

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

The State,

Respondent,

v.

Carvin Holman,

Appellant.

Appellate Case No. 2012-213249

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. The trial court erred in admitting graphic pictures of Victim's body because the prejudicial effect of the pictures' greatly outweighed their probative value when the pictures showed the top half of Victim's head blown off and a large volume of blood and brain matter splattered on the ground.

2. The trial court erred in ruling Defendant was not entitled to a voluntary manslaughter instruction despite evidence that Defendant's wife was in an adulterous relationship with decedent.

(FBOA, p. 4).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge fairly exercise his discretion in admitting five photographs to demonstrate, explain, and corroborate the location, extent, and order of individual wounds, which would support of a finding of malice, especially when the photographs were used as aids in presentation of testimony by the crime scene and blood stain pattern analyst and the forensic pathologist?

2. Did Appellant adequately preserve his argument for a voluntary manslaughter charge for appellate review when he failed to request the trial judge place the specific ruling on the record? Alternatively, did the trial judge err in declining to charge voluntary manslaughter where the evidence established Appellant knew of the romantic relationship

between victim and his long estranged wife weeks before the murder; expressed his intent to kill victim after a confrontation two weeks before the murder; again expressed his intent to kill victim hours before the murder; and, where he spent hours searching for victim then repeatedly shooting the victim at victim's home – facts evidencing no basis for finding heat of passion upon sufficient legal provocation?

STATEMENT OF THE CASE

An Orangeburg County grand jury indicted Appellant in August 2011 for murder, burglary first degree, possession of a weapon during violent crime, kidnapping, and criminal sexual conduct first degree. (R. pp. *). Public Defenders Mark Wise and John Stroud represented Appellant on the charges. A jury trial was held October 15-18, 2012, before the Honorable Edgar W. Dickson. The jury convicted Appellant of murder, burglary first degree, possession of a weapon during the commission of a violent crime, and kidnapping, but acquitted on the criminal sexual conduct charge. (Tr. p. 429, lines 3-18). Judge Dickson imposed a life sentence for murder and burglary first degree, forty years for kidnapping, and five years on the weapons charge. (Tr. p. 434, lines 9-18). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

The murder victim in this case, Anthony James, ("Mr. James" or victim), was shot on June 24, 2011, in his home, and two more times in his yard as he attempted to escape Appellant, Carvin Holman. It was a murderous conclusion to Appellant's extended hunt for victim. Appellant's animosity toward victim was a result of victim being romantically involved with Appellant's long estranged wife, Debbie Holman ("Debbie") – a fact known to Appellant for weeks before the murder. The jury found Appellant invited Debbie to his home, kept her against her will, searched for victim with her from the evening of June 23 to the afternoon of June 24, eventually surprising victim at victim's home where Appellant ended Mr. James' life. The jury heard the following facts in finding Appellant guilty:

Appellant and Debbie were married in 1998, and separated in or around June 2010, approximately a year before the murder. (Tr. p. 106, lines 10-16; p. 107, line 25- p. 108, line 2). Debbie had moved in with her mother and took the couples' two children with her, along with her other child from another relationship. (Tr. p. 107, lines 4-17; p. 109, lines 20-23). After the separation, Debbie began seeing Mr. James. (Tr. p. 108, lines 3-9). Debbie testified that Appellant knew she was "seeing" James and he "wasn't happy about it." (Tr. p. 108, lines 13-16). Debbie was planning on moving in with Mr. James with her three children. (Tr. p. 110, lines 6-14).

On June 23, 2011, Debbie received a phone call from Appellant asking her to come by his residence so that he could see his children, and also requested she return several videotapes to him. (Tr. p. 111, line 23- p. 112, line 5). Debbie went to Appellant's home that night to return the tapes, leaving her children at her mother's

