THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

Appellate Case No. 2012-213592

BRIEF OF PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals, in the form of a withdrawn, substituted and refiled opinion, on November 14, 2012.

TABLE OF AUTHORITIES

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QUESTION PRESENTED

I. Whether the Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in the sudden heat of passion.

INTRODUCTION

On April 9, 2007, James Salter was shot in a Best Buy parking lot in Myrtle Beach. (App. 138, 157). He later died from his injuries. (App. 519-20). Richard Niles, his fiancé, Mokeia Hammond and a third party, Ervin Moore, were charged with murder, armed robbery and possession of a firearm during the commission of a violent crime. (App. 103, 377). Niles and Hammond, who were tried jointly, invoked their respective rights to trial by jury, while Moore pled guilty to charges of voluntary manslaughter, robbery and possession of a firearm during the commission of a violent crime.[1] (App. 1, 376-78). Niles was convicted on all charges while Hammond was convicted of armed robbery.[2] (App. 726).

SUMMARY OF ARGUMENT

Contrary to the finding of the Court of Appeals, this is not a case where the trial court should have charged voluntary manslaughter. In fact, there was no evidence Niles was acting in the sudden heat of passion when he fired the weapon that killed Salter. Niles' testimony, if believed, cannot support an inference that he possessed criminal intent when he fired the weapon that killed Salter since Niles testified that:

- Salter fired at he and his fiancé first;
- "[T]he first thing that came into [his] head" after Salter shot at his car was whether his "fiancé got shot[.]"
- He then grabbed his gun and, with his eyes closed and without looking, fired his gun twice in an effort to "get [the victim] to stop shooting[;]"
- He confirmed he "wasn't trying to hit nobody[.]"

[1] The terms of Moore's plea agreement allowed him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Niles and Hammond. (App. 376-77).

[2] Hammond, the so-called getaway driver, was acquitted on the charges of both murder and possession of a firearm during the commission of a violent crime. (App. 726).

This is not sudden heat of passion. Accordingly, the State asks this Court to reverse the judgment of the Court of Appeals and affirm the murder conviction and sentence of Richard Niles.

STATEMENT OF THE CASE

Niles was indicted during the August 2007 and October 2008 terms of court pursuant to indictment numbers: 2007-GS-26-3362 (murder), 2008-GS-26-4118 (possession of a firearm during the commission of a violent crime) and 2008-GS-26-4119 (armed robbery). (App. 760-65). On March 9, 2009, both Niles and Hammond's cases were called to trial before the Honorable Benjamin H. Culbertson. (App. 1). Niles was represented by Verdell Barr. (App. 1). Four days later, Niles was convicted of murder, armed robbery and possession of a firearm during the commission of a violent crime. (App. 726). He received a thirty (30) year sentence for both the murder and armed robbery charges, in addition to a five (5) year sentence for the weapons charge, all to be served concurrently. (App. 749).

On appeal, Niles, represented by Robert M. Dudek of the South Carolina Commission on Indigent Defense and Reid T. Sherard, of Nelson, Mullins, Riley and Scarborough, L.L.P. sought appellate review of his murder conviction arguing the trial court erred in failing to instruct the jury on voluntary manslaughter. Following oral argument, the Court of Appeals, on September 12, 2012, issued a published opinion reversing and remanding Niles' murder conviction. The State then timely filed a petition for rehearing and Niles filed a response in opposition. Thereafter, the Court of Appeals withdrew, substituted and refiled its previous opinion on November 14, 2012. (App. 790-97). This Court granted the State's petition for writ of certiorari on February 6, 2014.

STATEMENT OF THE FACTS

The Killing of James Salter

On April 9, 2007, Ervin Moore was sitting outside the Trio Mini-mart in Trio, South Carolina, when he ran into drug dealer Richard Niles and his fiancé Mokeia Hammond. (App. 379-80). Following a brief conversation, Moore learned that Hammond and Niles were headed to Myrtle Beach. (App. 379-80). When Niles asked Moore if he wanted "to ride" Moore jumped at the chance. (App. 379). Shortly thereafter, Hammond drove the trio to Myrtle Beach in Niles' car, a black Ford Fusion.[3] (App. 379).

