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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

Roger L. Couch, Circuit Court Judge

Case No. 2010-GS-11-00607

The State of South Carolina,... Respondent,

v.

Hayword Tony Chambers,.. Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

1. The trial court abused its discretion by applying a preponderance of the evidence standard rather than a clear and convincing evidence standard for admission of testimony of an alleged "prior bad act" by Appellant as evidence of a common scheme or plan under Rule 404, SCRE and *State v. Lyle* and its progeny.

2. The trial court abused its discretion by admitting evidence of an alleged "prior bad act" by Appellant without considering whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

3. The trial court abused its discretion by admitting witness testimony constituting extrinsic evidence of an alleged specific instance of conduct to attack Appellant's credibility, in violation of Rule 608, SCRE.

4. The trial court abused its discretion by charging the jury on voluntary manslaughter when Appellant was not indicted for voluntary manslaughter or any other offense requiring the same proof as voluntary manslaughter.

STATEMENT OF THE CASE

A Cherokee County Grand Jury indicted Appellant on August 5, 2010, on the charge of murder under S.C. Code Ann. §§ 16-3-10 and -20. (ROA_002-03 - Indictment and True Bill.) The case was originally called for trial on November 15, 2011, but the trial was continued. The case was again called for trial on December 4, 2012, before the Honorable Roger L. Couch and a jury. (ROA_005 - Tr. p. 1.) Kimberly Leskanic, Esquire and Matt Kendall, Esquire were the Assistant Solicitors for the State. (*Id.*) Mitch Slade, Esquire represented Appellant. (*Id.*)

At trial, it was undisputed that Appellant intentionally discharged a firearm during a physical altercation with Calvin Todd Morgan ("Morgan"), that the bullet struck Morgan in the head, and that Morgan died the following day. (ROA_035-36, 079-80, 428 - Tr. pp. 229, 232, 286-87, 688.) Appellant asserted self defense in response to the charge against him. (ROA_030-31, 034 - Tr. pp. 209-10, 213.)

Before the jury was sworn, Appellant's counsel made a motion *in limine* to prohibit a jury instruction on manslaughter on the basis that the indictment was insufficient to support a manslaughter charge because the elements required to prove manslaughter were not included in the indictment. (ROA_017-022 - Tr. pp. 174-79.) The trial court reserved ruling on this motion. (ROA_022 - Tr. p. 179.)

The State presented testimony of twelve witnesses in its case in chief. The defense presented testimony of five witnesses in its case in chief, including Appellant.

After the defense rested, the State identified for the first time a new witness, Brad Douglas, and notified the court and Appellant's counsel it intended to call Douglas in rebuttal to testify regarding an alleged prior incident between himself and Appellant.

(ROA_500-502 - Tr. 760-62.) Appellant objected to Douglas's testimony on the bases that: (1) it was improper impeachment, (2) it was inadmissible character evidence, and (3) its probative value was substantially outweighed by the danger of unfair prejudice. (ROA_500-502, 567 - Tr. 760-62, 827.) The State argued Douglas's testimony should be admitted under Rule 404(a)(1), SCRE, to rebut character evidence introduced by Appellant, and under Rule 404(b), SCRE, as evidence of a common scheme or plan. (ROA_556-557 - Tr. pp. 816-17.) The court requested written briefs from both parties on the admissibility of Douglas's testimony, and both parties submitted written briefs the following morning, which became part of the record. (ROA_504 - Tr. p. 764, ROA_751-56 - State's Memo in Support; ROA_749-50 - Appellant's Memo in Opposition.) The State proffered Douglas's testimony and another witness's testimony outside the presence of the jury. (ROA_527-552 - Tr. pp. 787-812.) The State then argued it was not offering Douglas's testimony as impeachment of Appellant, but as character evidence under Rule 404(a) and to show a common scheme or plan and intent under Rule 404(b), SCRE. (ROA_556-557 - Tr. pp. 816-17.) After hearing the proffered witnesses and argument from counsel on both sides, the court found Douglas's testimony was admissible under Rule 404(a) and 404(b), SCRE. (ROA_580-581 - Tr. pp. 840-41.) In announcing its ruling on admissibility, the court did not address whether the probative value of Douglas's testimony was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. (ROA_578-582 - Tr. pp. 838-41.) The court overruled Appellant's objection and allowed the State to present Douglas's testimony to the jury. (ROA_580-581 - Tr. pp. 840-41.)

After the close of evidence, and before the court charged the jury, Appellant's counsel objected to a jury instruction on manslaughter on the basis that the State had not introduced evidence that the shooting occurred in the sudden heat of passion while under sufficient legal provocation. (ROA_634, 637 - Tr. pp. 895, 898.) Appellant's counsel also renewed his pre-trial objection to a manslaughter instruction on the basis that the indictment was insufficient to support a manslaughter charge because the required proof for manslaughter was not stated in the indictment. (ROA_637 - Tr. p. 898.) The court overruled both objections. (ROA_638 - Tr. p. 899.)

The court instructed the jury on the statutory elements of murder under S.C. Code Ann. § 16-3-10 and on the common law elements of self defense. (ROA_701-702, 704-708 - Tr. pp. 962-63, 965-69.) Over Appellant's objections, the court also instructed the jury on the common law requirements of voluntary manslaughter. (ROA_702-704 - Tr. pp. 963-65.)

The court submitted the case to the jury on December 7, 2012. (ROA_713-715 - Tr. pp. 974-76.) After deliberation, the jury submitted a written question to the court, requesting copies of the statutes for murder, manslaughter, and self defense. (ROA_716 - Tr. p. 977.) The court then repeated its jury charges on murder, manslaughter, and self defense. (ROA_716-724 - Tr. pp. 977-85.) The jury returned to deliberation and reached a verdict the same day of "not guilty" as to murder and "guilty" as to manslaughter. (ROA_726 - Tr. p. 987.) The court sentenced Appellant on December 7, 2012, under the voluntary manslaughter statute, S.C. Code Ann. § 16-3-50, to fifteen years imprisonment, with credit for time already served. (ROA_740-741 - Tr. pp. 1001-02; ROA_758 - Sentencing Sheet.)