house. (Tr. p. 112, lines 6-12). Debbie testified that upon arrival at Appellant's home, Appellant got into her car and asked to go to a local gas station. They began to argue about her relationship with victim, "He asked me questions like do you love him... how you going to choose him over me...." (Tr. p. 113, lines 11-21). Debbie testified Appellant forced her into his home after returning from the station, had a sexual encounter with her, hit her repeatedly, and kept her against her will. (Tr. p. 114, lines 1-25; p. 116, line 14 – p. 118, line 5). Debbie testified that Appellant hit her with a "long rifle." (Tr. p. 114, lines 11-22). Appellant told her he was going to kill her and that she had to "pay the consequences." (Tr. p. 116, lines 14-19). Debbie testified: "At some point he said we were going to go out and we were going to find Anthony, and so around about ten o'clock that's what we did." (Tr. p. 118, lines 16-18). The two went to Mr. James' house. Appellant took the rifle. Debbie testified she tried to escape but was unsuccessful; Appellant was able to get in the car with Debbie and, "the more I tried to put it in drive the more he start beating me, hitting me, and then he start biting me and stuff like that." (Tr. p. 118, line 18- p. 119, line 10). Once Appellant was able to get back into the car, they returned to Appellant's house. (Tr. p. 119, lines 11-12).

Debbie testified that upon returning to Appellant's house that night, Appellant continued to ask Debbie about her choosing victim over Appellant. Appellant told Debbie, "he was not going to give up; that he was going to do what he's got to do; he's going to get Anthony." (Tr. p. 124, lines 15-17). Later that night, Appellant took Debbie back out to find Anthony. (Tr. p. 125, lines 5-8). Debbie testified Appellant stated he was "going to find Anthony, and" if he failed to find Mr. James, he was going to kill Debbie. (Tr. p. 125, lines 5-19). They went by Mr. James' house and were unsuccessful

in finding him and then they went to James' work, the IGA in Holly Hill. (Tr. p. 125, lines 17-19; p. 126, lines 14-18). Upon arrival at the IGA, Appellant had Debbie call the store phone to speak with James. Debbie spoke to James briefly until Appellant took the phone from her and they left the IGA parking lot. (Tr. p. 126, line 25 - p. 127, line 8). As they were leaving, Appellant threatened Debbie again, "... he said if Anthony don't come, I'm going to kill you, and so we went down the road before he got to the dirt road, and he said again he was going to kill me. I knew he was going to kill me because he said he was going to kill me. So what I did was I jumped out of the car and just was trying to get away from him, and he stopped the car and he made me get back in the car." (Tr. p. 127, lines 9-16).

Once Debbie was back in the car, they returned to Appellant's house for a few hours only to go back out in search of Mr. James again. They left Appellant's home around twelve to one o'clock, the afternoon of June 24, 2011. (Tr. p. 128, lines 21-24). Debbie testified they went back to the gas station, then onto Mr. James' house where Appellant "got out of the car and I seen him walk to the back steps and when he walked to the back steps I turned around and that's when I looked at the keys in the car. And when I seen the keys in the ignition I cranked it up and I left and I drove from the back side of the house to the front..." (Tr. p. 129, lines 11-13; p. 130, line 20 - p. 131, line 7). Appellant had gone to the back steps of Mr. James' home. (Tr. p. 131, lines 10-12). Appellant was carrying the rifle he had had with him earlier. (Tr. p. 131, lines 13-15). As Debbie was trying to escape Appellant in the car, she thought she heard a gunshot. (Tr. p. 132, lines 6-8). Debbie went to the Holly Hill police station and reported she has been held hostage and injured. She was taken to the hospital by ambulance. (Tr. p. 133, line

20-p. 134, line 12). At the hospital, a gynecological exam was performed on Debbie, and also photographs of her multiple injuries were taken. (Tr. p. 134, lines 24-25; p. 135, line 15 – p. 136, line 25).

Jessie Emile James, (“Jessie”), who lived “kati-cornered across the street” from the victim, Mr. Anthony James, testified that on June 24, 2011, in the afternoon “shortly after one,” he was watching television whe he heard a loud noise which caused him to get up and look outside. He “thought it was a transformer blowing.” (Tr. p. 204, lines 14-16; p. 206, line 25 - p. 207, line 2). Jessie stepped out onto his front porch and saw “Anthony on his back—down on his back” on the ground. (Tr. p. 207, lines 8-17). Next, Jessie testified that he saw “a person, someone, approach him and do something to him. I heard a shot.” (Tr. p. 207, lines 20-21). It appeared that person had a rifle and was “either reloading it or cocking it.” (Tr. p. 208, lines 6-12). The person then fired the rifle. (Tr. p. 208, lines 19-23). In court, Jessie demonstrated, testifying that “[h]e had the rifle kind of like that and he was standing over Anthony, and there was a shot.” (Tr. p. 209, lines 12-13). Mr. James then called 911. (Tr. p. 209, line 25). After firing the shot, the person ran off towards the woods. (Tr. p. 208, line 18; p. 210, lines 1-4).

