

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Chesterfield County
J. Michael Baxley, Circuit Court Judge
2010-GS-13-0192, 2010-GS-13-0263

SC Court of Appeals

Appellate Case No. 2012-213655

THE STATE,

RESPONDENT,

v.

THOMAS STEWART,

APPELLANT

**INITIAL BRIEF OF RESPONDENT AND
DESIGNATION OF MATTER**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENSKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit
P. O. Box 616
Bennettsville, SC 29512
(843) 479-6516

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II. The trial court properly denied an objection to the prosecution closing argument when it argued that malice can be inferred through the use of a deadly weapon. This action was consistent with the opinion in State v. Belcher which did not restrict prosecutorial argument concerning reasonable inferences from the evidence concerning malice23

III. Since the state of mind of a victim is relevant evidence when the defense of self-defense is offered, the trial judge did not abuse his discretion in admitting evidence from the Appellant’s statement that he had been violent against the victim previously. The admission of other evidence of the fact that an arrest warrant for trespassing and a restraining order by the victim against the Appellant within days prior to the crime was admissible as relevant evidence and part of the res gestae where it was argued that knowledge of the matters may have been a motive for the assault and reflected both the state of mind of the Appellant as well as the victim. The admission of other evidence concerning the conduct of the Appellant to the victim made the admission of the challenged evidence harmless error.31

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

RESPONDENT'S STATEMENT OF THE CASE

Appellant, Thomas Stewart was indicted by the Chesterfield County Court of General Sessions for murder and possession of a weapon during the commission of a violent crime. The Appellant was represented by Casey Secor, S. Boyd Young and William McGuire of the South Carolina Office of Indigent Defense. The State of South Carolina, represented by Kernard E. Redmond, Adam Foard and Christopher Jones of the Fourth Circuit Solicitor's Office. The indictments were called to trial on December 3, 2012 before the Honorable J. Michael Baxley. On December 6, 2012, the jury returned a verdict of guilty as to the charges of murder and possession of a weapon during the commission of a violent crime. TR. 677 lines 7-15. A motion for a new trial was made and denied the same date. Judge Baxley sentenced Appellant to life in prison and five years to be served consecutively. TR. 691 lines 18-24. The Appellant timely filed his notice of appeal.

STATEMENT OF THE STATE'S VERSION

"My daddy's stabbing my momma." Tr.p. 471-473. The Appellant declared: "I'm going to kill you." Tr.p. 476. The victim was not seen stabbing back. Tr.p. 482-483. This case involves the death of Bellany Clyburn at the hands of the Appellant as the conclusion of a violent relationship. The victim was murdered on January 1, 2010 after suffering 39 stab wounds (Tr.p. 342-343) after being confronted at her own apartment by a knife-wielding Appellant. The state's evidence revealed that the victim, who had made a restraining order against the Appellant within days before the incident and arrest warrants concerning a trespassing and assault and battery. Tr.p. 328, 404-407. In a statement to police, the Appellant admitted that he had arrived in the early morning hours. He confronted the victim with her two children as she left the apartment. She returned to the apartment where she attempted to defend herself and used mace on the

Appellant. She ran out of the apartment , where she was chased down by the Appellant, resulting in 39 stab wounds. She died as a result of the attack. The Appellant was found away from the scene covered in blood. Tr.p. 192-193, 195. He declared that he had “lost it in love.” Tr.p. 195-196. The Appellant further stated that he carried the knife into the apartment. Tr.p. 196-197. See also, State Exhibit 7. He stated that the only reason why he stopped stabbing the victim because he felt threatened by others who had come to the scene. In his initial statements the Appellant made no claim about self-defense. Tr.p. 197-198.

ARGUMENT

- I. **The trial court properly applied the mandates of Batson v. Kentucky in rejecting the defense motion. The Solicitor gave valid race-neutral reasons for each of the four peremptory strikes which were not pretextual. The defense failed in Step 3 of the Batson test to show pretext where the Caucasian jurors not struck were not similarly situated to the challenged African American juror. Purposeful discrimination was not proved.**

In his argument, the Appellant contends that he was able to prove pretext on the part of the Solicitor in his use of peremptory strikes against potential African American jurors. Alternately, he contends that Judge Baxley failed to resolve whether pretext was shown and only addressed whether the reasons given by the prosecution under Batson v. Kentucky, 476 U.S. 79 (1986) were race-neutral. In addressing the reasons for using four of its five strikes on African Americans, the prosecution expressed valid race neutral reasons which were accepted against the defense’s protest that the reasons were pretextual. A review of the reasons, in the context of this record, reveals a sound basis for Judge Baxley’s denial of the motion. A new trial is not warranted.

