STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. The trial court erred in finding no discrimination in the State's use of peremptory challenges because (a) the trial court failed to comply with the third step in the Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor's group neutral explanations and make a deliberate decision whether purposeful discrimination occurred; and (b) Appellant proved the State's proffered reasons were pretextual because they were not applied in a neutral manner.
2. Where the State announced to the jury that malice can be implied from use of a deadly weapon and where the jury was asked to consider a lesser included offense of murder and self defense, the trial court erred in overruling Appellant's objection and failing to issue a correction to the jury.
3. The trial court erred in overruling Appellant's objection to unfairly prejudicial character evidence offered by the State.

## STATEMENT OF THE CASE

Appellant is a South Carolina state prisoner currently serving a sentence of life in prison plus five years following his conviction for murder and possession of a weapon during the commission of a violent crime. A Chesterfield County Grand Jury indicted Appellant on the charges of murder and possession of a weapon during the commission of a violent crime. The State of South Carolina, represented by Kernard E. Redmond and Adam Foard, called the case for trial on December 3, 2012 before the Honorable J. Michael Baxley. Appellant was represented by Casey Secor and S. Boyd Young. On December 6, 2012, the jury returned a verdict of guilty as to the charges of murder and possession of a weapon during the commission of a violent crime. R.677 lines 7-15. Judge Baxley sentenced Appellant to life in prison plus five years to be served consecutively. R. 691 lines 18-24.

Thereafter, Appellant timely filed his notice of appeal.

## STATEMENT OF THE FACTS

Appellant was involved in an extra-marital affair with the victim for about eight years. R. 558 21-25. In April of 2009, the victim attacked Appellant's wife with a lug wrench and was convicted of assault and battery of a high and aggravated nature. R. 137 line 25 – R.138 line 2; R. 519 line 12 – R. 521 line 16. The victim served a prison sentence and was released in mid-December, 2010. R. 566 lines 4 – 25. Appellant spent several days with the victim immediately after her release from prison. R. 522 line 24 – R. 523 line 19; R. 526 lines 13 – 17; R. 565 line 19 – 567 line 17. On December 28, police were called in response to an incident involving a dispute between Appellant and the victim at the Pageland gym; however, no arrests were made. R. 250 line 3 – R.251 line 3. The victim signed a warrant against the Appellant for trespassing dated December 27, 2009 and an order of protection dated December 29, 2009. R. 358 line 24 – R. 359 line 8. In the early morning hours of January 1, 2010, Appellant went to the residence of the victim. R. 595 line 19 – R. 596 line 4. Appellant and the victim began to argue, and a struggle ensued. R. 604 lines 17-24. At some point in the struggle, the victim sprayed Appellant with pepper spray. R. 195 lines 8-25. Appellant testified that he was blinded by the pepper spray and that the victim attacked him with a knife and hit him in the head. R. 604 line 17 – R. 608 line 18. Appellant testified that he was able to get a knife and that the victim attacked him outside the residence as he was trying to get away. R. 608 line 19 – R. 610 line 21. Appellant testified that he stabbed the victim several times and then fled to a nearby park where he was arrested by police shortly thereafter. R. 610 line 22 – R. 611 line 11. Police recovered two knives and a can of pepper spray from the front of the victim's residence. R. 160 lines 3-11. The victim died from multiple stab wounds. R. 343 lines 21-24.

## ARGUMENT

The appellate standard of review for questions of law is de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court."); Fresmire v Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2008) ("This court reviews all questions of law de novo."). The appellate court will not disturb the trial court's findings of fact unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

### I. THE TRIAL COURT ERRED IN FINDING THAT THE STATE'S USE OF PEREMPTORY CHALLENGES DID NOT VIOLATE BATSON.

The trial court committed reversible error when it declined to find a Batson violation because (a) the trial court failed to adhere to the third step of the Batson analysis and (2) the Appellant carried its burden to prove that the State's facially race neutral reasons were not applied neutrally. Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