Lieutenant Gerald David Carter with the Orangeburg County Sheriff’s Office responded to the crime scene and testified as an expert in the field of crime scene analysis and bloodstain pattern analysis. (Tr. p. 245, lines 6-12; p. 247, lines 9-14). While on the scene, Lt. Carter observed the victim “had massive trauma to his head and skull. He had massive trauma to his right forearm...That was a contusion that was massive to his chest as well as an injury to his lower back...These appeared to be gunshot wounds.” (Tr. p. 252, lines 3-8). Upon further inspection of the crime scene, Lt. Carter observed “some

blood, a bloodstain pattern both on the outer walls of the mobile home and on the slab. There were various patterns of blood spatters on the back steps. On the back steps there was additional blood, going down the casing and down the steps...there was a bloodstain pattern also on the back door where it was open.” (Tr. p. 255, lines 8-15). A cartridge casing was recovered at the scene. (Tr. p. 259, line 9-15). Lt. Carter testified that the cartridge was “fired from a high-powered rifle, most probably a bolt action type weapon. A thirty-thirty is the most common in the western type rifle.” (Tr. p. 260, lines 3-6). Lt. Carter testified further about the rifle and the firing action of such a weapon: “It (the cartridge) would have to be taken out before it is fired again. When you shoot it, you have to push the lever open and eject it. A bolt action is the same thing. If you don’t push the lever the shell stays in the gun.” (Tr. p. 260, lines 9-13). A bloodstain pattern was also discovered on the interior of the back door and in the laundry room of the mobile home. (Tr. p. 261, lines 5-9). The bloodstains in the corner of the kitchen were consistent with “the right side or right arm wound of the victim, the shot hitting the subject and the blood spattering on the wall, running down the wall onto the floor.” (Tr. p. 262, lines 19-23). The blood spatter told Lt. Carter that the victim was originally shot in the house. (R. p. 271, lines 14-16).

Dr. Janice Ross of Newberry Pathology Associates performed an autopsy on the victim. Dr. Ross found “fragments of bullets in the head, the right arm and the chest cavity.” (Tr. p. 282, lines 20-21). “The fragments were kind of outlining the path of the bullets which is consistent with a high-power rifle.” (Tr. p. 282, lines 24-25). Dr. Ross testified she found three distinct wounds, with a possible fourth to the forearm, but that, in her opinion, was “most likely ... related to the arm shot. (Tr. p. 283, lines 15-20). Dr.

Ross described a shot to the arm, the chest and the head. (Tr. p. 283, lines 7-14; p. 284, lines 1-22; p. 285, line 11- p. 286, line 7; p. 287, line 24- p. 288, line 1). The result of this gunshot wound to the head would have been immediate unconsciousness and immediate death. (Tr. p. 288, lines 2-4). Dr. Ross opined the cause of death was laceration of the brain due to the gunshot wound; it would have caused him to die within seconds. (Tr. p. 288, lines 20-24).

Investigator Riley L. Godwin of the Orangeburg County Sheriff's Department served as lead investigator on this case. Appellant gave a statement (State's Exhibit # 2) to Inv. Godwin at 9:05 P.M. of June 25, 2011. (Tr. p. 330, lines 12-17; p. 331, line 7). Inv. Godwin published the statement to the jury at trial. (Tr. p. 335, lines 22-25). Appellant admitted shooting Mr. James. (R. p. *).

The State also presented the testimony of Teresa Rutland, a co-worker of victim's at the IGA. She testified that Appellant approached victim in the IGA store approximately two weeks before the murder, slapped him, and threatened to kill him. (Tr. p. 220, line 21 – p. 221, line 14; p. 222, lines 5-7). She recalled Mr. James told her Appellant had threatened him before. (Tr. p. 222, line 4).

ARGUMENT

I.

The trial judge fairly exercised his discretion in admitting five photographs to demonstrate, explain, and corroborate the location, extent, and order of individual wounds which would support of a finding of malice, especially when the photographs were used specifically as aids in presentation of testimony by the crime scene and blood stain pattern analyst and the forensic pathologist.

