STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

vs.

HAYWORD TONY CHAMBERS,

Appellant.

FINAL BRIEF OF RESPONDENT

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II

Voluntary manslaughter is a lesser included offense of murder and therefore, the State was not required to separately indict Appellant for voluntary manslaughter where he was indicted by a grand jury for murder.

STATEMENT OF THE CASE

Appellant Chambers was indicted for murder. Chambers proceeded to jury trial before the Honorable Roger L. Couch on December 4, 2012. On December 7, 2012, the jury found Chambers guilty of voluntary manslaughter. Judge Couch sentenced Chambers to fifteen years' imprisonment.

STATEMENT OF FACTS

This appeal concerns a shooting that resulted from a senseless argument in a crack house. Sergeant Steve Green testified that he and Officer Sizemore responded to the 911 call about the shooting. They found Victim, who was still breathing, lying between the sofa and coffee table, and they called EMS inside. ROA. pp. 111-114

Kevin Ward, a fireman, was one of the EMS responders called inside. Ward found the victim, Calvin Todd Morgan, laying between the sofa and coffee table in the living room.

Ward testified that the items on the table did not appear to be knocked over. Victim had a gunshot wound to the head. ROA. pp. 41-45; p. 58 (chair knocked over). Victim was loaded on a stretcher and flown by helicopter to the Upstate Medical Center. ROA. p. 48.

Detective Blanton testified that after speaking with witnesses on the scene, they looked for a person nicknamed "New York" who drove a burgundy Volvo station wagon. A lead led them to the vehicle and then the person known as "New York," who was brought to the police station. Detective Blanton determined New York was Chambers. When Chambers was brought to the police station, Detective Blanton did not notice any injuries on Chambers or any indication that he had been in an altercation. ROA. pp. 73-75.

Acting on information, Sergeant Green went to a house with Sergeant Hughes looking for a person going by the nickname "New York." They knocked on the door and heard crying on the inside. A man came to the door. Hughes asked the man if he knew New York and the man at first said "no." The man told the officers that only his wife and child were in the house and then admitted, "I'm the one you're looking for." The man, which Green identified in court as Chambers, asked Green "do you want the gun?" and told Green it was in the bedroom. ROA. pp. 116-119. Green recovered a .380 caliber gun from the bedroom. ROA. p. 121.

After shooting Victim, Chambers drove his Volvo to his cousin's house, James Wade. Wade testified that Chambers came to his house in the early hours of November 28, 2009, about two or three a.m. ROA. p. 141, p. 143. Chambers parked his car in front of Wade's house. Chambers was upset and Wade drove him home. Chambers said he was going to the police station, but he wanted to see his children first. ROA. pp. 145-148.

Claudette Byers knew Victim all her life and started seeing Victim after he was released from prison. ROA. pp. 151-152. Byers used crack cocaine, but testified Victim did not do drugs. ROA. p. 153. Byers also knew Chambers, but knew him only as "New York." On the day of the shooting, Byers saw Chambers, Scottie Montgomery, and Calvin Wallace in Calvin's room. She testified that Chambers bought crack from Byers and smoked it in Calvin's room. ROA. pp. 154-156.

Byers ran out of crack cocaine and wanted to get more from her supplier. Chambers drove her. When they came back, Victim demanded, "where is my dope?" Chambers said something to Victim, Byers did not remember what, but Victim replied that he was not talking to Chambers, he was talking to "his old lady." After more words were exchanged, Chambers pulled out a pistol. Byers testified that Chambers walked up on Victim and Victim grabbed him. Byers tried to pull Victim away, but Victim pushed Byers and told her to run. ROA. pp. 158-159. Byers then heard two shots. ROA. p. 160. She heard Chambers yelling "Where that bitch at? Where that bitch at, I am going to kill her too." ROA. p. 160, line 25 – p. 161, line 1. Byers testified that Victim had bought her crack for her birthday. ROA. pp. 164-165. Byers testified that Victim was drinking. ROA. p. 165. In her statement to police, Byers told them that during the confrontation, Victim stood up and started towards Chambers, and Victim and Chambers were wrestling in the doorway before Byers fled. ROA. p. 196.