During jury selection, the State used all five of its peremptory strikes, four of which to strike African American jurors. R. 96 lines 13-15. Appellant is African American. The racial composition of the impaneled jury was two African Americans and ten Caucasians. See Jury Rollcall List for Panel. The two African Americans in the impaneled jury, Juror 95 and Juror 59, were presented by the State only after the State had used four of its five peremptory strikes and the State had only one peremptory challenge remaining. R. 87 lines 10-13; R. 88 lines 2-6. The State used its final peremptory strike to strike an African American juror (Juror 33). R. 88 lines 19-25; Jury Rollcall List for Panel at 3. Appellant objected and the trial court held a Batson hearing. R. 96 line 13 – R. 108 line 6. The four African American jurors struck by the State

were Jurors 101, 33, 117, and 126. R. 97 lines 19-21. The State excused Juror 101 because he had a prior arrest: "possession of cocaine charge that was nolle prossed." R. 98 lines 4-9. The State excused Juror 33 because local law enforcement told the prosecutor that the juror had "prior incidents involving his . . . girlfriend who is now his wife." R. 99 line 23 – R. 100 line 12. The State excused Juror 117 because "the main reason, obviously, was the fact that he was unemployed . . ." but also because the juror knew the victim. R. 99 lines 6-19. The State excused Juror 126 because the State observed her disinterested demeanor and that the juror was late returning from a break. R. 98 line 22 – R. 99 line 4.

Appellant argued that State's strikes of Jurors 101 and 33 were pretextual because there were other similarly situated white jurors with prior arrests that were not stricken by the State. R. 101 lines 1-8; R. 106 lines 13-23. Appellant offered Jurors 105 and 131, both white and similarly situated with prior arrest records, R. 106 lines 13 – 23, that the State did not strike, R. 85 lines 19-22; R. 86 lines 11-14.

Appellant argued that the State's strike of Juror 117 was also improper because there was another similarly situated white juror that knew the family of the victim. Appellant offered Juror 128, as a similarly situated white juror who knew the victim's family because they came to her workplace "all the time." R. 31 lines 15-24. Juror 128 was the first juror called and the State did not strike her. R. 83 lines 16-19. With regard to Juror 126, counsel for Appellant noted that he did not notice any jurors come back late from a break. R. 102 lines 11-17.

Regarding Jurors 101 and 33, the trial court found that there had been a previous, "negative relationship with law enforcement, and that has been found by our Court in the case of [State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)], to be a permissible reason for a strike."

R. 104 lines 13-19. Regarding Juror 117, the trial court found the State's reason that the juror knew the victim was a valid reason; however, the trial court did not accept the fact that the juror may be unemployed "as a valid reason to impose a strike." R. 105 lines 2-9. Regarding Juror 126, the trial court found that disinterested demeanor "has been previously permitted by our Supreme Court in the case of [State v. Casey, 325 S.C. 447, 481 S.E.2d 167 (1997)] and "[s]pecifically on the issue of being late, in the case of [State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991)] our Supreme Court has permitted a strike and found that to be a valid reason." R. 104 line 19 – 105 line 1.

Purposeful discrimination in the jury selection process constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. See Batson v. Kentucky, 476 U.S. 79 (1986). A Batson challenge requires a three step process:

> First, the [Defendant] must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [State] to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [Defendant] has proved purposeful discrimination.

State v. Giles, Op. No. 27353 (S.C. Sup. Ct. filed Jan 15, 2014) (Shearouse Adv. Sh. No. 2 at 100).

A. As a matter of law, the trial court failed to comply with the third step in the Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor's explanations and make a deliberate decision as to whether purposeful discrimination occurred.

The trial court must proceed to the third step of the Batson process unless discriminatory intent is inherent in the explanation provided by the proponent of the strike. State v. Rogers, 405 S.C. 520, 526, 748 S.E.2d 247, 251 (Ct. App. 2013) (quoting State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct.App.2006)). The United States Supreme Court has made clear