Appellant contends the trial judge erred in admitting photographs, specifically State's Exhibits 24, 25, 26, 27, and 28. He argues the photographs are "graphic and shocking," and were unfairly prejudicial. (FBOA, pp. 10-12). The record shows no abuse of discretion.

Relevant Facts:

Appellant shot victim multiple times with a high powered rifle. In pre-trial, defense counsel requested the Court review the five photographs to be offered at trial expressing concern the photographs were "graphic." (Tr. p. 44, lines 17-25). Counsel argued "there are photographs that show Mr. James covered in a sheet that I think obviously would relate to the jury what happened here without the graphic nature of some of those photographs." (Tr. p. 45, lines 8-12).

The State responded that photographs would add in explaining the location, extent, and order of the wounds which in turn supports a finding of malice:

... Mr. Holman shot Mr. James one time, striking him in the arm. They struggled after that, at which time Mr. James got away, and Mr. Holman shot across his yard, basically striking him at that time in the chest with a thirty-thirty rifle, and it basically severed his lower spine and pretty much that dropped him, and Mr. Holman at that time re-loaded that gun, walked over to him across the yard, and there was a witness across the street who actually saw the last shot which was basically fired point-blank taking the top of Mr. James' head off.

It is one thing to describe that but another to actually see it. That is malice, and I would like to show that to the jury.

(Tr. p. 45, line 18 – p. 46, line 6).

Defense counsel agreed the evidence will indicate a shot, a struggle, a chase and additional shots, but, he argued, if that demonstrates malice, a “description of it” without the photographs would suffice. (Tr. p. 46, lines 10-20).

The trial judge noted a limited number of five were being offered, with each photograph “depict[ing] something about each one of the shots.”¹ He conditionally ruled the photographs would like be allowed, but took the matter under advisement to review the photographs again. (Tr. p. 46, line 21 – p. 47, line 3). At a later point in the trial (after conclusion of the testimony from the first witness, Ms. Debbie Holman, and the second witness, Ms. Pamela Bradshaw² who saw Ms. Holman when she arrived at the Holly Hill Police Department), the trial judge ruled:

... what I have decided is that I am going to allow the five color photographs into evidence. I note your objection to those so as to preserve the record.

I believe from what I know now, the photographs are used only to corroborate and there are not too many of them.

¹ State’s Exhibit 24 shows the deceased from his left side. State’s Exhibit 25 shows a view of the deceased’s from his feet. State’s Exhibit 26 shows the gunshot wound to the chest. State’s Exhibit 27 shows the deceased’s body rolled on his front and appears to show an exit wound. State’s Exhibit 28 is a photograph that shows the gunshot wound to the right forearm. The photographs are available for the Court’s review having been designated by both parties.

² Ms. Bradshaw testified that when Ms. Debbie Holman came into the office “[s]he seemed very panic-stricken... crying, screaming for help,” and Ms. Bradshaw “could tell she had kind of been through something because she - - some sort of altercation of some sort because she had some bruising and lacerations to her face or facial area. She was crying and very hysterical saying someone was after her.” (Tr. p. 175, lines 11-17).

The State is trying to present the photographs that are in my estimation as basic as they can be, not tending to cause any prejudice by showing close-ups or anything like that.

(Tr. p. 179, lines 11-21).

Lieutenant Gerald David Carter with the Orangeburg County Sheriff's Office later testified as an expert in the field of crime scene analysis and bloodstain pattern analysis. (Tr. p. 245, lines 6-12; p. 247, lines 9-14). Lt. Carter took the photos introduced as State's Exhibits 24, 25, 26, 27, and 28. The State offered the photographs through Lt. Carter and the defense objected. (Tr. p. 250, lines 1-14). Lt. Carter testified that he had observed, when reviewing the scene, the victim body which showed he "had massive trauma to his head and skull. He had massive trauma to his right forearm...That was a contusion that was massive to his chest as well as an injury to his lower back...These appeared to be gunshot wounds." (Tr. p. 252, lines 3-8). Lt. Carter specifically referred to the photographs in explaining the position and number of wounds visible on the victim's body. (Tr. p. 252, lines 9-24). He also explained he located skull fragments in and round the body. (Tr. p. 252, line 25 – p. 253, line 19). There was no objection to State's Exhibits 31 and 32 showing the markers where the skull fragments were located. Neither did the defense object to the photographs of "various patterns of blood spatter" in and round the back of the home. (Tr. p. 255, line 2 – p. 256, line 4). The officer repeatedly used the photographs to demonstrate and explain his crime scene observations.