Thereafter, Appellant filed his timely Notice of Appeal on December 10, 2012, and simultaneously served the Notice of Appeal on the State by U.S. Mail.

STATEMENT OF THE FACTS

The Incident

Appellant had a physical altercation with Calvin Todd Morgan ("Morgan") in the early morning hours of November 28, 2009. (ROA_038-039, 418-428 - Tr. pp. 242-43, 678-88.) Appellant fired one shot from a .380 caliber semi-automatic handgun during the altercation. (ROA_120-122, p. 333-35.) The bullet struck Morgan in the head. (ROA_045 - Tr. p. 249.) Morgan was semi-conscious when emergency response personnel arrived, and he died the following day. (ROA_044-045 - Tr. pp. 248-49.)

Conflicting testimony was presented as to who initiated the altercation. Appellant testified Morgan initiated the altercation. (ROA_418-424 - Tr. pp. 678-84.) Michelle Davis, who ran from the room seconds before the shot was fired, testified consistently with Appellant. (ROA_351-353 - Tr. pp. 610-12.) They both explained that Morgan and his girlfriend were having an argument over drugs, the girlfriend called out to Appellant not to leave because Morgan was going to beat her, then Morgan began using profanity with Appellant and started toward him to fight. (ROA_351-353, 418-424 - Tr. pp. 610-12, 678-84.) On the other hand, Morgan's girlfriend testified Appellant initiated the altercation by inserting himself into an ongoing argument between herself and Morgan over drugs. (ROA_158-159 - Tr. pp. 377-78.) She did not know what Appellant allegedly said to Morgan to start the fight, and she did not identify any reason that allegedly prompted Appellant to get involved. (*Id.*)

The incident occurred at approximately 3:00 a.m. inside a residence known as the "white house," where Morgan's girlfriend lived. (ROA_052, 066, 151-152, 201, 210, 227, 251, 258, 318, 404 - Tr. pp. 256, 270, 370-71, 420, 429, 446, 470, 477, 575, 664.) Appellant had never been to this residence, and he had never met Morgan. (ROA_176, 404, 406 - Tr. pp. 395, 664, 666.) Appellant was there because he gave Morgan's girlfriend a ride across town to replenish her supply of crack cocaine, brought her back to the house, and came inside to collect payment for giving her a ride. (ROA_157-185, 345-346 - Tr. pp. 376-77, 604-05.) When the fight began and the shooting occurred, Appellant was waiting to be paid. (ROA_163, 350, 417, 419 - Tr. pp. 381, 609, 677, 679.) Multiple witnesses were present, although none of them were in the room at the moment of the shooting. (ROA_167, 208, 333, 367-368 - Tr. pp. 386, 427, 590, 626-27.)

Appellant was carrying the firearm lawfully with a South Carolina Concealed Weapons Permit. (ROA_400 - Tr. p. 660.) He admitted he discharged the firearm intentionally. (ROA_428 - Tr. p. 688.) Appellant testified that when Morgan began coming at him across the room, he drew his gun. (ROA_422-423 - Tr. pp. 682-83.) Morgan then advanced on a drawn gun, (*id.*), and Appellant testified:

> A. -- I felt that he was overpowering me and I pulled the trigger to get him off. I had no idea where the gun was pointed at the time. It didn't matter. I just wanted him to get off me.
>
> Q. Were you trying to aim at any part of his body?
>
> A. Not at all, no.
>
> Q. Just anywhere?
>
> A. I just wanted the gun to go off and maybe he would get off me.

(ROA_428 - Tr. p. 688.) Appellant then ran from the house and went to a cousin's house. (ROA_429 - Tr. p. 689.) He left his car at the cousin's house and returned home. (ROA_430 - Tr. p. 690.)

Arrest and Indictment

Law enforcement officers arrested Appellant later that morning, prior to Morgan's death, and charged him with assault and battery with intent to kill. (ROA_079 - Tr. p. 286.) After Morgan's death, the charge against Appellant was upgraded to murder. (ROA_079-080 - Tr. pp. 286-87, ROA_004 - Warrant.) The grand jury subsequently issued an indictment for murder. (ROA_002-03 - Indictment and True Bill.) The indictment stated:

> That Hayword Tony Chambers, did in Cherokee County between November 28, 2009 and November 29, 2009, feloniously, willfully, and with malice aforethought, kill one Calvin Todd Morgan by shooting the victim, and that the victim died as a proximate result thereof, all in violation of § 16-3-0010, 0020, *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

(*Id.*)

Appellant was not indicted for manslaughter or for any offense involving the unlawful killing of another in the sudden heat of passion after sufficient legal provocation.

Evidence of "Prior Bad Act" at Trial

In its rebuttal case (after the defense rested its case in chief), the State was allowed to introduce testimony of Brad Douglas, over Appellant's objection, regarding an alleged prior incident between himself and Appellant. (ROA_500-502 - Tr. pp. at 760-62.) Douglas testified he knew Appellant "[f]rom the streets" for two to three years.

(ROA_527-528 - Tr. pp. 787-88.) He agreed to pay Appellant for a ride in Appellant's car. (ROA_529 - Tr. p. 789.) During the ride, Appellant allegedly told Douglas he wanted payment in drugs rather than in cash. (ROA_531 - Tr. p. 791.) Douglas testified he did not have any drugs, so he asked to be let out of the car before reaching his destination. (*Id.*) He exited the car and began to walk away, then Appellant allegedly called him back. (*Id.*) Appellant allegedly pointed a chrome handgun at Douglas then hit him on the head with the gun. (ROA_532 - Tr. p. 792.) Douglas did not claim that any shots were fired or that there were any witnesses to the alleged incident. (*Id.*) Douglas testified that he ran, and Appellant chased him on foot. (ROA_533 - Tr. p. 793.) Some people then picked Douglas up and took him to the police station, where he reported the incident. (*Id.*) Douglas did not follow up with the police regarding the incident after it occurred, nor did he have any subsequent incidents with Appellant. (*Id.*)

The Gaffney Police Department issued an Incident Report regarding the Douglas incident, which was introduced into the record at trial as State's Exhibit 32.[1] (ROA_543 - Tr. p. 803; ROA_757 - Incident Report.) Inconsistent with Douglas's testimony, the Incident Report stated:

> On the above date and times [February 12, 2009, 10:28 p.m.], c/v states that he was riding in a burg. station wagon on W Floyd Baker. C/v states the sub then told the c/v to get out of the sub vehicle. C/v states that after he got out of the vehicle the sub then got out of the vehicle and pulled out a small handgun. C/v states that the sub then struck the c/v in the side of the face w/ the small handgun. C/v states that he then left the scene and went to the CCDC for help. R/o was called out to bingo where officer B. Green states that the sub stated to B. Green that the sub was giving c/v a ride. Sub states that the c/v was going to pay the sub for

[1] The Incident Report (State's Exhibit 32) was introduced for purposes of the evidentiary hearing only. It was not published to the jury.