that "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" Batson, 476 U.S. at 93, 106 S. Ct. at 1721 (1986) (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)). See also United States v. Alanis, 335 F.3d at 965, 968-969 nn. 2,3 (9th Cir. 2003) (finding that the trial court committed an error of law by failing to "evaluate meaningfully the persuasiveness of the prosecutor's [group]-neutral explanations," and to "make a deliberate decision whether purposeful discrimination occurred"); accord, e.g., Lewis v. Lewis, 321 F.3d 824, 832 (9th Cir. 2003) (holding that "the court has a affirmative duty to determine if purposeful discrimination occurred" and the trial court did not fulfill this duty by concluding that a prosecutor's state race neutral reason for striking a potential African American juror was "probably . . . reasonable"); Barnes v. Anderson, 202 F.3d 150, 157 (2d Cir. 1999) (finding that the trial court's "murk[y]" analysis and refusal to rule on the credibility of either attorney's explanation failed to satisfy "the court's duty under the third step of Batson"); People v. Fuentes, 818 P.2d 75, 81–83 (Cal. 1991) (finding that the trial court "failed to take the next, necessary step of asking whether the asserted reasons actually applied to the particular jurors whom the prosecutor challenged").

The trial court heard Appellant's arguments that the State's peremptory strikes were pretextual. However, the trial court never addressed Appellant's arguments, but instead summarily concluded that each of the reasons proffered by the State were ones that were found to be "permissible" in previous cases. R. 104 line 9 – R. 105 line 16. Just because the State's proffered reasons for excusing a juror has passed muster in a previous case does not relieve the trial court of its duty under the third step in Batson to meaningfully evaluate whether that reason was applied neutrally in the case at hand. See State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d

891, 892 (1989) ("In this case, an examination of the circumstances shows that the solicitor's originally neutral reason was proven to be a pretext because it was not applied in a neutral manner."). See also Garrett v. Morris, 815 F.2d 509, 511 (8th Cir. 1987) ("[T]he court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination."); Lewis, 321 F.3d at 831 ("[A] court engaging in the third step of Batson has various tools at its disposal in order to fulfill its duty to determine whether purposeful discrimination has occurred. In an ideal setting, a court would use most, if not all, of these tools in evaluating a Batson motion.").

State v. Giles is a recent South Carolina Supreme Court case which held that a race-neutral explanation proffered by the proponent of a preemptory challenge at the second stage of the Batson analysis need not be persuasive or plausible; however, "it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence bearing on it." State v. Giles, Op. No. 27353 (S.C. Sup. Ct. filed Jan 15, 2014) (Shearouse Adv. Sh. No. 2 at 103). Because Appellant concedes that the State offered facially race-neutral reasons at the second step, Giles is applicable to the case at hand only to the extent that it demonstrates the importance of the trial court's duty to meaningfully evaluate the proffered reasons in the context of the specific circumstances to determine if discrimination exists in the third step. As *Giles* Court noted, "[r]easonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson process to determine if purposeful discrimination has occurred, is impossible if the proponent of

the challenge provides only a vague or very general explanation." Id. In the case at hand, Appellant offered comparisons to other members of the venire for a disparate treatment analysis, but the court failed to meaningfully address each of the similarly situated jurors pointed out by Appellant and offer its thoughts on why those similarly situated jurors did not evince pretextual treatment by the State. R. 100 line 13 – R. 108 line 4.

In United States v. Hill, 146 F.3d 337, 342 (6th Cir. 1998), the Sixth Circuit found that the district court's "abrupt conclusion" that the prosecutor's proffered reason outweighed the defendant's showing under the totality of the circumstances was inadequate. The Sixth Circuit concluded that the record "denies us the district court's thoughts as to how [the circumstances of the case] weighed on the district court's conclusion in the third step of the Batson analysis." Id. at 342-43. Like Hill, the trial court in this case arrived at the "abrupt conclusion" that the State did not treat jurors "distinctly and separately among the races." R. 105 lines 10 – 14. Like Hill, the trial court in the instant matter denied us its thoughts on how the evidence of the similarly situated jurors offered by Appellant weighed on the court's conclusion in the third step of the Batson analysis.

Similarly, in Coulter v. Gilmore, 155 F.3d 912, 921 (7th Cir. 1998), the Seventh Circuit found that the trial court violated Batson because "it never evaluated the differential manner in which the state handled—or rather, failed to handle—nonminority jurors who were similarly situated to the African-Americans the prosecution struck. A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic." Like the trial court in Coulter, the trial court in the instant case failed to evaluate the differential manner in which the

State handled the jurors who were similarly situated to the African Americans jurors that the prosecution struck.