Dr. Janice Ross of Newberry Pathology Associates performed an autopsy on the victim. Dr. Ross found "fragments of bullets in the head, the right arm and the chest cavity." (Tr. p. 282, lines 20-21). "The fragments were kind of outlining the path of the bullets which is consistent with a high-power rifle." (Tr. p. 282, lines 24-25). Dr. Ross

testified she found three distinct wounds, with a possible fourth to the forearm, but that, in her opinion, was “most likely ... related to the arm shot. (Tr. p. 283, lines 15-20). Referring to the photographs, State’s Exhibits 24, 25, 26, 27 and 28, Dr. Ross described the injuries shown.

In regard to the wound to the deceased’s right arm, Dr. Ross testified that “[t]he shot entered the upper right arm on the side and came out toward the inside of the right arm.” (Tr. p. 283, lines 7-14; p. 284, lines 1-22) (referencing State’s Exhibit 28).

In regard to the wound to the chest, Dr. Ross testified the path of the projectile went from front to back and downward and slightly to the right with part of the bullet fragments exiting the back and other fragments being found under the skin near the same area. (Tr. p. 285, line 11- p. 286, line 7) (referencing State’s Exhibit 26 and 27). Dr. Ross found the following injuries as a result of the path of this bullet: “[t]hat one lacerated the left kidney, went through some of the intestines, went through the spine and the backbone, and then through the spinal cord at the level of L-three on the lower back, and that would have paralyzed him immediately.” (Tr. p. 286, lines 2-14). The chest wound would have eventually been fatal. (Tr. p. 286, lines 18-22).

In regard to the head wound, Dr. Ross described the injury as “basically to the left temple area and the bullet opened up the top of the head, made a path through the brain.” (Tr. p. 287, line 24- p. 288, line 1). The result of this gunshot wound would have been immediate unconsciousness and immediate death. (Tr. p. 288, lines 2-4). Dr. Ross noted the same weapon was used for injury to the head as in the previous wounds. (Tr. p. 288, lines 5-7). Anthony James’ cause of death was laceration of the brain due to the gunshot wound; it would have caused him to die within seconds. (Tr. p. 288, lines 20-24).

Further, Jessie James, the victim's neighbors, demonstrated the final show that he observed Appellant inflict, testifying that "[h]e had the rifle kind of like that and he was standing over Anthony, and there was a shot." (Tr. p. 209, lines 12-13).

Discussion:

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." *Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005); *Gambell v. Int'l. Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, an appellant "must show both the error of the ruling and resulting prejudice." *Recco Paper & Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). *See also State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). "To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily,

an emotional one.”” *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995), quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149. However, “[i]f the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.”” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010), quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353. See also *State v. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (photograph of child “substantiated [forensic pathologist] Dr. [Joel] Sexton’s testimony that the child’s sickle cell trait was not outwardly apparent” thus “had a purpose independent of arousing sympathy, and was properly admitted”).

Here, the photographs were used to specifically demonstrate, explain, and corroborate the location, extent, and order of individual wounds which, in turn, gave evidence of malice. Further, the photographs were used by two of the state’s experts in explanation of their testimony. Further still, the photographs corroborated the testimony from the neighbor who observed the last shot. Consequently, there were discrete and necessary reasons to submit the photographs. “Admitting photographs which serve to corroborate testimony is not an abuse of discretion.” *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008). See also *State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim’s body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim’s mouth); *State v. Edwards*, 10 S.E.2d 587, 588 (1940) (“In our opinion the trial Judge did not abuse his discretion in admitting the photograph [depicting head, torso, neck wound, decomposition and maggots] as being relevant, nor can we attach any

importance, in view of the facts of this case, to the contention that the photograph prejudiced the jury against the defendant. Everything depicted by the photograph was, subsequent to its introduction, testified to in detail by the witnesses.”).

