or scheme, absence of mistake or accident, and intent, citing to *State v. King*, 424 S.C. 188, 818 S.E.2d 204 (2018), and that there must be a logical relation to the crime charged. Tr. I, p. 392, ll. 16-21.

After the state rested, defense counsel renewed his Rule 404(b) objection and argued that Hollifield’s testimony was not credible in her attempt to link the statement to 2019. Tr. II, p. 7, ll. 18-22. The trial court reaffirmed its prior ruling. Tr. II, p. 9, ll. 5-7.

Discussion

The trial court abused its discretion by refusing to exclude Hollifield's testimony of a prior threat she overheard appellant make to the deceased because no exception to Rule 404(b) properly applied, any probative value was substantially outweighed by the danger of undue prejudice, and the alleged incident was too remote in time. Accordingly, this Court should reverse.

Rule 404(b) of the South Carolina Rules of Evidence provides,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Rule 404(b), SCRE. Moreover, “evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.” *State v. Lawson*, 424 S.C. 51, 57, 817 S.E.2d 509, 512 (Ct. App. 2018) (citing *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999)); *see also State v. Robinson*, 438 S.C. 421, 435, 882 S.E.2d 883, 891 (Ct. App. 2023) (citing Rule 404(a), SCRE) (“Typically, evidence of a person’s character is not admissible to prove the person acted ‘in conformity therewith on a particular occasion.’”). “The proponent of prior bad act evidence must demonstrate it has a legitimate purpose, i.e., the evidence does something more than prove a person has a propensity to commit crimes.” *Robinson*, 438 S.C. at 435, 882 S.E.2d at 891 (citing *Johnson v. State*, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021) (internal quotation marks omitted).

“Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and

some disputed fact or element of the crime charged.” *Perry*, 430 S.C. at 31, 842 S.E.2d at 658. In addition, “courts have considered temporal remoteness in determining whether admission is proper, but there exists no set time limit beyond which a prior bad act is simply, per se, too remote.” *State v. Scott*, 405 S.C. 489, 504, 748 S.E.2d 236, 245 (Ct. App. 2013) (*comparing* Rule 404(b), SCRE, *with* Rule 609(a)-(b), SCRE).

“Even if prior bad act evidence . . . falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” *Clasby*, 385 S.C. at 155-156, 682 S.E.2d at 896 (citing *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) and Rule 403, SCRE). “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.” *Id.* (citing *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008)). Unfair prejudice means “an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

In appellant’s case, evidence that Hollifield overheard appellant make a threat to the deceased had no logical relevance or connection to some disputed fact or element of the murder charge that appellant was tried for. The evidence failed to show motive, identity, the existence of a common plan or scheme, the absence of mistake or accident, or intent. The trial court thus erred by finding that the testimony was probative of intent or absence of mistake. Tr. I, p. 337, ll. 3-7. The state’s sole purpose to elicit testimony from Hollifield about the prior threat she overheard appellant make was to prove appellant had a propensity to commit crimes. *Robinson*, 438 S.C. at 435, 882 S.E.2d at 891. In fact, the state merely argued that the evidence was relevant and provided only a conclusory reason in response to defense counsel’s 404(b) objection

that it had the burden to prove a malicious act and that it showed a criminal intent, without explanation. Tr. I, p. 320, ll. 19-23; *see e.g., State v. Galloway*, 443 S.C. 229, 243-244, 904 S.E.2d 866, 874 (2024) (explaining that the state failed to provide an on-the-record explanation as to why the contested evidence was admissible over the 404(b) objection as the state merely articulated that the evidence was relevant and “it should have explained a legitimate purpose for which the testimony was offered and why offering it for that purpose was not prohibited by Rule 404(b).” Moreover, “[u]ntil the State explains a valid purpose for offering evidence of other crimes, wrongs or acts, there is no basis for the trial court to overrule the objection.”).

Neither the state nor the trial court provided any basis for its reasoning that the contested evidence of an alleged prior threat was probative of intent or absence of mistake. *See e.g., Johnson*, 433 S.C. at 557, 860 S.E.2d at 700 (explaining that in appropriate cases, Rule 404(b) authorizes admissibility of logically relevant gang evidence to prove motive and intent, providing examples like gang evidence providing probative evidence to explain an otherwise senseless shooting or inexplicable massacre). Therefore, the trial court committed an error of law by admitting the testimony under Rule 404(b) because it determined without explanation that the evidence proved intent and absence of mistake. *See State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (explaining that the failure to exercise discretion is an abuse of discretion); *see also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”).