How the Issue Was Raised

The record before the court reveals that the State used four (4) of its five (5) peremptory

challenges against African American potential jurors. Tr. p. 83-91, Roll call list for panel, ROA ___. The jury was made of ten Caucasian jurors and two African American jurors. The defense objected to the State's use of the preemptory challenges after an off-the-record discussion with the prosecution. Tr. p. 96, ll. 11-19.

The State's Reasons

The trial judge requested the Solicitor to explain his reasons for the strikes against the four potential African American jurors. In describing the manner he would use, Judge Baxley stated:

THE COURT: Let's do it this way. Mr. Young, you give me the four jurors whom you object. I first determine whether they are cognitive as a group, whether that be a racial group, gender group, whatever it and which I think that will determine if they're acceptable. Then I'll hear from the State as to what their purpose or reason in for striking and then hear from you as to why you believe that would be invalid reason. That fair enough reason?

Tr. p. 97, ll. 10-17.

Solicitor Redmond stated earlier that his basis for striking **juror 101** was that he had been charged with "possession of cocaine" and that it was later nolle prossed. Tr. p. 96, ll. 13-20.

Solicitor Redmond stated that it was a prior arrest handled by the Solicitor's Office. Although he stated he did not know the particular reasons for the dismissal, "based on that interaction with law enforcement, especially with it being a drug charge, we feel that gives enough to [raise] concerns..." Tr. p. 98, ll. 10-16. He stated this occurred in 2009. Tr. p. 98, ll. 4-20.

As to **juror 126**, it was proffered that this juror was late in returning to court after a break and there were additional concerns about her demeanor appearing disinterested. Solicitor Redmond stated that her lateness raised concerns about her ability to be [conscientious] in a serious murder trial. Tr. p. 98, l. 22 – p. 99, l. 4.

Concerning **juror 117**, Solicitor Redmond stated that she was unemployed, which he noted had been upheld as a race neutral reason. However, he further stated that in their discussions that it was pointed out that she knew the victim. Tr. p. 99, ll. 5-10. See Tr. 30-31 (“I went to school with her,” but that she had not seen her in some time). He also stated that knowing the victim sometimes works both ways stating there was another juror that the defense struck.¹ Because juror 117 knew the victim, but not in what context she knew her raised concerns, but Solicitor Redmond unequivocally declared the reason for the use of the strike was the fact that juror 117 was unemployed. Tr. p. 99, ll. 6-19.

As to **Juror 33**, Solicitor Redmond stated they had no information about him, but law enforcement were present and they had one strike left at the time. Solicitor Redmond stated law enforcement made them aware that juror 33 had prior incidents involving his girlfriend who is now his wife. Although they did not result in criminal charges, the reported incidents revealed the juror and his wife engaged in a “tumultuous” relationship. He stated that given the nature of the case before them (a girlfriend being killed by her boyfriend after violence toward the boyfriend’s wife) it raised concerns. Solicitor Redmond stated this information about the incidents was given to him by the Chief of Police of Pageland. Tr. p. 99, l. 23 – p. 100, l. 12.

The Defense Claims that the Reasons for the Strikes Were Pretextual

Judge Baxley then inquired of the defense why they thought these reasons were pretextual. Concerning the strike of **juror 101** on the basis of the nolle prossed possession of cocaine charge, he stated he had no way of knowing if other jurors had “some other nolle prossed charges in some other clerk’s office.” Tr. p. 100, ll. 17-23. However, he stated that juror 131

¹ The defense struck Juror 128 who stated that she knew the victim’s family because “they come to where I work all the time.” Tr. p. 31, l. 15 – p. 32, l. 6.

was struck by the defense because he had a son in law enforcement, but had on his rap sheet a nolle prossed assault and battery with intent to kill charge. Tr. 100-01. The defense opined that they were similarly situated and his charge was for a violent crime, as opposed to a drug charge.

As to **juror 117**, who the prosecution stated was unemployed and went to school with the victim, the defense noted the first juror called was juror 128 but who was struck by the defense because the victim's family comes in and out of the store all the time. Tr. p. 101, ll. 10-14. The defense stated juror 128 was not struck for knowing the victim's family. He opined this was similarly situated and therefore the reason for juror 117 was not race neutral. Tr.p. 101, l. 16-18.

As to **juror 33**, the defense argued the basis was that someone told them this person would not be a good juror. Tr. 101. The defense said "I don't know. I mean I'll leave that up to the Court." He said he did not have law enforcement assistance but noted that the court asked the juror about criminal domestic violence charges and he did not answer. Tr. 102.