On the drive to the beach, Niles made several phone calls and the threesome began "smoking blunts." (App. 379). Upon their arrival, the group continued to smoke with Hammond occasionally dropping Niles off at various hotels to conduct drug sales. (App. 379). Eventually the group ran out of marijuana. (App. 379-80). Looking to get more marijuana, Niles called James Salter, a fellow drug dealer, and arranged a meeting in a nearby Best Buy parking lot. (App. 380). While the testimony differs as to how events unfolded in the time immediately leading up to the shooting, the evidence clearly shows Salter was shot and killed by Niles. (App. 387, 554-55, 519-20).

Immediately following the incident Salter attempted to flee the scene, but after exiting the parking lot, crashed his car on a nearby side street. (App. 156). Officers Ryan Wood and Keith Deverell, who were responding to the shooting, came across Salter's recently crashed car and attempted to give aid. (App. 141-42). While Officers Wood and Deverell were assisting Salter, he explained that he was shot by "two black dudes." (App. 142). Salter died as a result of the gunshot wound he received in the shooting. (App. 519-20).

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[3] While the car was actually a rental car rented to Niles' mother, Martha, the State, for purposes of convenience, will refer to the car as Niles' car. Furthermore, while there is a discrepancy in the record as to whether the car is gray, dark gray or black, there is no question that the car involved in the incident was the car rented to Martha Niles.

At the scene of the crime, police collected a spent bullet. (App. 244-45). Police also searched Salter's car and collected the following: (1) swabs of blood; (2) clothing; (3) a .40 caliber Smith and Wesson handgun; (4) bullet casings; (5) two cell phones; and (6) a backpack full of money. (App. 248, 247-57).

The next day, police discovered Niles' car at a nearby trailer park. (App. 220-23, 339). After identifying the car, authorities towed the car to the police annex to be searched and inventoried. (App. 237-38). The results of the search yielded the following items: (1) shell casings and bullets (App. 348-50); (2) a red plastic cup (App. 346); (3) cigarette filters (App. 347-48); (4) glass fragments (App. 341); and (5) blood samples (App. 343-44).

On April 13, 2007, Investigator Willie Brown of the Williamsburg County Sherriff's office along with investigators from the Myrtle Beach Police Department executed a search warrant at the home of Martha Niles, Richard Niles' mother. (App. 459-60). The results of the search yielded additional shell casings, a room key, a digital scale, baggies with marijuana seeds, a rental car receipt for a black Ford Fusion, and seven-hundred ($700) dollars in cash. (App. 464).

The Charges

Following the conclusion of the investigation Niles, Hammond and Moore were charged with armed robbery, murder and possession of a firearm during the commission of a violent crime. (App. 751-59). The day before his trial was scheduled to begin, Moore entered into a plea agreement whereby the State would allow him to plead to armed robbery, voluntary manslaughter and possession of a firearm during the commission of a violent crime in exchange for his testimony against both Niles and Hammond. (App. 376).

The Trial

At trial, the State painted the picture that Niles and Hammond, who were tried jointly, acted as a modern-day Bonnie and Clyde, with Hammond as the getaway driver and Niles as the robber. (App. 108). In support of this theory, the State called their confederate, Ervin Moore. (App. 376). In particular, Moore explained that Niles, shortly before the robbery, announced to the trio, "we're going to do a lick"[4] which Moore understood to mean, "we're going to commit a robbery." (App. 381). Getting into the specifics of the plan, Moore testified he was supposed to make sure the marijuana was in the car, at which point Niles would get out of the car and demand the money from Salter. (App. 381-83). Hammond would serve as the getaway driver. (App. 381-83).