In any event, even if the Hollifield evidence is construed to show intent or absence of mistake for appellant’s charged offenses, any possible probative value of the evidence is

substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE. Again, the trial court failed to articulate reasoning on the record underlying its Rule 403 decision and merely ruled that the statement did not violate Rule 403. Tr. I, p. 338, l. 9; *see also State v. Spears*, 403 S.C. 247, 254, 742 S.E.2d 878, 881 (Ct. App. 2013) (holding that where it was not implicit or apparent from the record whether the trial court considered whether the probative value of a prior bad act was substantially outweighed by unfair prejudice, “the trial court erred by failing to conduct an on-the-record balancing test.”). Further, in *Perry*, 430 S.C. at 44, 842 S.E.2d at 665, our Supreme Court wrote:

The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden “should be subjected by the courts to rigid scrutiny,” considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

Under rigid scrutiny, considering the individual facts and circumstances of this case, any possible probative value of the Hollifield evidence may have had is substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show appellant's propensity to commit the crime charged. *See e.g., State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (“Evidence of other crimes, even if logically relevant to prove intent, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.”). The Hollifield evidence does not meet the clear and convincing standard required by *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989). *See also Fletcher*, 379 S.C. at 24, 664 S.E.2d at 483 (“Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required

for proof beyond a reasonable doubt . . .”). In addition, the probative value of the alleged prior threat was minimal, and it largely went to propensity. The remoteness in time of the alleged incident, which at its earliest occurred in November of 2019, and lack of logical relevancy cuts also against probative value on the issue of intent. Tr. I, p. 320, ll. 8-9; *see State v. Ostrowski*, 435 S.C. 364, 397, 867 S.E.2d 269, 286 (Ct. App. 2021) (erroneous admission of text messages from up to six weeks prior to defendant’s arrest where many of messages were “completely extraneous to the events that were the subject of the trial, and the State made no real effort to link the text messages to the specific drugs at issue in this case.”); *Scott*, 405 S.C. at 504, 748 S.E.2d at 245. Perhaps most offensively, the evidence carried a high danger of prejudice. *State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899 (Ct. App. 1994) (quoting *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984)) (“When the prior bad acts are ‘strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.”). Therefore, where the prejudicial effect of the contested evidence substantially outweighed any probative value, the trial court erred by admitting the evidence and by failing to conduct an on-the-record Rule 403 balancing. Tr. I, p. 338, l. 9; *Gillian*, 373 S.C. at 611, 646 S.E.2d at 877.

In sum, the trial court abused its discretion by allowing the state to elicit testimony from Hollifield concerning a prior alleged threat appellant made against the deceased where the evidence was not offered for a permissible purpose pursuant to Rule 404(b), the danger of unfair prejudice substantially outweighed any probative value of the evidence, and where the trial court failed to articulate its reasoning or Rule 403 balancing on the record.

III.

The trial court erred by refusing to declare a mistrial after the state made an improper closing argument that asked the jury to send a message with its verdict and where the prejudicial effect could be removed no other way.

Standard of review

This Court reviews a trial court's decision on a motion for mistrial for abuse of discretion. *State v. Benton*, 443 S.C. 1, 6, 901 S.E.2d 701, 703 (2024).

Relevant facts

As relevant, during the state's rebuttal argument, the state argued to the jury that,

Your verdict in this case says whether this was okay, you decide – you decide was it all right for him to shoot Jenny when she was like that picture shows in that – that – was that okay for him to do. That's – that's your – that's what you decide. Only 12 people can say if that was all right or not. You, in a sense, define the world of this case. You make the decision. Do we live in the world, whether that's not right or not.

Tr. II, p. 203, ll. 2-9. Defense counsel objected to the state's argument and a bench conference was held. Tr. II, p. 203, ll. 10-11. The state then continued,

I hope the 12 of y'all do not want to live in a world where it's okay to do what [appellant] did to Jenny Cimbollek. I'm asking you to find him guilty of murder, possession of firearm during the commission of a violent crime.

Tr. II, p. 203, ll. 13-17.

Defense counsel moved for a mistrial based on the state's improper closing argument. Tr. II, p. 203, ll. 23-24. He argued that the state was not allowed for the jury to advocate to send a message. Tr. II, p. 204, ll. 1-4. He contended that the jury's province was to find the facts and noted that following his objection the state continued to ask the jury if they wanted to live in a world where this was okay. Tr. II, p. 204, ll. 4-8. Defense counsel requested a mistrial due to

the solicitor's improper closing argument. Tr. II, p. 204, ll. 8-9. The state responded that its argument was limited to the case. Tr. II, p. 204, ll. 11-13. The state asserted that the law allowed the state to implore the jury to do justice and to evaluate the facts of the case. Tr. II, p. 204, ll. 13-16.

The trial court explained that the jury is to determine the facts of the case "not the truth of the matters before the jury, they are to determine the facts." Tr. II, p. 204, ll. 22-25. The trial court continued that counsel requested a mistrial based on the state's comments that "Hope you don't want to live in a world like this, and is actually trying to perhaps maybe more invite the jury to convict on a motion, but a mistrial should [] be granted where the . . . trial is infected with unfairness as to make a resulting conviction a denial of due process." Tr. II, p. 205, ll. 1-7. The trial court determined that a curative instruction should be given and denied the motion for a mistrial. Tr. II, p. 205, ll. 8-14. The trial court then read the following instruction to the jury: "Mr. Foreman, Ladies and Gentlemen of the jury, you are to decide the facts of this case based on the evidence presented, not on any emotion, and you'll disregard all the other comments to the contrary. You must decide this case based on the facts presented to you that are in evidence." Tr. II, p. 205, ll. 20-25.