Judge Baxley inquired of the defense concerning **juror 126** who the State asserted was late and "had something of an attitude." Tr. p. 102, ll. 7-10. Counsel Young responded that he did not recall the court admonishing any juror for being late and claimed he viewed the jury and did not know what they were talking about (concerning the attitude). Tr. p. 102, ll. 11-17.

The Trial Court's Findings and Conclusions

Judge Baxley however noted whether it is a valid issue was a separate question, but confirmed that there were two jurors who were 10 minutes late after a break, noting that he was a few minutes late himself. He stated at that time to make sure other jurors were not outside. He

confirmed that **juror 126** was one of the two jurors. Tr. p. 102, l. 18 – p. 103, l. 4.²

The trial judge then ruled on the defense Batson motion. In particular, Judge Baxley stated:

THE COURT: All right. Just a moment. All right. The Court is prepared to rule at this time, and what I have before me is four jurors that the Defense complains about. They are Juror 101, 126, 117 and 33.

With regards to 101 the reason given for the strike is that this juror had a nolle prossed cocaine charge; that there had been previous, obviously, from that negative relationship with law enforcement, that that has been found by our Court in the case of the State v. Johnson at 302 SC 243, to be a permissible reasons for a strike.

This same reason will apply to Juror 33. With regards to the juror who may have been late or who may have a demeanor that is - - seems to be disinterested, the Court finds that has been previously permitted by our Supreme Court in the case of the State v. Casey, 325 SC 447. Specifically on the issue of being late, in the case of State v. Wilder, 306 SC 535 our Supreme Court has permitted a strike and found that to be a valid reasons.

In regard to Juror 117, the Court finds that the State [main] reason that this witness had known the victim and had been to school with the victim is a valid and non-racial reason for the strike. Court does not accept the fact that the juror may be “unemployed” particularly in this environment. That is not, in this Court’s opinion, and in this [locale] a valid reason to impose a strike.

And I do find that reason that the victim was known to the juror. **Also, I do not find that there is a pattern here of jurors being treated distinctly and separately among the races, one decision for one and another decision for the other. That would be opposite or inappropriate.**

And the Court finds that the Batson motion should be denied for these reasons.

Tr. p. 104, l. 9 – p. 105, l. 16.

At that point, defense counsel Young sought to clarify Judge Baxley’s ruling. He stated

² At that time of the proceedings, the State withdrew its Batson motion. Tr. 103-04.

he was provided with a rap sheet which included the juror 131 was passed over and had a *nolle prosequed* assault and battery with intent to kill charge. Tr. p. 106, ll. 12-19. However, counsel Young also added that juror 105 (a white female that the defense struck) had something listed on the rap sheets as either arrest or conviction on bad check and simple assault. Tr. p. 106, ll. 20-23.

Judge Baxley stated the Solicitor states this case arises from a criminal domestic violence situation and the Court found the *nolle pros* was a valid reason of juror 101. Tr. 106-07.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). A court is “bound by the trial court's factual findings unless they are clearly erroneous.” *Id.* at 6, 545 S.E.2d at 829; see also State v. Edwards, 384 S.C. 504, 508, 509, 682 S.E.2d 820, 822, 823 (2009); State v. Haigler, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999) (“The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous.”).

BATSON STANDARDS

“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a [juror] on the basis of race or gender.” McCrea v. Gheraibeh, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (citing State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); see also Batson, 476 U.S. at 89, 106 S.Ct. 1712. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. See Purkett v. Elem, 514 U.S. 765, 767–68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

First, the [party asserting the Batson] challenge must make a prima facie

showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the Batson] challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. The ultimate burden always rests with the [party asserting the Batson challenge] to prove purposeful discrimination.

State v. Giles, 407 S.C. 14,_, 754 S.E.2d 261, 263 (2014) (internal citations omitted); see also Snyder v. Louisiana, 552 U.S. 472, 476–77, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (quoting Miller–El v. Dretke, 545 U.S. 231, 277, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)).

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. Purkett, 514 U.S. at 768, 115 S.Ct. 1769; State v. Inman, 2014 Westlaw 2765674 (S.Ct.S.C. 2014). The explanation must only be “clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it.” Giles, 407 S.C. at _, 754 S.E.2d at 265; see., e.g., id. at _, 754 S.E.2d at 262, 265–66 (finding that a defendant's explanation that he “did not feel the [struck] jurors were right for the jury,” while “technically, semantically and intellectually racially neutral,” would not allow the circuit court to “assess the plausibility of the proffered reason for striking the potential jurors”).