B. Appellant carried its burden to prove that the State's proffered reasons were pretextual because they were not applied in a neutral manner.

A comparative juror analysis, sometimes called a disparate treatment analysis, is a side-by-side comparison of the characteristics of the challenged jurors to those of the non-challenged jurors. "Comparative juror analysis is an established tool at step three of the Batson analysis for determining whether facially race-neutral reasons are a pretext for discrimination." Crittenden v. Ayers, 624 F.3d 943, 956 (9th Cir. 2010). The United States Supreme Court, the Fourth Circuit, and the South Carolina Supreme Court have endorsed its use. United States v. Barnette, 644 F.3d 192, 205 (4th Cir. 2011) ("[A] proper analysis of a Batson claim requires that a court engage in comparative juror analysis." (quoting Miller-El v. Dretke, 545 U.S. 231, 232 (2005))); State v. Giles, Op. No. 27353 (S.C. Sup. Ct. filed Jan 15, 2014) (Shearouse Adv. Sh. No. 2 at 103) ("[C]omparison to other members of the venire for purposes of a disparate treatment analysis . . . is often used at the third step of the Batson process to determine if purposeful discrimination has occurred . . . .").

> More powerful than the bare statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were not. If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination.

Miller-El, 545 U.S. at 232. See also Boyd v. Newland, 467 F.3d 1139, 1149 (9th Cir. 2006) ("[C]omparative juror analysis is an important tool that courts should use on appeal." (emphasis in original)).

In State v. Oglesby, the South Carolina Supreme Court found that although the State was able to articulate a facially neutral explanation for striking African American jurors, the explanation was in fact pretextual because the State did not apply those reasons neutrally. 298 S.C. at 281, 379 S.E.2d at 892. In Oglesby, the solicitor struck three black females because they were patients of a doctor who was a defense witness. Id. at 280, 379 S.E.2d at 892. The Court found that reason sufficiently neutral. "The solicitor negated his reason, however, when he seated a white female juror who was also a patient of the doctor." Id. at 281, 379 S.E.2d at 892. The facts of Oglesby mirror the case at hand. In both Oglesby and in the instant case, the State offered facially neutral explanations for striking the African American jurors. However, just as in Oglesby, the State negated these reasons by seating similarly situated white jurors.

The State will likely argue that Oglesby can be distinguished because the proffered reason for striking the African American jurors in Oglesby (i.e., that the jurors were struck because they were patients of a defense witness), was exactly the same reason for both the African American jurors and the Caucasian juror; whereas, here, the State could point to small differences in the characteristics between the African American jurors and the similarly situated Caucasian jurors. For example, the State struck Juror 101 because he had a prior arrest; specifically a "possession of cocaine charge that was nolle prossed." R. 98 lines 4-9. The State may argue that Appellant could not produce a similarly situated white juror with a prior arrest specifically for cocaine, therefore his Batson challenge must fail. However, this is a distinction without a difference. Appellant produced two similarly situated white jurors with prior arrests: one with a prior arrest for assault and battery with intent to kill which was nolle prossed (Juror 131) and one with a prior arrest for simple assault and check fraud (Juror 105). R. 106 lines 14-23. The proffered reason is in fact the same: the prior arrests engender a "negative relationship

with law enforcement," as stated by the trial court. R. 104 lines 13-19. A position that would require similarly situated jurors to have a prior arrest for the exact same charge would gut Batson. It would reduce the opportunity for a defendant to show disparate treatment though comparison by allowing attorneys to hide behind immaterial distinctions.

In fact, the only way to truly distinguish Oglesby from the case at hand actually militates in favor of Appellant. In Oglesby, the defendant was able to show only one similarly situated white juror, whereas here, the Appellant is able to point to three similarly situated white jurors to demonstrate pretext and a pattern of disparate treatment.