In his testimony, Moore described the incident in detail, stating that upon Salter's entering the parking lot and pulling beside Niles' vehicle, he got out of the car to identify the marijuana. (App. 382). Moore explained that after identifying the marijuana and passing Niles on his return to the car, he watched as Niles stood alongside Salter's car. (App. 383, 384). Continuing, Moore said he observed Niles leaning into Salter's window when he heard two shots, after which, Niles, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (App. 384-85, 387, 388, 391). Moore testified Salter returned fire, and Niles fired back. (App. 385). During the exchange of gunfire, Moore explained that Niles shot Salter. (App. 387-88). Moore then stated that the trio fled the Best Buy parking lot in Niles' car, retreating to a nearby trailer park.[5] (App. 386). There, Niles reportedly called his mother and asked her to report the car stolen. (App. 386). According to Moore, Niles hid the stolen

[4] According to Urban Dictionary, a lick is defined as: "any instance when you come upon easy money, whether you jack it, hustle it, or barter for it." See www.urbandictionary.com entry entitled "lick." Alternate definitions include "stealing from someone." See www.urbandictionary.com entry entitled "lick" definition number three.

[5] Moore testified that on the way to the trailer park, Niles admitted he fired the initial shots. (App. 387-88).

marijuana and gun before getting a cab to an area hotel. (App. 386, 390). Hammond accompanied Niles, leaving Moore behind. (App. 390).

Corroborating Moore's testimony regarding the aftermath of the incident, the State presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Niles' description run from a white car and jump into the rear driver's side door of a dark car. (App. 212, 213). The dark car then sped out of the parking lot. (App. 212, 213). Watts further noted the driver of the getaway car was a female. (App. 214). Angie Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (App. 182-83, 191). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Niles. Specifically, Niles' fingerprints were found on top of Salter's car. (App. 313). Additionally, DNA evidence taken from the driver's seat of Niles' car was consistent with that of Hammond to a probability of one in one quadrillion. (App. 511-12).

Meanwhile, Niles, testifying in his own defense, disputed Moore's version of the incident explaining there was no agreement between anyone to do "a lick." (App. 546). Instead, Niles explained, he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (App. 543-44).

Describing the incident, Niles stated that upon Salter's arrival at the scene, Moore emerged from the car and got into Salter's white Mustang, presumably in an effort to purchase the marijuana. (App. 553, 572). At that time, Hammond, who was seated next to Niles, allegedly informed him that Moore and Salter were fighting. (App. 553). Niles then testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which

Salter allegedly reached for his gun and fired at the car. (App. 554). Continuing, Niles explained that he reached in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because "he was trying to get him to stop shooting." (App. 554, 555). After the incident, Niles admitted to leaving the car in a nearby trailer park.[6] (App. 556-57).

The Request to Charge

Following the close of evidence, Niles asked the trial court to charge, in addition to self-defense, the lesser-included offense of voluntary manslaughter arguing, the gunshots could serve as sufficient legal provocation and "the jury could infer that . . . the situation got out of hand and [the crime] was committed in the heat of passion. (App. 622). Outside of this general argument, defense counsel never specifically identified the evidence supporting a theory that Niles was acting in the sudden heat of passion. The trial court denied Niles' request, finding the evidence showed that either Salter began firing and Niles was acting in self-defense, or Niles started shooting during the course of an armed robbery, which the trial judge implied, would result in his being guilty of murder. (App. 623).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The evidence presented at trial determines the law from which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). The trial court's decision regarding jury charges will not be reversed where the charges as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). However, the trial court commits reversible error

[6] On cross-examination, Niles admitted, that to his knowledge, Moore did not have a gun. (App. 594).

if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

ARGUMENT

I. The Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in the sudden heat of passion

On appeal, Niles maintained the trial court erred in failing to charge the jury on voluntary manslaughter arguing his testimony that Salter shot first, at which point he returned fire, was evidence of sufficient legal provocation and sudden heat of passion since self-defense and voluntary manslaughter are not mutually exclusive. In response, the State, while agreeing that self-defense and voluntary manslaughter are not mutually exclusive, disagreed with the proposition that the trial court should have charged voluntary manslaughter on the facts of this case arguing *inter alia* that Niles' testimony failed to establish he was acting in the sudden heat of passion when he shot and killed Salter.