Luis Callazo also was in the house when Victim was shot. ROA. p. 202. He testified Chambers, Byers and "Big Momma" left the house to get crack cocaine. After they returned, Callazo observed that Chambers was angry. He heard Chambers walk down the hall and say

"I'm going to kill this bitch." ROA. pp. 204-207.

Tynisha Poole lived with Chambers. She testified Chambers left the house at 11:00 or 11:30 pm. ROA. pp. 225-226. Poole told the jury that Chambers takes his gun everywhere he goes. ROA. p. 226. Chambers called Poole at 3:00 a.m. and told her that he shot somebody. ROA. pp. 227. Wade brought Chambers home. Chambers changed clothes and left them in a pile. He left the gun on the mantelpiece. ROA. pp. 227-231. Poole later brought the clothes to the authorities at the detention center. ROA. pp. 231-233.

Dr. Janice Ross performed the autopsy on Victim, who died the day after the shooting. She testified Victim's entrance wound was in the forehead. She concluded, based on the absence of stippling, that Victim was shot from at least two feet away. ROA. pp. 244-245. Gunshot residue was detected on Chambers' jacket. ROA. pp. 288-290. Blood on Chambers' pants was a 1 in 1.2 quadrillion match with Victim. ROA. pp. 312-313.

The first defense witness was Darrell Mayberry. He testified he was outside drinking beer while Chambers, Byers, and Big Momma were gone. When the three came back, they went inside the house. ROA. pp. 319-321. Calvin came out of the house and told Mayberry that Victim was mad. ROA. p. 327. Mayberry was not in the house when he heard the gunshot. Chambers came out first and he appeared to be mad. ROA. p. 334. Mayberry testified as follows:

> Q: In looking at "New York's" appearance, did it look to you like he had been in any sort of altercation?
>
> A: Yeah. I mean, it seemed like his clothes was straggly, you know.

ROA. p. 335, line 24 – p. 336, line 2.

Sandra Davis, "Big Momma," testified that when Victim was released from prison, he was good to Byers. However, Byers was smoking crack and running around. ROA. p. 341. Davis left the house with Chambers and Byers to buy crack cocaine. ROA. p. 345.

Davis testified as follows about what happened next when they came back:

> Q: . . . Describe what [Victim] was doing when you walked into the room.
>
> A: He was – he was telling her to give him his dope because he knew she had stole his dope.
>
> Q: What was he saying to her?
>
> A: He was saying "give me my stuff. Give me my stuff."
>
> Q: Okay. You need to say the words that the folks were saying. I realize there is some bad language involved here, but you need to say what the folks were saying.
>
> A: He was telling her "give me my shit, bitch. I know you got my shit. Give me my shit."
>
> Q: And what was [Byer's] response to that?
>
> A: "I don't got your stuff. I don't got your stuff."
>
> Q: All right. Did this go on for awhile?
>
> A: No, because I – I stepped in and said "yes, you do have his stuff. I seen you pick it up."

ROA. p. 349, line 7 – line 22.

Davis testified that Chambers said he was going to step out, but Byers needed to pay him. Chambers was not mad, but Victim was furious. ROA. pp. 350-351. Byers grabbed Chambers and begged him not to leave because Victim was going to beat her. ROA. p. 351. Victim lashed out at Chambers to stay out of his business. Victim was calling Chambers a

motherfucker. Chambers replied, "I'm not going to be too many of your motherfuckers. You don't even know me." Davis admitted, though, that she could not recall exact words that were spoken because she was high. ROA. pp. 351-352.

Victim moved forward a couple of steps and Chambers pulled out his gun. Victim was still calling Chambers names and continued towards Chambers. ROA. pp. 352-353. However, Davis confirmed that Victim did not smoke crack, that it was not his lifestyle. ROA. p. 353. Davis affirmatively answered defense counsel's leading questions that after Chambers pulled out his gun, Victim continued to be angry, continued to be furious, and advanced towards Chambers. At that point, Davis ran out of the room. ROA. p. 354.