> the ride. Sub stated to Green that the c/v jump out of the car and was not going to pay the c/v. Sub stated to Green a fight took place and sub went back to the sub vehicle and left the scene.

(ROA_757 - Incident Report.)

The State also proffered testimony outside the presence of the jury of police officer Jeff Sizemore, who created the Incident Report. (ROA_538-552 - Tr. pp. 798-812.) Sizemore did not recall the Douglas incident, (ROA_538 - Tr. p. 798), so he testified from the written Incident Report, which included both information provided by Douglas and information obtained from Appellant on the date of the alleged Douglas incident. (ROA_539-541 - Tr. pp. 799-801.) He testified that, after police officers spoke with both Douglas and Appellant, no further action was taken by law enforcement. (ROA_543-545, 551 - Tr. pp. 803-05, 811.) He did not have Douglas fill out a victim statement form. (ROA_545 - Tr. p. 805.) One officer spoke with Appellant on the date of the alleged incident, but no one followed up with Appellant after that. (ROA_551 - Tr. p. 811.) No arrest was made. (*Id.*) On cross-examination, Sizemore testified the reason law enforcement did not follow up on Douglas's report was he did not believe a crime had been committed. (ROA_547 - Tr. p. 807.) However, on re-direct examination (still proffered outside the jury's presence), Sizemore changed his testimony and said he did believe a crime had taken place, but he did not know why law enforcement did not follow up. (*Id.*)

Appellant argued Douglas's testimony should be inadmissible because the evidence was not clear and convincing that the alleged prior bad act actually occurred the way Douglas claimed. (ROA_564 - Tr. p. 824.) Douglas's credibility was weak because of prior drug convictions. (ROA_563 - Tr. p. 823). There were notable inconsistencies

between Douglas's testimony and the Incident Report. There were also notable inconsistencies between the proffered account of the Douglas incident and the incident at issue in this case.

The court incorrectly interpreted the clear and convincing standard, stating: "the cases say, you know, again it has to be by clear and convincing evidence that it occurred. That's not proof beyond a reasonable doubt. That's not that far. *It's more of a preponderance.*" (ROA_575 - Tr. p. 835 (emphasis added).)

In addition, the court did not consider whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. (ROA_579-581 - Tr. pp. 839-41.)

Over Appellant's objection, the court allowed Douglas to testify in the State's rebuttal case. Officer Sizemore did not testify before the jury.

After claiming the Douglas incident was similar to this case to get it admitted into evidence, the State then took advantage of Douglas's testimony in its closing argument and argued the Douglas incident was *different* than this case. The Assistant Solicitor brought up Douglas multiple times in argument. She argued the Douglas incident was evidence that Appellant used his gun "[w]hen he was dealing with people on the street," which was "how he got his upper hand." (ROA_675 - Tr. p. 936.) She then argued to the jury *twice* that the Douglas incident was different. First:

> What did Todd Morgan do when he came towards him with the gun? He acted different from Brad Douglas. Todd Morgan was up against a couch in his room. The doorway is over there. And you know what's between Todd and the doorway? A man with a gun that he has never met before pointing it at him. And so he comes toward him with the gun, instead of reacting like that man thought he would,

> because that's the way the man had reacted a few months earlier.

(ROA_676 - Tr. p. 937.) The solicitor then argued:

> That's the difference. When he pulled this gun in February [2009], Brad Douglas put his hands up, because he's not going to mess with a man with a gun. Todd Morgan didn't. He reacted differently, and he had every right to. He's going to try to get that gun away from him, because a man is pointing a gun at him as he comes toward him, and then he made a decision to shoot him.

(*Id.*)

The court then submitted the case to the jury. Appellant was convicted of manslaughter because the trial court did not properly apply the law applicable to admissibility of "prior bad acts" and because the court charged the jury on manslaughter even though it was not part of Appellant's indictment.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The standard of review for the trial court's decision to admit evidence of "prior bad acts" by the defendant is abuse of discretion. *State v. Mathis*, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004). The standard of review for an error in jury instructions is also abuse of discretion. *State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013).

<u>ARGUMENT</u>

I. The trial court abused its discretion by applying a preponderance of the evidence standard rather than a clear and convincing evidence standard for admission of testimony of an alleged "prior bad act" by Appellant as evidence of a common scheme or plan under Rule 404, SCRE and *State v. Lyle* and its progeny.

The trial court improperly applied the law pertaining to admissibility of "prior bad acts" by a defendant.

A. <u>Evidence of a defendant's "prior bad acts" is not admissible to show conduct in conformity therewith.</u>

Generally, evidence of a defendant's "prior bad acts" is not admissible to prove propensity or conduct in conformity with the alleged prior acts. Rule 404, SCRE. Since *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923), South Carolina law has recognized five exceptions under which evidence of prior bad acts may be admissible. These five categories are now codified in the South Carolina Rules of Evidence, which provide that evidence of prior bad acts may 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. *See also State v. Cutro*, 365 S.C. 366, 375 n.5, 618 S.E.2d 890, 894 n.5 (2005) (recognizing that Rule 404(b) codified the five *Lyle* categories).