In its opinion, the Court of Appeals, after explaining Niles established sufficient legal provocation based upon his testimony that Salter fired first, further found Niles established sudden heat of passion based upon the following testimony:

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

(App. 796) (emphasis added). Continuing, the panel stated "Niles' testimony that grabbing the gun and returning fire was the 'first thing that came to . . . [his] mind' supports that he was acting on impulse upon being shot at by Salter." (App. 796).

Quite simply, the State disagrees with the Court of Appeals' conclusion that Niles' testimony provided evidence he was acting in the sudden heat of passion when he shot and killed Salter. Furthermore, while voluntary manslaughter and self-defense are not mutually exclusive, the opposite is also true as voluntary manslaughter is not a lesser-included offense of self-defense. E.g. State v. Starnes, 388 S.C. 590, 599-600, 698 S.E.2d 604, 609 (2011) (explaining fear alone did not entitle an accused to a charge on voluntary manslaughter since it would render voluntary manslaughter a lesser-included offense of self-defense). Perhaps most notably, the legal analysis for an instruction on each doctrine requires proof of different elements with remarkably different *mens rea* which, if proved, results in completely different consequences for the accused.[7] Keeping this in mind, the State submits that if the Court of Appeals ruling on this issue is not revisited it "would impermissibly blend the elements of voluntary manslaughter and self-defense" which in turn, "would render voluntary manslaughter a lesser-included offense of self-defense[.]" Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609.

A. Voluntary Manslaughter

In State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) this Court explained, "[v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." 338 S.C. at 101, 525 S.E.2d at 513. Thus, "[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing" to reduce murder to voluntary manslaughter. Id. Additionally, "[p]rovocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819

[7] Furthermore, while other jurisdictions have essentially combined self-defense and voluntary manslaughter to allow a jury to find, under a theory of "imperfect self-defense" that a failure to prove each of the elements of self-defense could still yield a verdict of voluntary manslaughter, this is not the law in South Carolina. See State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) (declining to adopt the theory of imperfect self-defense).

(2001). Further, to mitigate murder to manslaughter, the sudden heat of passion "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. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996).

B. The Relationship Between Self-Defense and Voluntary Manslaughter

In cases where both self-defense and voluntary manslaughter jury instructions may be involved, courts must review the facts to see if a charge on both is warranted. State v. Gilliam, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988). This was noted in State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), where Wiggins, the appellant, was convicted of voluntary manslaughter and on appeal argued the trial court erred in charging voluntary manslaughter because of his claim of self-defense. Rejecting Wiggins' argument and affirming the trial court's decision to charge both voluntary manslaughter and self-defense, this Court said, "it is well settled that self-defense and voluntary manslaughter are not mutually exclusive and both issues should be submitted to the jury *if supported by the evidence*." 330 S.C. at 549 n.18, 500 S.E.2d at 495 n.18 (emphasis added).

As mentioned above, the State completely agrees with this legal proposition but submits the evidence in this case—Niles' testimony regarding his intent in firing the weapon—cannot simultaneously serve as evidence of both self-defense and sudden heat of passion. For example, the evidence of sudden heat of passion in Wiggins came from the victim's sister who testified that she and the victim were in a heated argument with Wiggins when Wiggins threatened to "kick both [the victim and his sister's] asses." Wiggins, 330 S.C. 538 at 542, 500 S.E.2d at 491. The victim's sister recounted that immediately after stating this Wiggins shot the victim, who

although armed, did not reach for his gun until he was shot. Id. In contrast, the evidence supporting self-defense in Wiggins came in the form of Wiggins' testimony that the victim had cocked and pointed a gun at him as he was attempting to escort the victim off of the premises of his business following an argument, which Wiggins claimed, caused him to shoot the victim. 330 S.C. at 543-44, 500 S.E.2d at 492.