Davis also testified before the jury about a prior incident where Victim "had [a prior girlfriend] down stomping her." ROA. p. 367, lines 10-12.

On cross-examination, Davis testified as follows:

> Q: Was Todd still standing at the table when you left the room?
>
> A: No, he was coming towards "New York." He was coming over towards "New York."
>
> Q: All right. And "New York" had a gun pulled on him?
>
> A: Yes, ma'am.
>
> Q: And [Byers] had left the room?
>
> A: Yes, ma'am.
>
> Q: And you were able to leave the room?
>
> A: Yes, ma'am.
>
> Q: And he stayed in there with the gun?

A: Yes, ma'am.

Q: And what's he saying?

A: I can't even remember.

I can remember Todd calling him a motherfucker.

And I can remember him telling Todd "you don't know who you are playing with. You don't know who you are messing with. I ain't going to be too many of your motherfuckers."

Q: So he was angry too?

A: Yes.

Q: All right. It wasn't just Todd that was mad?

A: Yes, ma'am.

Q: Yes, it was just Todd?

A: No, ma'am, it was both of them was mad, yes ma'am.

Q: Both of them were mad?

A: Yes, ma'am.

ROA. p. 369, line 24 – p. 370, line 25.

Chambers testified on his own behalf. Chambers testified he has a concealed weapons permit. He testified that he acquired the gun and permit because of the neighborhood he lived in and to protect himself and his family. ROA. p. 400. Chambers often would taxi people about town in his vehicle in exchange for money or crack. ROA. p. 399. He took Byers and Davis to purchase crack. Upon returning to the house, Byers and Victim started arguing, with Victim accusing Byers of stealing his crack. Victim told Chambers to mind his own business and shut the fuck up, although Chambers claimed he had

not said anything to Victim. ROA. pp. 418-419. Chambers testified that as the situation escalated, Chambers decided to leave, but Byers begged him to stay. ROA. pp. 419-421. Victim told Chambers "motherfucker, you ain't got nothing to do with this shit. This ain't none of your business." To which Chambers replied, "I'm not the one you are angry with. It's with her." ROA. p. 421, lines 3-8.

Nonetheless, Victim's anger now turned towards Chambers. ROA. p. 421, lines 15-16. Chambers testified that Victim started towards Chambers and he did not slow down even when Chambers pulled out his weapon. Victim continued cursing and continued approaching. ROA. p. 423. Victim grabbed Chambers' gun and they struggled over the gun. ROA. pp. 423-424. Chambers pulled the trigger to get Victim off him, and Victim fell. Chambers left the house. ROA. pp. 428-429.

Chambers fled to his cousin's house and then his cousin drove him home. Chambers told his family what happened. He testified he was going to go to the police station to turn himself in. ROA. p. 430.

Defense counsel's strategy was to establish Victim's propensity for violence. Debra Littlejohn testified Victim was violent when drinking and is controlling. Littlejohn testified she dated Victim. Victim choked her one time after Victim wanted to see her but she told him she was going to dinner with her main boyfriend. ROA. pp. 459-461.

Georgia Ann Smith likewise testified Victim was violent when angry and furious. ROA. p. 466. One time he sat on a bucket next to her bed while she attempted to sleep, peering over her and threatening to hit her. ROA. pp. 470-471.

One time, Smith was compelled to point a gun at Victim because she felt threatened,

and he continued towards her even though she was armed. She shot Victim while he was trying to grab the gun from her. ROA. pp. 482-485.

In reply, the State called two witnesses. The first was Roscoe Morris. Morris testified, without objection, that Chambers was known to carry a gun and draw it on people. Specifically, Morris testified that "on the streets we stayed in about the same area. He was known to carry [the gun] at all times and draw it on a lot of people. He was known for that." ROA. p. 587, lines 1-4.

Morris testified that while they were in jail together, Chambers confessed to shooting Victim. Chambers told Morris that he got into an argument with Victim and he pulled his gun. A struggle ensued and Chambers had a premonition that he was going to die. So when he gained the leverage on Victim, he pointed the gun at Victim's head and shot him. ROA. p. 589.