The Supreme Court summarized the law on admissibility of prior bad acts in *State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008):

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,* 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been

> charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.; State v. Beck,* 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); *State v. Gillian,* 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Braxton,* 343 S.C. 629, 541 S.E.2d 833 (2001). 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. *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364, *cert. denied,* 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

Id. at 23-24, 664 S.E.2d at 483 (finding the "record [did] not contain clear and convincing evidence" the defendant committed the prior bad acts, so evidence of prior child abuse was inadmissible).

The rationale for inadmissibility of prior bad act testimony, when it does not fall within one of the *Lyle*/Rule 404(b) exceptions, is that such evidence is not probative of the facts at issue, but it nevertheless "is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." *Id.* at 26, 664 S.E.2d at 484. Evidence of prior bad acts as character evidence to show conformity therewith is an inappropriate use of such evidence, and it is extremely prejudicial to the defendant.

B. Whether a "prior bad act" actually occurred must be proven by clear and convincing evidence.

"If not the subject of a conviction, a prior bad act must first be established by clear and convincing evidence. The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." *State v. Mathis*, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004) (internal citations omitted). Numerous

South Carolina cases have held evidence of prior bad acts to be inadmissible because it was not clear and convincing to show either that the alleged prior bad act occurred or that the defendant was involved in the alleged prior bad act. *See, e.g., Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483 (evidence of prior child abuse inadmissible because the "record [did] not contain clear and convincing evidence that [defendant] was the person who committed the prior bad acts"); *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998) (evidence of prior infant deaths inadmissible because it was not clear and convincing that defendant was perpetrator of alleged prior acts); *State v. Pierce*, 326 S.C. 176, 485 S.E.2d 913 (1997) (lack of clear and convincing evidence defendant inflicted previous injury, so evidence of prior child abuse inadmissible).

C. The trial court erroneously equated "clear and convincing evidence" with "preponderance of the evidence."

The trial court did not correctly apply the clear and convincing evidence standard. Clear and convincing evidence is defined as:

> 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; it does not mean clear and unequivocal.

Fletcher, 379 S.C. at 24, 664 S.E.2d at 483 (emphasis added).

"Clear and convincing evidence" is a distinctly higher standard than preponderance of the evidence. Whereas "preponderance" merely requires a determination that the fact at issue more likely than not occurred, evoking the classic visual image of the scales of justice tipping ever so slightly in one direction, "clear and convincing" requires a firm belief that the fact at issue occurred. In the arena of civil jurisprudence, where preponderance of the evidence is the generally applicable burden of

proof, clear and convincing evidence has been set apart as "the highest burden of proof known to civil law." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). *See also Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 40, 737 S.E.2d 857, 862-63 (Ct. App. 2013) (same); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004) (same).

In this case, the trial court incorrectly interpreted the "clear and convincing" standard and assessed the State's evidence with a level of scrutiny markedly below the proper standard. The court was obligated to assess whether the testimony proffered by the State outside the jury's presence was sufficient to produce a "firm belief" that Douglas's testimony was true. However, the court stated: "[T]he cases say, you know, again it has to be by clear and convincing evidence that it occurred. That's not proof beyond a reasonable doubt. That's not that far. It's more of a preponderance." (ROA_575 - Tr. p. 835.) There is no evidence in the record that the court applied a "firm belief" standard as required by the cases above. The court merely applied a "more likely than not" preponderance standard.

D. <u>The court improperly admitted Douglas's testimony.</u>

If the court had correctly applied the clear and convincing standard, the court should have disallowed Douglas's testimony regarding the alleged prior incident.

The evidence was not clear and convincing. First, there were notable inconsistencies between Douglas's testimony and the Incident Report, including the following:

- Douglas testified he told Appellant to let him out of the car, (ROA_531 - Tr. p. 791), but the Incident Report stated Appellant told Douglas to get out of the

vehicle. (ROA_539 - Tr. p. 799; Incident Report.)

- Douglas testified Appellant demanded payment in drugs, (ROA_531 - Tr. p. 791), but this claim did not appear in the Incident Report. (ROA_544 - Tr. p. 804; ROA_757 - Incident Report.) Further, Officer Sizemore testified: (1) if Douglas told him there was a dispute over being paid in drugs, this would have been important to his case, and (2) the inference from the fact that he did not write anything in the Incident Report about being paid in drugs was that Douglas did not really tell him this. (ROA_544 - Tr. p. 804.)
- Douglas testified Appellant chased him down the street, (ROA_533 - Tr. p. 793), but this claim did not appear in the Incident Report. (ROA_544 - Tr. p. 804; ROA_757 - Incident Report.)
- Douglas testified some people picked him up and took him to the police station, (ROA_533 - Tr. p. 793), but the incident report stated that Douglas "left the scene and went to the [Cherokee County Detention Center] for help," with no mention of being picked up by anyone else. (ROA_540 - Tr. p. 800; ROA_757 - Incident Report.)

Second, the "common scheme or plan" exception requires not just similarity of the other acts to the crime charged, but also a close relationship between the crimes. *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999).

> Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan. "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a

> close degree of similarity." The evidence is admissible if the similarities outweigh the dissimilarities

State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (internal citations omitted). In *Cope*, the South Carolina Supreme Court affirmed the lower courts' ruling that evidence of alleged other bad acts was inadmissible because "[a]lthough there [were] some similarities between the crime charged and the other acts, there [were] also many distinctions." *Id.* at 338, 748 S.E.2d at 205. Similarly, in this case, there were notable inconsistencies between the proffered account of the Douglas incident and the incident at issue in this case, including the following:

- The alleged Douglas incident involved one person fleeing and another person chasing. Douglas testified that he ran from Appellant, and Appellant chased him on foot. (ROA_533 - Tr. p. 793.) However, in this case, there was no claim or testimony that either Appellant or Morgan attempted to flee or chase.
- The alleged Douglas incident occurred in Appellant's car and outside the car. (ROA_529, 531 - Tr. pp. 789, 791.) However, the incident in this case occurred inside a residence where Appellant had never been. (ROA_066, 404 - Tr. pp. 270, 664.)
- The alleged Douglas incident arose out of an alleged dispute between Douglas and Appellant regarding payment for Appellant giving Douglas a ride in his car. (ROA_531 - Tr. p. 791.) However, in this case, Appellant did not give Morgan a ride or provide any other service to Morgan, and there was no testimony or other evidence of any dispute over payment.
- The alleged Douglas incident occurred between acquaintances; Douglas and Appellant knew each other "from the streets." (ROA_527-528 - Tr. pp. 787-

88.) However, the incident in this case occurred between strangers because Appellant and Morgan did not know each other. (ROA_406 - Tr. p. 666.)