In other words, the rule from Wiggins is not that an individual's testimony regarding his intent can simultaneously serve as evidence of both sudden heat of passion and self-defense. Rather, Wiggins, like Gilliam, merely reiterated what the law already was—that in order to charge the jury on a lesser-included offense, or an affirmative defense, there must be evidence in the record supporting the charge. Nevertheless, the appellate panel here erroneously used Niles' testimony as evidence of both sudden heat of passion and as evidence he was acting in self-defense.

C. Niles' Testimony that he Shot the Gun is not Evidence of Intent

Initially, the State notes the Court of Appeals incorrectly characterized Niles' testimony when it found that grabbing the gun and returning fire was "the first thing that came to . . . [his] mind" after Salter fired at the car. (App. 796). Specifically, Niles, when asked whether he or Salter fired first, said that Salter fired first. (App. 554). He then testified as follows:

> That's when my fiancé she started screaming. She ducked in my lap. She was screaming. So, while he was shooting in the car, yes, I did had a gun. So, I grabbed my, I grabbed my pistol and that's when I shot two times. I went pow, pow. I wasn't trying to hit nobody.

(App. 554). Defense counsel again asked Niles *what* happened immediately after the gunshots, to which Niles responded:

> I was leaning back in the car and I shot two times . . . I was just trying to get him to stop shooting. That's all I was trying to do. *I didn't know [if] my fiancé got shot or nothing. That's the first thing that came into my head, you know.*

(App. 555) (emphasis added). While it is true that the first *action* Niles carried out after the shooting was to return fire, his testimony very clearly established "the first *thing* that came into [his] head" was whether his "fiancé got shot[.]" (App. 555). In other words, while Niles' *actions* show he retaliated, an action which is ambiguous as to criminal intent, his first *thought* after he and his fiancé were shot at clearly reflected concern for his fiancé's welfare. (App. 555). Thus, the State submits Niles' actions of grabbing the gun and returning fire is not evidence of sudden heat of passion, nor is it evidence of self-defense. Instead, the only evidence in the record regarding Niles' intent is his testimony that he shot at Salter because he was scared for his fiance's welfare. The State submits this testimony does not establish that Niles was acting in the sudden heat of passion.

D. Niles' Testimony Regarding his Intent in Firing the Weapon Cannot Serve as Evidence of Sudden Heat of Passion where the Testimony Fails to show that he was acting with Criminal Intent

Understanding Niles' testimony established "the first thing" that came into his mind after Salter allegedly shot at his car was fear for his fiancé, Hammond's safety, *after which* he closed his eyes and without looking, fired two shots in an effort to get Salter to "stop shooting," the testimony fails to show Niles was acting with an uncontrollable impulse to do violence to Salter. Specifically, the State first notes Niles' testimony that he feared for Hammond's safety cannot establish the appropriate *mens rea* for sudden heat of passion since fear, by itself, does not establish sudden heat of passion. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 ("[T]he mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge.") (emphasis in original). Furthermore, when combining sufficient legal provocation in this case—Niles' testimony that Salter shot first—with his testimony that after Salter allegedly fired the gun at the car he feared for Hammond's safety, the testimony still fails

to reveal whether Niles' was acting with criminal intent at the time he allegedly returned fire on Salter.