Miller-El v. Dretke, 545 U.S. 231 (2004), is equally instructive. In Miller-El, the United States Supreme Court conducted a comparative juror analysis of African American jurors stuck by the prosecution to show that the prosecution's proffered reasons were pretextual. Id. at 233. The Court found that the reason for striking one of the African American jurors also applied to Caucasian panel members who were selected was evidence of pretext. Id. Moreover, the suggestion of pretext was not mitigated by the prosecutor's explanation that the African American juror was struck when the State had 10 peremptory challenges left and could afford to be liberal in using them. Id at 249. If that were the explanation for striking the juror, then the prosecutor should have struck a nonblack juror, whom they examined and accepted before they struck the African American juror, despite her similar views. Id. In the instant case, Juror 117 was struck by the State because she had known the victim, R.105 lines 2-9, yet Juror 128, who was white, was not struck despite the fact that the victim's family came to her workplace "all the time." R. 31 lines 15-24. Like Miller-El, the suggestion of pretext is not mitigated because Juror 117 was struck early in the jury selection at a time when the State could afford to be liberal with its challenges. If that were the case, then the State would have struck white panel member Juror

128, who was the first juror called and was accepted by the State before Juror 117 despite the fact that she knew the victim's family.

Finally, a common sense review of the State's proffered reasons also reveals pretext. The State struck Juror 101 because of a prior arrest for cocaine possession, yet the state declined to use its third strike on Juror 131, a white juror with a prior arrest for assault and battery with intent to kill. It would be difficult to imagine a worse juror for the State in a murder trial than one that has previously been accused of a violent crime and would be likely more apt to sympathize with the defendant. The next juror called was Juror 117, an African American juror whom the State struck because she knew the victim. It would be difficult to imagine a better juror for the State than one that "had known the victim and been to school with the victim," R. 105 lines 2-9, yet the State used its third peremptory strike out of a scant five to exclude this juror. It is noteworthy that Juror 131 came up directly before Juror 117, R. 86 lines 11-22, because it shows that instead of using its third strike on the white juror with a previous arrest for assault and battery with intent to kill (Juror 131), the State used that same strike on a black juror who knew the victim and went to school with the victim (Juror 117).

## II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND FAILING TO CORRECT THE STATE'S REMARKS TO THE JURY THAT USE OF A DEADLY WEAPON IMPLIED MALICE WHERE THE JURY WAS CHARGED WITH A LESSOR INCLUDED OFFENSE OF MURDER AND SELF DEFENSE.

The trial court instructed the jury on murder, 638 line 22 – R. 640 line 14, voluntary manslaughter, R. 640 line 24 – R. 642 line 14, and self defense, R. 643 line 20 – R. 649 line 21. The trial court did not tell the jury that malice can be inferred from use of a deadly weapon; however, the State did so on three occasions. R. 657 line 23 – R. 658 line 1; R. 658 lines 5-6; R. 659 lines 12-13. Appellant objected and the trial court overruled. R. 658 lines 3-4. After

closing arguments and out of the presence of the jury, the trial court acknowledged Appellant's objection but noted that it did not instruct the jury on implied malice by use of a deadly weapon, and "the fact that the Court doesn't charge it the Court does not perceive that that takes away the ability of the State to argue that from a factual standpoint." R. 672 line 24 – R. 673 line 2.

State v. Belcher is clear that "the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009). See also, State v. Stanko, 402 S.C. 252, 263, 741 S.E.2d 708, 714 (2013) ("The language of Belcher is clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper."). Where a solicitor's closing argument misstates the law, "[t]he relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998). "[T]he Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant." Belcher, 385 S.C. at 608, 685 S.E.2d at 808.

It is clear that the Appellant offered evidence which could have reduced, mitigated, or excused murder because the trial court properly charged the jury with the lesser included offense of voluntary manslaughter and self defense. See State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 728 (Ct. App. 2012), reh'g denied (May 25, 2012), cert. granted (Nov. 20, 2013) ("We note that if the trial court properly charged involuntary manslaughter, the evidence supporting that

charge would 'reduce [or] mitigate' the charge of murder and, thus, under Belcher the malice inference charge was improper.").

In Belcher, the South Carolina Supreme Court described the "half-truth" nature of the charge:

> Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because 'if one intentionally kills another with a deadly weapon, the implication of malice may arise.' This highlights the 'half-truth' nature of the charge.