- All witnesses who saw the beginning of the incident in this case testified consistently that it began with an argument between Morgan and his girlfriend, and Appellant was drawn into the argument. (ROA_158-159, 351-353, 418-424 - Tr. pp. 377-78, 610-12, 678-84.) However, there was no evidence of any dispute between third parties in the alleged Douglas incident.
- The alleged Douglas incident merely involved one person hitting another person, not firing a gun. (ROA_532 - Tr. p. 792.) However, this case involved one person shooting another. (ROA_422-423, 428 - Tr. pp. 682-83, 688.)
- There were no witnesses to corroborate the Douglas incident, (ROA_532 - Tr. p. 792), but there were witnesses to the incident in this case, although none of them were in the room at the moment of the shooting. (ROA_167, 208, 333, 367-368 - Tr. pp. 386, 427, 590, 626-27.)

Third, the State's written memorandum in support of admitting Douglas's testimony made factual misstatements in its effort to make the Douglas incident look more similar to the incident at issue in this case. Specifically:

- The State's memorandum stated the parties agreed that "[t]he defendant frequently requires the payment of crack cocaine for providing these rides." (ROA_751 - State's Memo. p. 1.) However, there is no evidence in the record supporting this assertion.

- The State's memorandum stated "[i]n both instances, the defendant [sic] was being given a ride by the defendant." (ROA_752 - State's Memo. p. 2.) Setting aside the apparent mis-wording of this assertion, it was simply untrue that both instances involved Appellant giving a ride to the other person in the alleged altercations. Appellant never gave a ride to Morgan.
- The State's memorandum stated Appellant "testified he remained in [Morgan's girlfriend's] room at her request to protect her from the victim." (ROA_755 - State's Memo. p. 5.) However, Appellant never gave any such testimony; rather, he testified the reason he remained in the house was because Morgan's girlfriend had not yet paid him for giving her a ride. (ROA_417, 419 - Tr. pp. 677, 679.)
- The State's memorandum stated "the nonpayment in drugs for transportation remains a common theme in both instances." (ROA_756 - State's Memo. p. 6.) However, there was no testimony from any witness in this case of nonpayment in drugs in the incident at issue. Rather, Morgan's girlfriend agreed to pay Appellant. (ROA_163 - Tr. p. 381.) Three different witnesses testified the shooting occurred while Appellant was waiting to be paid. (ROA_162, 350, 417, 419 - Tr. pp. 381, 609, 677, 679.)

Based on the proffered testimony, the Incident Report, and the State's misleading written memorandum, the court found Douglas's testimony to be admissible. The court apparently disregarded: (1) the differences between the incident at issue in this case and Douglas's testimony, (2) Douglas's questionable credibility because of his criminal history, (3) the inconsistencies between the testimony and the Incident Report, (4)

Sizemore's inconsistent testimony as to whether he believed Douglas's report, and (5) law enforcement's decision not to follow up on Douglas's report. (ROA_579-581 - Tr. pp. 839-41.) Rather, the court simply asserted that Douglas's testimony:

> would be admissible under subsection -- the subsection on character trait having been placed into the controversy by the defense's testimony, as well as under the prior bad acts, so I'm going to allow it to come in.

(ROA_580-581 - Tr. pp. 840-41.)

By failing to apply the clear and convincing standard, the court admitted testimony regarding the alleged prior incident that likely would have been inadmissible under the proper standard. Therefore, the court's failure to apply the proper standard constituted reversible error.

The court's error alone was prejudicial to Appellant, and the State made it more prejudicial by misusing Douglas's testimony in closing argument. After claiming the Douglas incident was similar to this case to get it admitted into evidence, the State argued in closing that the Douglas incident was *different* than this case. As set forth above, the State argued to the jury *twice* that the Douglas incident was different. This highly prejudicial, improper argument adds to the basis for granting Appellant a new trial.

II. The trial court abused its discretion by admitting evidence of an alleged "prior bad act" by Appellant without considering whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

A. The trial court must balance the probative value of evidence of a "prior bad act" with the risk of undue prejudice.

South Carolina law specifically requires the trial court to balance the probative value of evidence of a defendant's alleged "prior bad act" with the risk of undue prejudice under Rule 403, SCRE before ruling on whether the evidence is admissible.

The court must consider the weight of these factors; it is not optional or discretionary. Failure to balance the probative value of the evidence with the risk of undue prejudice is prejudicial to the defendant and constitutes reversible error.

> In deciding whether to admit evidence of prior bad acts, courts must weigh the probative value of evidence of prior bad acts against its prejudicial effect. *State v. McClellan,* 283 S.C. 389, 323 S.E.2d 772 (1984). [E]ven if the evidence is clear and convincing and falls within a *Lyle* exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. [*State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).] Thus, "[s]uch evidence is inadmissible 'unless the close similarity of the charged offense and the previous act[s] enhances the probative value of the evidence so as to overrule the prejudicial effect.' " *McClellan,* 283 S.C. at 392, 323 S.E.2d at 774.

State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). *See also State v. Parker*, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993) (holding trial court is required "to balance the probative value of the evidence against its prejudicial effect"); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) (even if evidence of prior bad acts is clear and convincing and falls within a *Lyle* exception, trial court must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant); *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (same); *State v. Ford*, 34 S.C. 444, 452, 513 S.E.2d 385, 389 (Ct. App. 1999) (trial court "must determine that the probative weight of the evidence of other criminal acts outweighs its prejudicial effect").