There is no merit to the argument that the photographs were not needed to prove malice, as the State could have relied upon witness testimony. (See FBOA, p. 11). That is not the appropriate inquiry. Rather, the proper question for determining relevance was whether the photographs had “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “[A] defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense” and “the prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element of the offense.” *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *State v. Martucci*, 380 S.C. at 249, 669 S.E.2d at 607 (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)) (“The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant’s stipulation.”). As to Appellant’s remaining arguments – urging “simple alterations to the photographs which would have reduced the risk of unfair prejudice,” or using “black and white” photographs, (FBOA, p. 11) –such arguments were not made below and were not ruled upon by the trial judge. Thus, there is no ruling on these suggestions for this Court to review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (“Issues not raised and ruled upon in the trial court will not be considered on appeal”). To the extent, however, the “suggestions” would simply be another form of attempting to select the evidence the

State may use, and the arguments could be reached, Respondent submits the proceeding argument applies in full. At any rate, it has long been established that “[a] trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive.” *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607. See also *State v. Brady*, 461 P.2d 488, 494 (Ariz. 1969) (“The question of admissibility of the evidence is whether it has probative value. The same principle applies whether the pictures are in black and white or in color. Under the evidence of the instant case, the photographs were clearly admissible.”); *Farris v. State*, 328 So.2d 640, 641 (Ala.Crim.App. 1976) (“The colored photograph in question is clearly ghastly; but, gruesomeness is not grounds for excluding this type of evidence, if relevant. ... This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot, and should not, gloss over the fact that violent death is itself loathsome.”);

Further, unlike the photographs in *State v. Collins*, 398 S.C. 197, 201-14, 727 S.E.2d 751, 754-60 (Ct.App. 2012), the photographs at issue here were not “calculated to arouse the sympathy or prejudice of the jury,” rather, were offered and admitted as the best evidence of the offered fact. Additionally, the photographs unduly graphic by presentation, *i.e.* unnecessary close-ups; rather, the photographs are graphic by nature of the horrific wounds inflicted by Appellant. Even so, the presentation, as the trial judge noted, is at least as offensive as actual photographs could be. At any rate, the photographs well demonstrate and corroborate the crime scene analysis and forensic pathologist testimony concerning the wounds. Thus, the trial court did not err in finding the photographs relevant and admissible. Additionally, only five photographs were introduced – each showing a distinct facet of the injuries – as opposed to the numerous

photographs admitted in *Collins* where this Court held that there was an abuse of discretion in the admission of photographs. *See, for example, Collins*, 398 S.C. at 208, 727 S.E.2d at 757 (referencing seven photographs of a partially eaten ten year old victim). Again, there record shows a minimum of photographs to support and corroborate the testimony.

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result”). At worst, the photographs were cumulative to the other evidence, *i.e.* the testimony on the wounds. *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587, 588 -589 (1942) (“The photographs, it is true, were only corroborative of the spoken word, and proved to be unnecessary in this particular case, but they were no more than harmless surplusage. They showed material conditions which existed, and were not inflammable fuel to be consumed by the minds of the jurors, nor do we think that they were calculated to arouse the prejudices of the jury.”). *See also State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence “merely cumulative, insubstantial” did not affect the result of trial and considered harmless). Respondent notes again that the photographs of the

blood spatter evidence and skull fragments sites were admitted without objection, thereby presenting the jury with other evidence of gruesome details such that these photographs would not stand out alone. Moreover, there was overwhelming evidence of guilt in regard to the charges from the shooting – not the least of which is Appellant’s own confession of the shooting, the blood spatter evidence showing the shooting of an unarmed man in the man’s own home then chasing him into his own yard, shooting him in the case, ejecting a shell, then shooting him again while helpless on the ground – the last shot observed by a neighbor. (See R. p. * [statement]; p. 262, lines 19-23; p. 259, line 24 – p. 260, line 13; p. 209, lines 12-13). This evidence well supports the jury’s verdicts of burglary, murder, and possession of weapon, such that the admission of photographs, if considered error, could only be harmless on this record. *Bailey, supra*.

However, the record supports the basis for the trial judge’s ruling admitting the photographs over Appellant’s objection. His ruling should not be disturbed on appeal.

II.