Belcher, 385 S.C. at 610, 685 S.E.2d at 809 (quoting State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991)) (citation omitted). This "half-truth" is not made whole simply because the jury hears it from the State instead of the court.

Accordingly, Belcher should be extended to include remarks made by the State in closing arguments to prevent the State from effecting the harm that Belcher sought to prevent: a presumption that impermissibly shifts the burden to the defendant. As the trial court instructed the jury, it is the State's burden to "prove[] each and every element of the alleged crime beyond a reasonable doubt." R. 628 lines 17-19. The State's comments infected the trial with unfairness and violated Appellant's right to due process because it relieved the State of its burden to prove malice and shifted it to the Appellant to disprove. See Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding that the "Due Process Clause" forbids a state from placing the burden on the accused to prove his actions reduced the crime from "murder to manslaughter");

Belcher, 385 S.C. at 608, 685 S.E.2d at 808 (finding that due process is violated by impermissible burden shifting).

The prejudice to the Appellant is particularly acute in this case because (1) the State made the inferred malice remark three times, R. 657 line 23 – R. 658 line 1; R. 658 lines 5-6; R. 659 lines 12-13, (2) the State added emphasis by prefacing the remark with "most importantly," R. 657 line 25 – R. 658 line 1, (2) the judge had already charged the jury so the solicitor's subsequent remarks perceivably "added" inferred malice from a weapon to the trial court's instruction; (3) the trial court overruled Appellants timely objection, likely giving the jurors the impression that the court adopted or approved of the State's language, R. 658 lines 3-4; (4) in its closing, the State quoted from the trial court's jury instructions, and then immediately offered the implied malice remark, further suggesting to the jury that it was quoting or endorsed by the court;[1] (5) the State "waived opening" of its closing remarks, requiring the Defense to do their closing remarks first and denying Appellant the opportunity to correct the State's remarks, R. 625 line 22 – R. 626 line 1; (6) the trial court failed to provide a curative instruction, which again, suggested affirmation from the trial court of the State's closing remarks.[2]

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[1] The relevant passage is as follows:

> Now, malice doesn't have to be formed way in advance. The Judge told you that. He said, "Malice aforethought was not required if malice exists for any particular time before the act is committed." Ladies and gentlemen, you can find that malice was formed at any point up until Thomas Jeffery Stewart began striking the fatal blows with a knife to Bellany Clyburn.
>
> It can be express or inferred. That means it can be through spoken words or it can be shown through actions or most importantly it can be inferred from the use of a deadly weapon.

R. 657 line 16 – R.658 line 1 (emphasis added).

[2] Johnson v. State, 325 S.C. 182, 188, 480 S.E.2d 733, 735-36 (1997) (a solicitor's improper comments may be cured by the judge's instructions to the jury). See also State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) (even if solicitor's closing comments referred to defendant's failure to testify or present a defense, any prejudice to defendant was cured when trial judge gave

The State will likely argue harmless error and rely on State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). In Stanko, the South Carolina Supreme Court found that although the trial court violated Belcher by giving an improper instruction on malice inferred from use of a deadly weapon, the error was harmless because "the evidence of malice presented in the case was not limited to Appellant's use of a deadly weapon." Id. at 264, 741 S.E.2d 708, 714. However, Stanko is easily distinguished from the case at hand. In Stanko,

> [t]he State presented uncontested evidence that [Stanko] shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. [Stanko] then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended [Stanko] in possession of the Victim's vehicle and the gun used in the murder.