"Intent" is defined as "[d]esign, resolve, or determination with which the person acts" and a "state of mind in which a person seeks to accomplish a given result through a course of action." Black's Law Dictionary 810 (6th ed. 1990). "Criminal intent" is defined as "[t]he intent to commit a crime." Id. at 373; see also State v. Jefferies, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) (internal citations omitted) ("Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand.'"). Here, the fact that Niles was scared for his fiance's well-being does not reveal any sort of criminal intent. In fact, as noted by the Starnes Court, testimony regarding fear is often irrelevant to a determination of sudden heat of passion. In Starnes, this Court explained that "[a] person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear." 388 S.C. at 599, 698 S.E.2d at 609.

Furthermore, even adding Niles' testimony that he "grabbed his pistol . . . . [and] shot two times" with his testimony that Salter shot first which made him fear for Hammond's safety, Niles still fails to show he was acting with an uncontrollable impulse to do violence to Salter at the time he fired the gun. Specifically, Niles' testimony that he grabbed his pistol and shot twice, physical actions which, as mentioned above, fail to reveal any sort of intent, are coupled with Niles' testimony which show that at the time he fired the gun: (1) his eyes were closed; (2) he "wasn't even looking[;]" and (3) he, "wasn't trying to hit nobody" but was instead, "just trying to get [Salter] to stop shooting." (App. 569). Keeping this in mind, Niles' testimony simply does not establish the proper *mens rea* for voluntary manslaughter, which as a lesser

included offense of murder, "by definition requires *criminal intent* to do harm to another." State v. Childers, 373 S.C. 367, 375-76, 645 S.E.2d 233, 237-38 (2007) (Toal concurring) (emphasis added). Rather, Niles' testimony, consistent with Chief Justice Toal's description of the defendant's testimony in Childers, simply fails to establish any sort of criminal intent, instead establishing circumstances, which if believed, would justify the homicide as opposed to mitigating it.[8] In other words, even when viewing the evidence in the light most favorable to the accused, Niles' testimony does not establish a *mens rea* consistent with an uncontrollable impulse to do violence to the victim because, as noted above, he was not aiming at Salter and did not intend to shoot him, but instead said he merely wanted the shooting to stop because he feared for Hammond's safety when he fired the gun. (App. 569). In light of this testimony, Niles cannot establish the criminal intent required for a finding of sudden heat of passion and therefore, the State asks this Court to reverse the opinion from the Court of Appeals and affirm Niles' murder conviction and sentence.

E. Regardless of Whether Niles was Entitled to an Instruction on Voluntary Manslaughter the Failure to Charge the Jury on Voluntary Manslaughter was not Prejudicial Error

The State further questions the Court of Appeals finding that the trial court's purported failure to charge voluntary manslaughter was reversible error. See Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002) (explaining that in order to warrant reversal, the trial court's refusal to give a requested instruction must be both erroneous and prejudicial). While the Court of Appeals determined the jury may have reached a different verdict had it been

[8] Indeed, this distinction is the clear difference between voluntary manslaughter and self-defense. See Starnes, 388 S.C. at 598-99, 698 S.E.2d at 609 ("Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter-it will not justify it. This is the distinction between voluntary manslaughter and self-defense.").

charged on voluntary manslaughter, this is clearly at odds with what the jury actually found in this case.

In Arizona v. Fulminante, 499 U.S. 279, 307 (1991) the Supreme Court of United States, citing to Hopper v. Evans, 456 U.S. 605 (1982) found that the failure to give a jury instruction on a lesser included offense squarely fit into the category of Constitutional violations termed by the Court as "trial error." 499 U.S. at 307. Trial error "occur[s] during the presentation of the case to the jury," and is subject to harmless-error analysis because it "may .... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." Fulminante, 499 U.S. at 307-308. Accordingly, on direct review, a trial court's failure to charge a lesser included offense is subject to the harmless error standard first laid out in Champan v. California, 386 U.S. 18 (1967) that the error in question must be "harmless beyond a reasonable doubt." Brecht, 507 U.S. at 630.

Moreover, this Court has agreed with the Supreme Court's conclusion that a failure to charge a jury on a lesser included offense is subject to a harmless error analysis. See State v. Middleton, 2014 WL 766294 (Feb. 26, 2014) ("When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."); State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis.").