Appellant failed to adequately preserve his argument for a voluntary manslaughter charge for appellate review when he failed to request the trial judge place the specific ruling on the record. Even so, the record well demonstrates the trial judge appropriately declined to charge voluntary manslaughter where the evidence established Appellant knew of the romantic relationship between victim and his long estranged wife weeks before the murder; expressed his intent to kill victim after a confrontation two weeks before the murder; again expressed his intent to kill victim hours before the murder; and, where he spent hours searching for victim then repeatedly shot the victim at victim's home – facts evidencing no basis for finding heat of passion upon sufficient legal provocation.

Appellant argues he was entitled to a charge on voluntary manslaughter for two reasons 1) based upon the fact his wife was in an adulterous relationship with victim at the time of the shooting; and 2) Appellant's statement reflects a disclosure from wife to early on the morning of June 24th, that victim had "her on drugs" and had raped her. (FBOA, p. 13). Neither of these arguments can prevail in light of the record.

Relevant Facts:

Appellant's estranged wife, Debbie, testified that she was held by Appellant from the evening of June 23, 2011, until the afternoon of June 24, 2011, after Appellant had driven to victim's home with his rifle. During that time, Debbie and Appellant went to the store, (see Tr. p. 113, lines 11-21), went to victim's house twice, (Tr. p. 123, line 23 – p. 124, line 17; p. 125, lines 16-19); went to victim's work, (Tr. p. 126, lines 14-15); return to Appellant's house where Debbie feel asleep and did not wake until the afternoon, (Tr. p. 128, lines 21-24), then went to the store again, (Tr. p. 129, lines 9-11), then went to victim's house again, (Tr. p. 129, lines 22-23). During the time, Appellant threatened to "get" Mr. James. (See Tr. p. 124, lines 15-17).

However, the news of the romantic relationship was not new. Debbie testified she and Appellant had been separated for almost a year, and she had received complaints

from Appellant about her relationship with victim. (Tr. p. 108, lines 13-16; p. 146, line 20 – p. 149 line 14). Further, Teresa Rutland, a co-worker of victim's at the IGA. She testified that Appellant approached victim in the IGA store approximately two weeks before the murder, slapped him, and threatened to kill him. (Tr. p. 220, line 21 – p. 221, line 14; p. 222, lines 5-7). She recalled Mr. James told her Appellant had threatened him before. (Tr. p. 222, line 4).

The trial judge acknowledged on the record that defense counsel had requested a voluntary manslaughter charge and provided "four reasons," but declined the request to charge without discussion of those grounds or specificity in the ruling, stating that he would "go into [that] at a later time today." (Tr. p. 357, lines 4-7). The reasons do not appear later in the record; however, the trial judge again noted defense counsel's objection to the failure to charge voluntary manslaughter after the charge to the jury was given. (Tr. p. 423, lines 10-13).

Discussion:

It is questionable whether any particular argument on why the charge should have been given is preserved for review as the reasons argued for the request to charge do not appear in the record. *See State v. Brockmeyer*, 406 S.C. 324, 338-339, 751 S.E.2d 645, 652 - 653 (2013) ("we decline to reach this issue on issue preservation grounds ... Brockmeyer has failed to provide this Court with a sufficient record on appeal to evaluate this assertion of error."). Respondent is unable to address specifically whether the arguments now raised are the same offered in support of the charge below. Therefore, the issue should be considered procedurally barred. Even so, it is clear that a request for

the charge was made, and it is equally clear that the facts of record do not warrant the charge.

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996). “Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.” *Id.* “In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing.” *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

Assuming the argument that the “adulterous relationship” alone warrants the charge was made below and is properly before the Court, the facts of record do not show the type of discovery of the relationship that normally supports the charge.

“Adultery may, in some instances, serve as ‘sufficient legal provocation.’ Spousal adultery, however, is not a license to kill.” *State v. Gadsden*, 314 S.C. 229, 233-234, 442 S.E.2d 594, 597 (1994) (internal citations omitted). The offense of manslaughter is not available to a spouse who searches out one he believes to be in an adulterous relationship with his mate and kills him. *Id.* “In general, South Carolina has allowed marital infidelity to support a charge of marital voluntary manslaughter only when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation.” *State v. Cooley*, 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000). “The killing must also

happen so soon after the discovery of the affair tht the spouse does not have time to coolly reflect on the situation. *Id, citing Gadsden*, 314 S.C. at 233, 442 S.E.2d at 597.