Id. In the instant case, testimony at trial demonstrated conflicting versions of the event which are more akin to the facts in Belcher. In Belcher, the victim and another man began arguing at a gathering of friends and family and the defendant intervened and shot the victim who also had a gun. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Like Belcher, the evidence in the instant case revealed conflicting versions of the events. Like Belcher, both the victim and Appellant were in possession of deadly weapons. Like Belcher, the Appellant offered evidence of self-defense and the court so charged the jury. In Belcher, the Court noted that in many murder cases, there will be other evidence of malice apart from the use of a deadly weapon. "Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." Id. at 609, n. 8, 685 S.E.2d at 611, n. 8. Such a

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a curative instruction immediately following defense counsel's objection and charged the jury after closing arguments that defendant did not have the burden of proving his innocence and the jury could not consider defendant's failure to testify); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (where solicitor in his closing argument referred to the fact that neither defendant would testify, any prejudice to defendants was cured when solicitor promptly apologized to the jury after defense counsel's objection and the trial judge instructed the jury concerning the right of a defendant to remain silent and the State's burden of proof).

scenario mirrors the facts of Stanko, not the instant case. In the instant case, the fact remains that "evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide." Id. at 612, n. 10, 685 S.E.2d at 810. Simply put, if the jury believed the evidence entered by Appellant, then the only source of malice would have been inferred from the use of a deadly weapon.

The State may also argue that other instructions given by the trial court relating to intent and lack of provocation would cure any failure to issue a correction. However, the fact that that the trial court also charged the jury that the unlawful act must be intentional and without just cause or excuse will not cure any errors related to the State's closing remarks of inferred malice. R. 639 lines 4-7. See also Belcher, 385 S.C. at 611, 685 S.E.2d at 809 (finding that although the trial court had charged the jury that the killing had to be unlawful, deliberate and intentional, and without just cause or excuse, instructing the jury that malice could be inferred by the use of a deadly weapon was nonetheless confusing and prejudicial where evidence was presented that would reduce, mitigate, excuse or justify the homicide).

## III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ENTER UNFAIRLY PREJUDICIAL CHARACTER EVIDENCE

The State offered as evidence a video taped interview of Appellant. State's Exhibit 7. Appellant filed a motion in limine and also objected at trial to a twenty-four second portion of the video to be redacted.[3] R. 112 line 21 – R. 114 line 10. In the disputed portion of the video, Appellant states that Appellant "used to beat [the victim] up." State Exhibit 7 at 47:45 – 48:09. The disputed portion of the video does not contain any references to the victim being violent. R.215 lines 2-4 ("And the part when she beats up on him an all they aren't asking that that be

[3] The portion that Appellant moved to redact was from forty seven minutes forty five seconds though forty eight minutes nine seconds: a total of 24 seconds.

excluded and neither are we."). The State argued that Appellant had opened the door in its opening statement to allow evidence of the Appellant's character, and that evidence of Appellant's past violence towards the victim goes to the state of mind of the victim and the heart of Appellant's self-defense argument. R. 214 line 23 – 215 line 22. Appellant argued that the evidence violates Rule 404, SCRE as improper character evidence being introduced to show conformity therewith and Rule 403, SCRE because the prejudice to Appellant outweighed its probative value. R. 217 line 7 – R. 222 line 5. The trial court overruled Appellant's objection and allowed disputed portion of the tape into evidence.

The State later introduced an arrest warrant for trespassing and an order of protection, each signed by the victim against the Appellant. R. 358 line 18 – R. 359 line 8; State Exhibits 20 and 106. The State argued that these documents, like the redacted portion of the video, went to the victim's state of mind. R. 359 line 22 – R. 360 line 4. Appellant objected under Rule 404, SCRE and State v. Lyle, 125 S.C 406, 118 S.E. 803 (1923). R. 360 lines 7-26.

Rule 404 states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . . ." Rule 404, SCRE. It is well-settled that a defendant may open the door to what would otherwise be improper evidence. The case of State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), is often cited for the door-opening doctrine, although it never uses the open door language. See, e.g., State v. Young, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005) (citing Allen and noting the case is well known for the door-opening doctrine).

> We recognize certain exceptions to the general rule that an accused's bad character may not be offered against him by the State. One exception is where the accused takes the stand and thus becomes subject to impeachment, like any other witness. The accused may thus be cross-examined about any of his past transactions tending to affect his credibility. Secondly, where the accused offers evidence of his good character, thereby putting his reputation in issue, he may be cross-examined on particular acts which manifestly bear reference to the trait of character covered by the charge in the indictment.

Allen, 266 S.C. at 482, 224 S.E.2d at 886.