The second reply witness was Brad Douglass, who testified that Chambers pointed a gun at him because Douglass failed to pay for a ride in Chambers' car. ROA. pp. 619-620.

Chambers waived surrebuttal and the case was submitted to the jury. ROA. p. 633.

ARGUMENT

I.

The trial court did not err in admitting a prior incident where Appellant pulled a gun on an individual as the incident was proper rebuttal evidence under Rule 404(a)(1), SCRE, Appellant opened the door to the testimony, the evidence was admissible as common scheme or plan, and it was cumulative to other reply evidence to which Appellant did not object (Appellant's issues I-III).

Chambers challenges testimony from the State's reply witness, Douglass, about a prior incident when Chambers pointed a gun at Douglass when Douglass failed to pay him for giving Douglass a ride. Chambers opened the door to the testimony and further, it was admissible under Rule 404, SCRE. Finally, the evidence was cumulative to testimony from the State's other reply witness, Roscoe Morris, and therefore, any error is harmless.

The trial court admitted the testimony under SCRE, Rule 404. The trial court ruled as follows:

> All right, I have had an opportunity to review the incident report and also to go back over some of the testimony that was given during the proffer.
>
> In this case the State is offering this particular testimony I think for two purposes that I am considering in this, and that is, number one, under Rule 404(a)(1) concerning the character trait which was offered by an accused during his testimony. And in this case the testimony of the accused was a licensed gun carrier; he had a concealed weapons permit; and he went to a great deal of care to testify that he had gotten that weapon solely for defensive purposes, that he got it solely to protect himself and/or family. I think the testimony was even because that he had moved to a particular housing project or area that he needed to have that, that he felt like he needed to have that gun. So he portrayed himself as a peaceful law-abiding citizen who had the right to carry a gun for self-protection.

The prosecution is offering this evidence in an effort to rebut that particular character trait that was put into the record by the accused.

The other analysis is whether or not this evidence is being – is properly admitted under Subsection (b) of that same Rule 404 as a prior bad act which is being offered to show either motive, identity, the existence of a common scheme or plan, or the absence of mistake, accident or intent. And in that analysis –

I think in the first analysis I'm not so sure that I'm required to find that this evidence is being presented in such a fashion that it convinces the court by clear and convincing evidence of its truth.

But now as to the second analysis, that would be required, so I'm going to discuss that as well.

I have looked over other cases. In particular, I have looked at State v. Ford. That case discusses a similar analysis concerning the clear and convincing nature of the evidence and whether it should come in or not.

And in this particular case I have got a person who claims to have direct knowledge of the incident. In fact, the victim of that particular incident is testifying. He's testifying as to what he alleges happened. His statement, while in the incident report as related by a police officer on the report, did include all of the details of his statement in court. It is – I didn't find any inconsistencies in that statement. I don't see any place where he has stated something that was placed into the report that he has stated differently today.

The defense did properly point out several omissions from the report that was contained, other than what was contained in the statement here today.

And the police officer, in reviewing his testimony concerning this matter, he stated that he did believe that a crime was committed at that time, could not offer an explanation as to why further prosecution wasn't developed but did state that he believed what had occurred on that occasion.

There was no evidence presented by the defense at all to rebut what was presented to the court. I didn't hear any rebuttal evidence concerning that.

So it's going to be my finding that the evidence that's been presented does rise to the level of clear and convincing

> evidence.[1]
>
> I find that it 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. p. 578, line 13 – p. 581, line 4.

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.").

Under Rule 404(a)(1), SCRE, evidence of a person's character or a trait of character is generally inadmissible, except: "Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." In the instant case, Chambers testified on direct examination that he obtained the gun to protect himself and his family because the neighborhood he moved to was dangerous. He also testified that he obtained a concealed weapon permit. Chambers therefore sought to portray himself as a person who possessed the gun for lawful self-protection, opening the door to evidence that he used the same gun for purposes of intimidation and to settle disputes. Accordingly, Rule 404(a)(1) applies.

Chambers argues that Rule 404(a)(1) is limited by Rule 608(b), SCRE. Under Rule

---

1 The trial court correctly based its ruling on the clear and convincing standard, contrary to Chambers' argument. Chambers' argument to that effect simply takes the trial court's comments out of context. The trial court was merely commenting that the prior bad act does not have to be shown beyond a reasonable doubt.