None of these qualifiers are present in the current case. Here, Appellant has alleged his wife was having an affair with the decedent. However, his wife testified that she and Appellant had been separated a little less than a year prior to the shooting. (Tr. p. p. 107, line 21-p. 108, line 2). Appellant also did not catch his wife and victim in a guilty embrace or flagrantly suggestive situation. Moreover, the facts support that Appellant was aware of the “affair” well before the shooting. Debbie testified that she and Appellant argued about her relationship prior to the shooting, (R. p. 148, line 21 – p. 150, line 9), and Appellant had threatened Mr. James two weeks prior while Mr. James was at work, (Tr. p. 220, line 21 – p. 221, line 14; p. 222, lines 5-7). Further, Mr. James confided to his co-worker that Appellant had threatened him before. (Tr. p. 222, line 4).

At any rate, both of Appellant’s present arguments rest on either a “confession” of an affair, or statements of drug use and rape. “Where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation.” *State v. Byrd*, 323 S.C. at 322, 474 S.E.2d at 432. In particular, “a verbal confession of adultery, no matter what the content, would be insufficient to warrant a voluntary manslaughter charge.” *Cooley*, 342 S.C. at 68, 536 S.E.2d at 669. Therefore, either the confession or the alleged statements of drug use and rape will not support a finding of sufficient legal provocation.

Further, the timing of the present case establishes a cooling off period long enough for the passions of the ordinary reasonable person to have cooled. “Even if sufficient legal provocation has aroused a defendant’s passion, ‘if at the time of the

killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter.”” *State v. Smith*, 363 S.C. 111, 115-116, 609 S.E.2d 528, 530 (2005) (quoting *State v. Knoten*, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001)).

In *Smith*, the appellant had been convicted of voluntary manslaughter; however, the Supreme Court reversed as the facts did not warrant the charge. The record reflected Smith found out at 7:00 a.m. that his daughter had been molested. Over the course of the day, Smith went to work, came home, talked with his wife and daughter over a beer, showered, spoke with a therapist about scheduling appointments, retrieved his gun, went to the home of a friend to discuss target practice not the molestation allegation, had the friend’s son buy him shells for his gun, went to a local bar and grill around 5:30 p.m and talked with another friend before going the home of the molester. *Smith*, 363 S.C. at 114, 609 S.E.2d at 529-530. The Court found that this period of over ten hours was “certainly a long enough period to render Smith capable of cool reflection.” *Smith* at 116, 609 S.E.2d 528, 531. Since no heat of passion was present in *Smith*, which is required to establish voluntary manslaughter, the verdict was reversed. *Smith* at 116, 609 S.E.2d 528, 531. The time frame here is even longer. Either Appellant had weeks to think about the “relationship,” or, considering his other theory for the charge, he had from the early morning of June 23, 2011, to consider the “allegations” of drug use and rape, hunt for Applicant, return home, went to sleep, got up again, went out again, and finally found victim at victim’s home in the afternoon. (See R. p. [statement]). Either allegation, in context of this record, fails to show a lack of sufficient time to “cool off.”

In sum, Appellant was not entitled to a charge of voluntary manslaughter. The evidence shows no basis for finding heat of passion upon sufficient legal provocation. Rather, the evidence exclusively shows Appellant killed victim with malice aforethought as he hunted him down over an extensive period of time, and, upon finally finding Mr. James, shot him three times in a series of shots that took them from inside the victim's home to the yard where Appellant stood over decedent and fired a final shot. Appellant's statement not only reflects he admitted the shooting, he admitted the malice, confessing he "reloaded the gun" twice during the murder. (R. p. *). Appellant had to stop advancing towards the victim and take time to load the gun each time before he fired his last two shots. Appellant did not stop until he had shot victim in the chest and head, with the last shot to the head inflicted while victim was helpless on the ground. (R. p. *). The trial judge did not err by refusing a charge of voluntary manslaughter.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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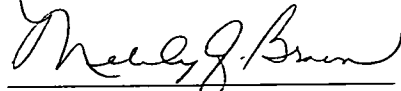
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