B. <u>The trial court did not balance the probative value of evidence of a "prior bad act" with the risk of undue prejudice as required by Rule 403, SCRE.</u>

Even though it was a mandatory requirement, the trial court failed to balance the probative value of Douglas's testimony with the risk of undue prejudice. Appellant's

counsel specifically pointed out to the court that the probative value must be balanced against the risk of prejudice:

> MR. SLADE: Well, Your Honor, I think when you analyze it in terms of the three hurdles that they have to come over. They have to come over the one we just talked about, they have to come over the character trait, and they have to come over the prejudice versus –
>
> THE COURT: Yes, sir.
>
> MR. SLADE: -- probative.
>
> THE COURT: Then it has to be weighed on 404.
>
> MR. SLADE: The probative value.

(ROA_567-568 - Tr. pp. 827-28.)

However, despite Appellant's counsel's argument that the court must balance the probative value of Douglas's testimony with the risk of undue prejudice, the court failed to do so. Instead, the court simply assessed whether Douglas's testimony was "clear and convincing"[2] based on certain elements of his testimony that the State alleged to be similar to the facts of this case. (ROA_578-581 - Tr. pp. 838-41.) Nowhere in the court's assessment of the evidence did it address whether the probative value of the evidence outweighed its prejudice. (*Id.*)

Failing to assess Douglas's testimony under Rule 403 was prejudicial to Appellant and was reversible error for multiple reasons. First, it placed into evidence an account of alleged prior conduct by Appellant that was not part of the incident at issue, potentially inciting the passion and caprice of the jury based on facts outside the scope of the incident for which Appellant was on trial.

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[2] As discussed above, the trial court improperly defined the clear and convincing standard.

Second, Douglas was a controversial witness because he had a tracheotomy prior to his appearance in court and spoke with a "voice box," which made his testimony difficult to hear and understand. (ROA_526, 528, 616-617 - Tr. pp. 786, 788, 876-77.) When his testimony was proffered outside the presence of the jury, the Solicitor had to repeat and interpret much of his testimony to confirm it was heard correctly. (ROA_527, 534 - Tr. pp. 787-94.) This led to multiple objections by Appellant's counsel and prompted the court to state:

> I understand your feelings, Mr. Slade. And as we go through this, I'm trying to develop a strategy by which we can do it so it doesn't appear that the State is testifying for him.

(ROA_529 - Tr. p. 789.) The prejudice was so substantial that, when Douglas testified before the jury, the court put the clerk of court under oath to repeat Douglas's testimony for the jury. (ROA_583-584 - Tr. pp. 843-44.)

Third, Douglas's physical condition was prejudicial because it tended to create the false impression with the jury that Appellant allegedly threatened and attacked a handicapped man. Such an impression would have been less prejudicial if it related to a witness involved in the facts of this case. However, when it related to a witness who had nothing to do with the facts of this case, it injected an inappropriate degree of prejudice into the evidence.

Fourth, the State provided no notice that it may call Douglas as a witness until after the defense had rested its case in chief. Appellant was given no opportunity to prepare for Douglas's testimony, evaluate the facts, or identify potential witnesses to rebut his testimony.

Fifth, as set forth above, the court's ruling on admissibility was based on inaccurate representations in the State's written brief. The State submitted its written brief to the court immediately before Douglas took the stand for his proffered testimony, (ROA_526 - Tr. p. 786), and Appellant was not given an opportunity to rebut the State's inaccurate representations before the State made a decision on inadmissibility of Douglas's testimony.

III. The trial court abused its discretion by admitting witness testimony constituting extrinsic evidence of an alleged specific instance of conduct to attack Appellant's credibility, in violation of Rule 608, SCRE.

As one basis for admitting Douglas's testimony, the court found Appellant introduced evidence of his own character as a lawful and peaceable gun owner and allowed the State to introduce the testimony as character evidence under Rule 404(a)(1) to rebut Appellant's testimony. (ROA_580-581 - Tr. pp. 840-41.)

Under Rule 404(a)(1), if a defendant introduces evidence of a pertinent trait of his own character, the State may introduce evidence of the defendant's character to rebut the character evidence introduced by the defendant. However, the State must still abide by the Rules of Evidence governing the way in which character evidence may be introduced.

Specifically, Rule 608 prohibits the State from using a third-party witness to introduce evidence of alleged specific instances of conduct by the defendant. Rule 608 provides, in pertinent part:

> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or

> untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Id. See also Mizell v. Glover, 351 S.C. 392, 401, 570 S.E.2d 176, 180 (2002) ("Rule 608(b) allows specific instances of conduct to be inquired into on cross, but does not allow those instances of conduct to be proved by extrinsic evidence.").

Under Rule 608, the State may only introduce evidence of prior specific instances of conduct by inquiring into those specific instances on Appellant's cross examination. Rule 608, SCRE. The State may not introduce evidence of specific instances of conduct through testimony of a third-party witness. *Id.*

In this case, the State never attempted to cross examine Appellant regarding the alleged Douglas incident. Instead, the State waited until after the defense rested its case, then attempted to ambush the defense in its rebuttal case with Douglas's testimony. Before the State introduced Douglas's testimony, Appellant's counsel objected to it as improper:

> MR. SLADE: Ms. Leskanic has told me now that she says that there is an incident -- she asked Hayword has he ever pointed a gun at anybody. I think she's intending to offer somebody who says Hayword pointed a gun at him. My objection to that, Your Honor, is that that's not -- that's not proper rebuttal. It's not proper impeachment. It's obviously the prior use of a bad act and that . . . doesn't come in against the defendant.
>
> THE COURT: It's being offered for impeachment purposes.
>
> MR. SLADE: And -- that's exactly right. And that's not proper impeachment, simply because in order to properly impeach somebody and even have a chance of introducing extrinsic evidence for that, you have to properly impeach them by saying "didn't you at such a such a time do such and such a thing? That was not done.

> All that was asked was "have you ever pointed a gun at anybody?" He denied it. She is stuck with that answer.

(ROA_499-500 - Tr. pp. 759-60.)

The court improperly allowed the State to introduce Douglas's testimony regarding an alleged specific instance of conduct by Appellant. Allowing Douglas's testimony regarding the alleged specific instance of conduct was prejudicial to Appellant. This testimony was calculated to, and arguably did, influence the jury based on passion or caprice to decide against Appellant based on the jury's conception that Appellant had a propensity to draw a firearm and point it at others, not on the evidence regarding the incident at issue. This was improper use of character evidence in violation of Rule 608, SCRE.