608:

> Specific instances of 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.

(Emphasis added).

Chambers' reliance on Rule 608 is misplaced because Rule 608 concerns evidence of a witness's credibility rather than the broader "pertinent character trait" that is the concern of Rule 404(a)(1). Further, Rule 404(a)(3), unlike Rules 404(a)(1) and (2), incorporates Rules 607, 608, and 609. The failure to incorporate Rule 608 in Rules 404(a)(1) and (2), as was done for Rule 404(a)(3) further establishes Rule 608's inapplicability. See German Evangelical Lutheran Church v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003) (Under the canon of construction "expressio unius est exclusio alterius" the expression or inclusion of one thing "implies the exclusion of another, or of the alternative.") (citation omitted).

Although not cited by Appellant, the Supreme Court in State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008), noted Rule 404(a)(1) allows the prosecution to cross-examine the accused about prior bad acts or conduct when the accused offers evidence of his good character regarding a specific character trait. Id., at 106, 661 S.E.2d 389. The Supreme Court further noted: "The State is restricted to showing bad character only for the traits

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Note counsel indicated his agreement with the trial court's statement. ROA. p. 575, lines 11-14.

initially focused on by the accused, and impeachment may be done by introducing prior convictions with extrinsic evidence. Id.

The Court in that case cited with approval State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990). Major was decided **prior** to the implementation of the rules of evidence. Major found that the State could offer evidence to rebut good character evidence offered by the defense but limited it to: "(1) prior bad acts, not the subject of a conviction, which may be inquired about, but for which the answer of the accused must be taken; and (2) prior convictions which may be proven by extrinsic evidence." Id., at 185, 391 S.E.2d at 238. While Young apparently adopts the rational of Major, the Young opinion remained silent as to whether Rule 401 had the same limitation on extrinsic evidence announced in Major.

Regardless, the State's reply evidence is admissible under the open-the-door doctrine. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984).

This doctrine does not limit evidence presented on the basis that it is extrinsic. For instance, in State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997), Bennett presented testimony from his girlfriend, Gonsalves, that created the inference that Bennett was opposed to drugs. The State then elicited testimony from its reply witness, Mack, that implied Bennett was not so adamantly opposed to drugs as portrayed by Gonsalves. Id., at 260, 493 S.E.2d at 849-50.

In State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974), Bell testified that the

prosecuting witness had given him a watch that was admitted into evidence as an exhibit. The Supreme Court found no error in allowing the State to call a police officer in reply who testified that the victim had reported the watch as stolen in a burglary. Id., at 245, 209 S.E.2d at 892-93. In State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003), the Supreme Court found the defendant opened the door to his prior drug convictions because during opening arguments, his counsel argued that he was an addict and not a dealer. The Supreme Court opined:

> The opening statement created the impression that petitioner had no prior connection to the sale of narcotics. In reality, petitioner was not a mere drug user, but an individual who sought to 'elevate' his status to that of a drug dealer. That he was unsuccessful in actually selling anyone illegal drugs does not alter the fact that he tried. We therefore agree with Judge Shuler that petitioner's counsel opened the door to the introduction of evidence rebutting the contention that petitioner was merely an addict.

Id., at 541, 579 S.E.2d at 319.

In the instant case, Chambers testified about how he followed all the requirements and attained a concealed weapons permit. He testified that he purchased the gun and the permit, "being that the type of neighborhood I was in and it was protection for me and my family." ROA. p. 400, lines 18-19.

Further, the trial court properly ruled that evidence was admissible under common scheme or plan. In both cases, Chambers was using his car to ferry people around and in both cases, he used his gun to settle a dispute resulting from his unregistered taxi service. Prior bad acts may be admissible when they establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged.

State v. Lyle, 125 S.C. 406, 118 S.E.809 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense; and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994).

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. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000).

Under Rule 404(b), evidence of common scheme or plan may be found admissible. "Such evidence is relevant because proof of one is strong proof of the other. 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 if there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-278 (2009) (citation omitted). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id., 384 S.C. at 433, 683 S.E.2d at 278.