Here, the State submits that regardless of whether the trial court erred in failing to charge the jury on voluntary manslaughter, any error was clearly harmless and as such, cannot be prejudicial based on the facts before the Court. Specifically, because the jury was presented with two different versions of how the shooting transpired, only one of which incriminated Niles, it is

clear beyond a reasonable doubt that the jury, by convicting both Hammond and Niles of armed robbery, would have convicted Niles of murder regardless of whether Niles had receive a jury instruction on voluntary manslaughter.

1. The State's Version of the Shooting

In particular, Moore, Hammond and Niles' confederate, explained that Niles, shortly before the robbery, announced to the trio, "we're going to do a lick" which Moore understood to mean, "we're going to commit a robbery." (App. 381). Getting into the specifics of the plan, Moore testified he was supposed to make sure the marijuana was in the car, at which point Niles would get out of the car and demand the money from Salter. (App. 381-83). Hammond would serve as the getaway driver. (App. 381-83).

In his testimony, Moore described the incident in detail, stating that upon Salter's entering the parking lot and pulling beside Niles' vehicle, he got out of the car to identify the marijuana. (App. 382). Moore explained that after identifying the marijuana and passing Niles on his return to the car, he watched as Niles stood alongside Salter's car. (App. 383, 384). Continuing, Moore said he observed Niles leaning into Salter's window when he heard two shots, after which, Niles, with the marijuana and a .357 in hand, dove into the backseat behind Hammond. (App. 384-85, 387, 388, 391). Moore testified Salter returned fire, and Niles fired back. (App. 385). During the exchange of gunfire, Moore explained that Niles shot Salter. (App. 387-88). Moore then stated that the trio fled the Best Buy parking lot in Niles' car, retreating to a nearby trailer park. (App. 386). There, Niles reportedly called his mother and asked her to report the car stolen. (App. 386). According to Moore, Niles hid the stolen marijuana and gun before getting a cab to an area hotel. (App. 386, 390). Hammond accompanied Niles, leaving Moore behind. (App. 390).

Corroborating Moore's testimony regarding the incident, the State presented eyewitness testimony from Angie Hooper and Harold Watts. Watts, a passerby in an adjacent parking lot, stated he heard gunfire and saw a heavy-set black male matching Niles' description run from a white car and jump into the rear driver's side door of a dark car. (App. 212, 213). The dark car then sped out of the parking lot. (App. 212, 213). Watts further noted the driver of the getaway car was a female. (App. 214). Angie Hooper, whose minivan was hit by a stray bullet, echoed Watt's testimony but instead described the female driver simply as a "dark figure." (App. 182-83, 191). The State further corroborated Moore, Hooper and Watts' testimony through forensic evidence taken from the cars of Salter and Niles. Specifically, Niles' fingerprints were found on top of Salter's car. (App. 313). Additionally, DNA evidence taken from the driver's seat of Niles' car was consistent with that of Hammond to a probability of one in one quadrillion. (App. 511-12).

2. Niles' Version of the Shooting

In contrast, Niles, testifying in his own defense, disputed Moore's version of the incident explaining there was no agreement between anyone to do "a lick." (App. 546). Instead, Niles explained, he was simply trying to connect Moore, whom he claimed was looking to buy marijuana, with Salter, who was looking to sell marijuana. (App. 543-44).

Describing the incident, Niles stated that upon Salter's arrival at the scene, Moore emerged from the car and got into Salter's white Mustang, presumably in an effort to purchase the marijuana. (App. 553, 572). At that time, Hammond, who was seated next to Niles, allegedly informed him that Moore and Salter were fighting. (App. 553). Niles then testified to hearing Salter yell, "[y]ou ain't getting out this car with my weed without no money" after which Salter allegedly reached for his gun and fired at the car. (App. 554). Continuing, Niles

explained that he reached in his bag, which he often kept open with his gun exposed, and fired two shots at Salter, because "he was trying to get him to stop shooting." (App. 554, 555). After the incident, Niles admitted to leaving the car in a nearby trailer park. (App. 556-57). On cross-examination Niles said Moore did not have a gun. (App. 594).