IV. The trial court abused its discretion by charging the jury on voluntary manslaughter when Appellant was not indicted for voluntary manslaughter or any other offense requiring the same proof as voluntary manslaughter.

A. A defendant has a constitutional and statutory right to a grand jury indictment before being tried for any offense.

The South Carolina Supreme Court has held that a criminal defendant "has a constitutional and statutory right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment." *State v. Means*, 367 S.C. 374, 383, 626 S.E.2d 348, 353 (2006). *See also* S.C. Const. art. I, § 11 ("No person may be held to answer for any crime . . . unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . . ."); S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury . . . .").

> The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to

> allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted.

Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). An indictment that does not state the elements of an offense the defendant is required to answer is insufficient for that offense to be submitted to the jury because the defendant is unable to make an informed decision how to plead and is unable to defend himself properly. In the case of a lesser included offense *in which all elements of the lesser offense are also elements of the greater offense*, a valid indictment for the greater offense is also sufficient to submit the lesser offense to the jury because the indictment states the elements the defendant is required to answer.

The burden is on the State to obtain an indictment for each separate offense to be submitted to the jury. The burden is not on the defendant to anticipate which homicide offense the State may pursue and against which elements of the various offenses he may have to defend himself. *See, e.g., State v. Smith*, 406 S.C. 215, 219 n.6, 750 S.E.2d 612, 614 n.6 (2013) (finding it was error to instruct jury on aiding and abetting homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(2) when the indictment was only for homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(1) because "[t]he State, of course, could have indicted Petitioner for the offenses of section (A)(1) *and* section (A)(2), but it did not do so.").

The State may not try a defendant for an offense when the proof required for that offense is different than the proof required for the indicted offense. *See, e.g., State v. Lynch*, 344 S.C. 635, 545 S.E.2d 511 (2001), *overruled in part on other grounds, State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (holding that State's swapping the aggravating circumstance in an indictment charging first degree burglary from entering in

the nighttime to causing physical damage changed the nature of the offense because the proof required for each circumstance was materially different and therefore changed what the defendant was called upon to answer). *See also Means*, 367 S.C. at 386-87, 626 S.E.2d at 355 (State may not amend an indictment to state an offense with different elements; grand jury must issue indictment for the charge to be tried unless it is lesser included of the indicted charge).

As Justice Pleicones stated in his dissent in *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001), *overruled in part on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005):

> Where the State is unsure which of several offenses the defendant may have committed, and where it is unclear whether these offenses are lesser included offenses under the tests I suggest that we adopt, the State is free to seek multiple indictments or a multi-count indictment in which each offense is alleged as a separate charge.

Id. at 616, 552 S.E.2d at 734 (Pleicones, dissenting).

In addition, if the State seeks to charge a defendant with an offense not included in an indictment, there is a procedure to amend the indictment. After presenting an indictment, the State may amend the indictment if either the amendment does not change the nature of the offense, the amended charge is a lesser included offense, or the defendant waives presentment of the amended indictment and pleads guilty. *Means*, 367 S.C. at 385-86, 626 S.E.2d at 355 (citing *State v. Myers*, 313 S.C. 391, 438 S.E.2d 236 (1993)); S.C. Code Ann. § 17-19-100 (requirements for amendment of indictment).

Therefore, it is a violation of South Carolina law to require a defendant to stand trial for an offense when he has not been indicted for that offense or for another offense requiring the same proof.

B. Voluntary manslaughter requires additional proof not required for murder.[3]

Voluntary manslaughter requires proof of separate and distinct elements not included within the definition of murder. South Carolina law defines murder as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. By contrast, South Carolina law requires additional proof for the offense of voluntary manslaughter. The mandatory elements of voluntary manslaughter—sudden heat of passion and sufficient legal provocation—are not part of the crime of murder. *See, e.g., State v. Wood*, 362 S.C. 135, 142, 607 S.E.2d 57, 60 (2004) (holding voluntary manslaughter is an unlawful killing in the sudden heat of passion with sufficient legal provocation); *State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) (same). To prove these elements, manslaughter requires proof of "an uncontrollable impulse to do violence" in the heat of passion based on provocation that "'would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection.'" *State v. Knoten*, 347 S.C. 296, 304, 555 S.E.2d 391, 396 (2001) (quoting *State v. Cole*, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000)); *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993).

[3] Appellant recognizes that manslaughter has historically been treated as a lesser included offense of murder. *See, e.g., State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) (recognizing manslaughter as a lesser included offense of murder; "[m]urder may be reduced to manslaughter if the defendant can show that the act was committed 'in the heat of passion upon sufficient legal provocation.'"); *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (finding jury should have been instructed regarding voluntary manslaughter as a lesser included offense of murder). However, the South Carolina Supreme Court has also described the recognition of manslaughter as a lesser included offense of murder as an "anomaly in the law." *Elliott*, 346 S.C. at 607, 552 S.E.2d at 729. Appellant's argument here is that voluntary manslaughter does not pass the elements test and should not be submitted to the jury as a lesser included offense of murder when the indictment does not state the elements of proof required for manslaughter.

South Carolina courts have concluded in numerous cases that an offense may only be treated as a lesser included offense if it does not require proof greater than (or in addition to) the proof required for the "greater" offense. In other words, the test for determining whether one crime is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser. *See, e.g., Knox v. State*, 340 S.C. 81, 84, 530 S.E.2d 887, 888 (2000) (ABHAN not a lesser included offense of second degree lynching), *overruled in part on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Murdock v. State*, 308 S.C. 143, 144, 417 S.E.2d 543, 544 (1992) (possession of counterfeit LSD with intent to distribute not a lesser included offense of possession of LSD with intent to distribute). *See also, e.g., Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 (1997) (entering without breaking is not a lesser included offense of first degree burglary, because the former requires entry without breaking, while the latter requires entry without consent and may include a breaking in a given case).