In the instant case, Chambers argues that the evidence was not clear and convincing. However, the trial court acted within its discretion to find the evidence rose to the level of clear and convincing. Specifically, Douglass testified in detail about the incident, rendering the evidence clear and convincing, and thus admissible. State v. Adams, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998) (finding that corroboration is not required in sexual assault

prosecutions, so testimony of victim of prior bad act was sufficient where that victim identified Adams as the perpetrator and described the assault with specificity).

Further, the trial court did not err in admitting the testimony under common scheme or plan. Evidence established the same gun was involved and the same car. ROA. p. 529-532. Both incidents arose out of circumstances where Chambers engaged in a dispute related to his ferrying around individuals for money or drugs and responded to the dispute by brandishing his gun – the one he allegedly purchased for self-protection.

Chambers complains that the trial court failed to balance the probative value against the prejudicial effect of the evidence. However, Chambers failed to argue to the trial court that the trial court should make that determination. An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011).

Further, the probative value is considerable in light of the fact that Chambers was arguing self-defense and presenting evidence that gave the impression that he only purchased the weapon for protection, and not the offensive purposes attested to by Morris and Douglass.

Further, any error is harmless in light of testimony from the other reply witness, Roscoe Morris, who testified that Chambers drew his gun on a lot of people and that he was known for it. Tr. p. 857, lines 1-4. State v. Haselden, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003) (finding any error in admission of evidence was cumulative to other evidence including admission by defendant); State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (finding no prejudice from admission of divorce complaint alleging appellant and his co-defendant had an adulterous affair where it was cumulative to other evidence and appellant

admitted having the adulterous relationship); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other evidence to which no objection was made is harmless).

II.

Voluntary manslaughter is a lesser included offense of murder and therefore, the State was not required to separately indict Appellant for voluntary manslaughter where he was indicted by a grand jury for murder (Appellant's IV).

Chambers argues the State should have separately indicted Appellant for voluntary manslaughter, arguing that the offense is not a lesser included offense of murder. The well-established rule of law is that voluntary manslaughter is a lesser included offense of murder. Anderson v. State, 342 S.C. 54, 58, 535 S.E.2d 649, 651, n.2 (2000). An indictment for a greater offense is sufficient to sustain a conviction for a lesser offense. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (finding an indictment for a greater offense provides subject matter jurisdiction for a lesser offense).

In the instant case, the State was not required to separately indict Chambers for voluntary manslaughter since it is a lesser included offense of murder. Further, the indictment sufficiently put Chambers on notice of what charges he must be prepared to meet as it advised Chambers that he was charged for killing Victim on November 28 and 29, 2009. See State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006).

Chambers' argues that voluntary manslaughter is not a lesser included offense based on the elements test. However, as Justice Pleicones noted:

> A different test applies when the indictment charges a

> common law offense, and the question is whether that charge includes any lesser included common law crimes. In deciding this issue, reference must be had to the common law development of the crime and its historical lesser included offenses, and not to the "elements test."

State v. Elliott, 346 S.C. 603, 609-10, 552 S.E.2d 727, 731 (2001) (J. Pleicones dissenting) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Justice Pleicones further observed, "murder is defined as the unlawful killing of a human being with malice aforethought, and includes the lesser offense of manslaughter, the unlawful killing of a person without malice. . . . When the grades of common law homicide are defined this way, murder and manslaughter satisfy the 'elements test' described above." Id., 346 S.C. at 610, 552 S.E.2d at 731.

In the instant case, there was no error in submitting voluntary manslaughter as a lesser included offense to murder. The State was not required to amend the indictment or present the grand jury with an indictment for voluntary manslaughter. See State v. Green, 406 S.C. 589, 753 S.E.2d 259 (Ct. App. 2014).

Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

vs.

HAYWORD TONY CHAMBERS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Jay T. Thompson, Esquire, 1320 Main St., 17th Floor, Columbia, SC 29201and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 20TH day of June, 2014.

NORMA BIGBEE
Legal Assistant

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