3. Regardless of Whether there was Error, any Error was Harmless and Therefore, Cannot be Prejudicial

At its' core, this case as it relates to murder, is simply a question of intent. There is no question that Richard Niles shot and killed James Salter. The only question is, if one were to assume that the jury was instructed on voluntary manslaughter, can this Court find, beyond a reasonable doubt, that the jury would have still convicted Niles of murder. The State believes that it can.

In this case, the jury's task, as it relates to the murder charge, was to review the evidence and determine whether Niles was acting with criminal intent when he shot and killed Salter. As summarized above in Sections I(E)(1) and I(E)(2), the evidence yielded one of two conclusions—either Niles shot Salter during the course of a robbery or Niles shot Salter after Salter shot at Niles' vehicle. Indeed, it is clear the only evidence in the record, and the judge's charge itself, required the jury to answer whether it believed Moore's testimony; that the trio of himself Niles and Hammond agreed to rob Salter; or Niles' testimony, that there was no agreement to rob Salter. Here, the jury, by finding Hammond guilty of armed robbery, clearly determined there was an agreement amongst the group to commit an armed robbery. (App. 702) ("The only limitations on your verdict regarding [Hammond] is that you cannot find [her] guilty of any crime unless you likewise find [Niles] guilty of that same crime."). This is obviously the reason Niles was also convicted of armed robbery. Moreover, because the only evidence at trial indicated Hammond was the getaway driver, Hammond's conviction was clearly based on the

concept that the hand of one is the hand of all, meaning the jury believed Moore's "hit a lick" testimony which of course at least evidenced an implicit agreement.

Understanding that the jury determined there was an agreement to commit an armed robbery, there is simply no likelihood that had the jury received a charge on voluntary manslaughter it would have even entertained such a verdict for Niles. Indeed, the law as charged to the jury, allowed the jury to infer malice from the mere fact that Salter was killed during the commission of an armed robbery meaning the jury was not even required to consider whether Niles acted with malice, but instead could have inferred as much. (App. 694) ("If one intentionally kills another during the commission of a felony the inference of malice may arise."). Moreover, the only arguable evidence of sudden heat of passion—Niles' testimony that Salter fired first and fired back—could not be believed by the jury in light of their implicit finding that there was an agreement to commit an armed robbery. Thus, because, as mentioned in the instructions, the jury had to base its' verdict on the evidence, and the evidence showed, beyond a reasonable doubt, that Hammond and Niles committed an armed robbery, the jury's decision to convict Niles means it did not believe Niles' self-serving testimony as to his intent in firing the weapon. Accordingly, the State submits that even if the jury had received a charge on voluntary manslaughter, the evidence shows, beyond a reasonable doubt, that Niles was guilty of murder.

CONCLUSION

In light of the aforementioned arguments, the State respectfully asks this Court to reverse the judgment of the Court of Appeals' and affirm Niles' murder conviction and sentence.

Respectfully Submitted,

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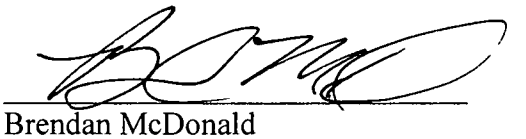

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March 10, 2014.

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5034 (S.C. Ct. App. filed September 12, 2012, refiled November 14, 2012)

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

Appellate Case No. 2012-213592

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon:

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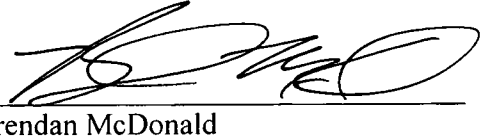
On this 10th day of March 2014.



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