Discussion

The trial court erred by refusing to declare a mistrial after the state asked the jury to send a message with its verdict several times during its rebuttal closing argument, which constituted an improper closing argument calculated to arouse the jurors' passions or prejudices. Therefore, this Court should reverse.

"A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." *State v. Wilson*, 389 S.C. 579, 585-86, 698 S.E.2d 862, 865 (Ct. App. 2010). "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *Id.* (citing *State v. White*, 371 S.C. 439, 447-48, 639 S.E.2d 160, 164 (Ct. App. 2006)). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Id.* at 586, 698 S.E.2d at 866. Moreover, "[t]he granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495-96, 692 S.E.2d 560, 563 (Ct. App. 2010)). "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *State v. Ferguson*, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)).

"A closing argument must stay contained to the evidence within the record or any reasonable inferences that can be drawn therefrom." *Washington v. State*, 440 S.C. 550, 564, 891 S.E.2d 668, 675-676 (Ct. App. 2023) (citing *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010)). "A solicitor's closing argument must not appeal to the

personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Id.* at 458, 891 S.E.2d at 676 (citing *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "A prosecutor's improper closing argument may so infect the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Lighty*, 616 F.3d 321, 359 (4th Cir. 2010) (citing *United States v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998) (internal quotation and alterations omitted)).

In *United States v. Runyon*, a panel of the Fourth Circuit Court of Appeals "decline[d] to approve the prosecution's encouraging the jury to "send a message to the community, send a message with your verdict." 707 F.3d 475, 514 (4th Cir. 2013). Moreover, the Fourth Circuit acknowledged that it in *United States v. Caro*, it had "expressed skepticism about the government's comments about messages sent to anyone other than the defendant, 597 F.3d 608, 625 n. 17 (4th Cir. 2010)—skepticism that other circuits seem to share, *see, e.g., Sinisterra v. United States*, 600 F.3d 900, 910 (8th Cir. 2010) (holding that urging "the jury to send a message with its verdict" is improper because it "impinge[s] upon the jury's duty to make an individualized determination that death is the appropriate punishment for the defendant")." *See id.* (internal quotation marks omitted).

In appellant's case, the trial court erred by refusing to grant a mistrial after the state's improper closing argument. The solicitor's comments during its rebuttal closing argument asked the jury to consider if they "live[d] in the world, whether that's not right or not," and implored to the jury that the state hoped the jury did not want to live in a world like that. Tr. II, p. 203, ll. 2-9, 13-17; *see United States v. Young*, 470 U.S. 1, 18 (1985) ("The prosecutor was also in error to try to exhort the jury to do its job; that kind of pressure, whether by the prosecutor or defense

counsel, has no place in the administration of criminal justice.”) (internal quotation marks omitted). Those comments did not ask the jury to evaluate the facts of the case but instead asked the jury to consider broader society. Tr. II, p. 204, ll. 13-16; *see Runyon*, 707 F.3d at 515 (explaining that urging the jury to send a message to the community “invites it to play to an audience beyond the defendant – to use its decision not simply to punish the defendant, but to serve some larger social objective or to seek some broader social approval as well.”). The state’s comments were not contained to the record, were designed to appeal to the jurors personal biases, and were calculated to arouse their passions and prejudices. *Washington*, 440 S.C. at 564, 891 S.E.2d at 675-676; *Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865. Therefore, the state’s comments during closing argument were improper.

Moreover, the state’s improper comments prejudiced appellant. *See Fortune v. State*, 428 S.C. 545, 556, 837 S.E.2d 37, 43 (2019) (citing *State v. Durden*, 264 S.C. 86, 93, 212 S.E.2d 587, 590-91 (1975) (“The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent he was denied a fair trial.”). Although the trial court issued a curative instruction, it only asked the jury to decide the facts of the case based on the evidence presented and to “disregard all other comments to the contrary.” Tr. II, p. 205, ll. 20-25; *but see Wiley*, 387 S.C at 498, 692 S.E.2d at 564 (explaining that a curative instruction was sufficient where the trial court specifically instructed the jury that opening statements should not be considered as evidence and that the jury should not draw any inferences of guilt or innocence from such statements); *see also State v. Harris*, 382 S.C. 107, 119, 674 S.E.2d 532, 538 (Ct. App. 2009) (explaining that the trial court’s curative instruction explained to the jury they were not to consider the question in their deliberations, and thus, any error was cured because “the trial court specifically instructed the jury to disregard the

question.”). The trial court’s vague references to disregard “comments to the contrary” neither removed nor cured the prejudice of the solicitor’s argument which injected personal biases, passions, and prejudices into the jury’s consideration of the case and its ultimate verdict. It therefore cannot be said that the solicitor’s improper comments did not infect the fairness of appellant’s trial. The result is that the prejudicial effect of the solicitor’s improper closing argument could be removed by no way other than by granting a mistrial. *See Dial*, 405 S.C. at 257, 746 S.E.2d at 500. Therefore, the trial court abused its discretion by refusing to grant a mistrial.

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests that this Court reverse his convictions and sentence and remand to the Court of General Sessions of Union County for a new trial.



Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of August, 2026.