The principle is illustrated by the former statutory offense of "killing by stabbing or thrusting." While manslaughter is codified in the South Carolina Code of Laws at S.C. Code Ann. §§ 16-3-50 and 16-3-60, killing by stabbing or thrusting was codified one section earlier, at S.C. Code Ann. § 16-3-40.[4] Like manslaughter, killing by stabbing or thrusting included elements requiring proof beyond that required for murder. In *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986), the South Carolina Supreme Court held that killing by stabbing or thrusting was not a lesser included offense of murder because it required proof of an element not required for murder. The court held the jury should not be instructed on killing by stabbing or thrusting when the indictment was for

[4] The General Assembly repealed the "killing by stabbing or thrusting" statute in 2010, after the incident at issue in this case. *See* Act No. 273 § 22, 2010 S.C. Acts 1937.

murder because the elements of killing by stabbing or thrusting required proof beyond that required for the indicted offense:

> Appellant also requested a charge of killing by stabbing or thrusting, S.C. Code Ann. § 16-3-40 (1985). The same set of facts may support an indictment for one of several distinct offenses. *State v. King,* 289 S.C. 371, 346 S.E.2d 323 (1986); *State v. Bodiford,* 282 S.C. 378, 318 S.E.2d 567 (1984). Appellant was indicted for capital murder, S.C. Code Ann. § 16-3-20 (1985). While the grand jury *could* have indicted appellant for killing by stabbing or thrusting, it did not.
>
> The trial judge may submit to the jury only those offenses for which the defendant has properly been indicted or which are supported by the indictment. *See, e.g., State v. Beachum,* 288 S.C. 325, 342 S.E.2d 597 (1986). An offense is supported by an indictment only when it requires no proof beyond that which is required for conviction of the indicted offense. *State v. Norton,* 286 S.C. 95, 332 S.E.2d 531 (1985). The offense of killing by stabbing or thrusting requires proof of an element not required to prove the crime of murder, i.e., use of a knife or similar weapon to cause death. Since the offense of killing by stabbing or thrusting is not supported by the indictment for murder, the trial judge properly refused to submit the offense to the jury.

Kornahrens, 290 S.C. at 286, 350 S.E.2d at 184.

C. <u>The court charged the jury on voluntary manslaughter even though the indictment did not include the required elements to submit voluntary manslaughter to the jury.</u>

The indictment in this case did not include the required elements to submit voluntary manslaughter to the jury. Appellant was indicted for allegedly killing Morgan "feloniously, willfully, and with malice aforethought, . . . all in violation of § 16-3-0010, 0020. " (ROA_002 - Indictment.) However, manslaughter is a separate offense requiring separate proof, for which Appellant was not indicted. He was not indicted for killing anyone in the sudden heat of passion or with sufficient legal provocation, both of which are separate, mandatory elements of voluntary manslaughter. Like killing by stabbing or

thrusting, manslaughter requires proof beyond that required for murder. Appellant was not indicted for the elements that must be proven separately and distinctly from murder in order to prove manslaughter.

Nevertheless, the trial court instructed the jury regarding voluntary manslaughter, as follows:

> [T]o prove voluntary manslaughter, the State must prove beyond a reasonable doubt that the defendant took the life of another person in the sudden heat of passion, based on sufficient legal provocation.
>
> Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute a voluntary manslaughter.
>
> Sudden heat of passion may for a time affect a person's self-control and temporarily disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrolled impulse to do violence.
>
> Sufficient legal provocation must be of the type that would make a person of ordinary reason and caution become enraged and lose control temporarily.

(ROA_706-703 - Tr. p. 963-64.) These elements did not appear anywhere in the indictment. Therefore, South Carolina law as presented to the jury required the jury to find proof beyond that required for murder in order to find Appellant guilty of manslaughter.

D. <u>The court's jury charge on manslaughter violated Appellant's constitutional and statutory right to a grand jury indictment before being tried for any offense.</u>

The manslaughter instruction was erroneous and prejudicial to Appellant. By instructing the jury on an offense for which Appellant was not indicted and that required proof beyond the indictment, the court subjected Appellant to conviction for a charge

never considered by the grand jury. The grand jury never considered whether Appellant may have been guilty of killing another in the sudden heat of passion with sufficient legal provocation. However, by submitting this offense to the jury, the court bypassed Appellant's constitutional and statutory rights under S.C. Const. art. I, § 11 and S.C. Code Ann. § 17-19-10.

CONCLUSION

The trial court erred by allowing the State to introduce testimony of Brad Douglas in its rebuttal case and by charging the jury on voluntary manslaughter when Appellant was not indicted for voluntary manslaughter or any other offense requiring the same proof as voluntary manslaughter. For the foregoing reasons, Appellant requests that this Court reverse and remand for a new trial.

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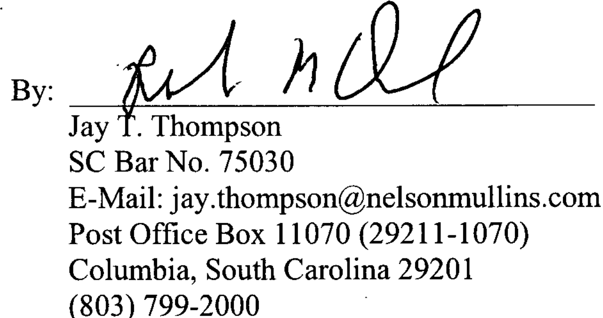

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Columbia, South Carolina
This 6th day of June, 2014.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHEROKEE COUNTY
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Roger L. Couch, Circuit Court Judge

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CERTIFICATION OF COUNSEL

The undersigned counsel certifies that the Final Brief of Appellant comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellant Hayword Tony Chambers** on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorneys of record, Salley Elliott and David Spencer, Senior Assistant Deputy Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

This 6th day of June, 2014.

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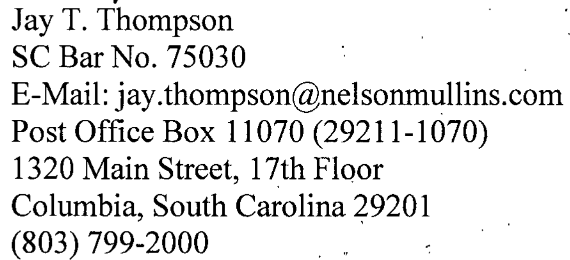
By: 

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