In the present case, the video, arrest warrant, and restraining order were introduced in the State's case-in-chief and the Defense was not yet sure if Appellant would testify. Therefore, the first exception from Allen does not apply. The second exception from Allen also does not apply because Appellant had not yet offered evidence of his good character for the State to rebut.

The State argued that Appellant somehow opened the door in its opening statement to allow in character evidence. However, nothing in Appellant's opening statement made reference to Appellant's good character or otherwise put Appellant's reputation in issue to open the door to rebuttal by the State. The State argued that Appellant's opening statement suggested that Appellant would be asserting self defense; therefore, the state of mind of the victim would be relevant to the self defense claim. R. 217 line 18 – R. 218 line 15; R. 359 line 17 – R. 360 line 4. Presumably, although the State never raised it, the State intended that Rule 405(b) would allow the evidence in as pertinent to an essential element to a claim or defense. However, the state of mind of the victim is not an essential element to Appellant's self-defense claim. This is borne out by the language of the trial court's charge to the jury:

> Now, evidence of prior difficulties between the Defendant and the victim maybe [sic] considered in deciding whether a threat existed and whether the Defendant had reason to believe that a threat existed and how serious that threat was and the Defendant's state of mind on the particular occasion . . . .
>
> Also, the reputation of the victim as a violent person may be considered in deciding whether there was a need for force, whether the Defendant had to believe -- excuse me. Had reason to believe there was a need for force and whether deadly force was reasonably necessary and whether the victim had such a reputation.

> And also prior instances of violence by the victim may be considered in deciding whether the Defendant actually believed he was in imminent danger of death or serious bodily injury or was actually in imminent danger."

R. 646 line 16 – R. 647 line 9 (emphasis added). Clearly, it is the state of mind of the Defendant that is pertinent to the elements of self defense, not the state of mind of the victim. As Appellant pointed out at trial, "Miss Clyburn is not claiming self-defense." R. 220 lines 21-22. Therefore, the State's assertion that the victim's state of mind "goes right into the heart of possible self-defense issues" is simply incorrect.

The State may argue that any error was harmless because the Appellant testified and entered evidence of good character; therefore, the State would have eventually been able get the disputed evidence in front of the jury. However, once the disputed evidence was entered and shown to the jury, it changed the dynamic of the case and affected strategic decisions, including the decisions to enter evidence of good character and the Appellant's decision to testify. Moreover, there can be little doubt that the redacted portion of the video, the arrest warrant, and the restraining order were extremely prejudicial to the Appellant. It allowed the jury to judge Appellant based on extrapolation and violates the policies that underpin the rule. See Michelson v. U.S., 335 U.S. 469 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); Boyd v. U.S., 142 U.S. 450, 458, (1892) (proof of earlier robberies "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value"); 1

McCormick On Evid. § 190 (7th ed.) ("The evidence of or statements about bad character would not be irrelevant, but particularly in the setting of the jury trial, the dangers of prejudice, confusion and time-consumption outweigh the probative value.").

## CONCLUSION

Consistent with the foregoing, the trial court committed reversible error when it (1) declined to find a Batson violation where (a) the trial court failed to adhere to the third step of the Batson analysis and (b) Appellant carried his burden to prove that the State's facially race neutral reasons were misapplied; (2) overruled Appellant's objection and failed to correct the State's multiple remarks to the jury that use of a deadly weapon implied malice where the jury was charged with a lesser included offense of murder and with self defense; and (3) allowed the State to enter improper character evidence unfairly prejudicial to the Appellant.

Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

Respectfully Submitted,

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This 3rd day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certified that a true copy of the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal in the above referenced case have been served upon Donald J. Zelenka, Esquire, State of South Carolina, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201, this 3rd day of February, 2014.

By: RJ McCl

Jarrett O. Coco
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2014.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

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Appellant proposes the following be included in the Record on Appeal:

1. Chesterfield County Courthouse Rollcall List for Panel, dated 12/03/2012 (attached as Appendix A)
2. State's Exhibits 7, 20 and 106
3. Transcript of Proceedings pp. 18-117, 132-143, 146-207, 211-304, 309-423, 455-469, 497-503, 510-544, 556-693

I certify that this designation contains no matter which is irrelevant to this appeal.

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