In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So.2d 272, 290 (La.1995); see also Batson, 476 U.S. at 93–94, 106 S.Ct. 1712 (stating that the court must consider “the totality of the relevant facts,” including both

direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508–09, 682 S.E.2d at 822; see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party is attempting to show that the “originally neutral reason was ... a pretext because it was not applied in a neutral manner.” State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). However, “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence *tending to prove purposeful discrimination* to be considered at Batson's third step.” Miller–El v. Dretke, 545 U.S. 231, 241 (2005). Contrary to the Appellant’s position, it does not automatically prove purposeful discrimination.³

Under Batson, the assessment was still based upon a totality of the circumstances test. “[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.” United States v. McAllister, 693 F.3d 572, 580 (6th Cir.2012). The answer to the decisive question about whether the race-neutral explanation for a peremptory challenge should be believed will largely turn on an evaluation of credibility and usually will involve an evaluation of the demeanor of the jurors and the attorney who exercises the challenge. See Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). “The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the [defense attorney’s] credibility to such an extent that a court should sustain a Batson challenge.” Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir.2003). “[T]he critical question in

³ See People v. Hudson, 157 Ill.2d 401, 431 (1993) (“[A] venireperson possessing an unfavorable trait may be accepted as a juror while another venireperson possessing that same negative trait, but also possessing other negative traits, may be challenged.”).

determining whether [the State] has proved purposeful discrimination at step three is the persuasiveness of the [defense counsel's] justification for [its] peremptory strike.” See Miller–El v. Cockrell, 537 U.S. 322, 338–39, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003). And the persuasiveness of the State's justification depends heavily on credibility. See *id.* at 339 (“At [step three], ‘implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.’ In that instance the issue comes down to whether the trial court finds the [defense counsel’s] race-neutral explanations to be credible.” (quoting Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam))).

Thus, the credibility of the prosecutor justifications are at issue, but credibility is not based solely on the demeanor of the lawyer when she offered the justifications. While “[c]redibility can be measured by, among other factors, the [lawyer’s demeanor[,]” it can also be measured “by how reasonable, or how improbable, the explanations are[] and by whether the proffered rationale has some basis in accepted trial strategy.” *Id.*; see also Miller–El v. Dretke, 545 U.S. 231, 241, 253, 125 S.Ct. 2317, 2325, 2332, 162 L.Ed.2d 196 (2005). “Determining whether the reason offered is an honest one turns on in-person credibility assessments which clearly the district court is in the best position to make.” United States v. Montgomery, 210 F.3d 446, 453 (5th Cir.2000); see also Felkner v. Jackson, _ U.S. _, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011) (noting that a Batson claim “turns largely on an evaluation of credibility” (internal quotation marks omitted)). Deference to the trial court's findings is particularly appropriate” in a Batson challenge because it requires an assessment of credibility.⁴

⁴ In State v. McMillan, 400 S.C. 298, 734 S.E.2d. 171 (S.C.Ct.App. 2012), the Court of Appeals in a reverse Batson scenario concluded that the trial court erred when it concluded that the defense counsel’s justification was not race-neutral. The Court of Appeals found McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. The Court found that this reason, although questionable, is race neutral. See *id.* at 123, 470 S.E.2d at 371 (stating the

ANALYSIS

In his brief before this Court – for the first time – the Appellant contends that the trial judge completely failed to apply the third step of Batson which requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. He essentially argues that Judge Baxley stopped his assessment at Step two. This new assertion does not entitle Appellant to the requested relief.

The New Failure to Complete Step 3 Issue Is Procedurally Barred

First, Respondent questions whether that precise claim is properly before the Court because he did not raise that same claim before Judge Baxley. See State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (finding where a defendant failed to call an alleged error to the trial judge's attention at the first opportunity to do so, the defendant is procedurally barred from raising the issue on appeal). After the trial court's ruling, the Appellant's only inquiry concerned an expansion of his claim that he learned another potential juror (#105) had evidence of a dismissed charge of bad checks and simple assault. Tr.p. 106-107. However, there was no assertion below that the trial court completely failed to do a "step three" assessment as he now claims. His new complaint must be rejected on that initial basis. See State v. Dunbar, 356 S.C.

defendant's reasons for striking a juror do not have to be reasonably specific or legitimate—the reason need only be race neutral); State v Cochran, 369 S.C. at 321, 631 S.E.2d at 301 (“Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution.”); State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App.1997) (“The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause.”). The Court also found the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan “used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination.” State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999).

138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”). See People v. Jackson, 357 Ill.App.3d 313, 328 (2005) (finding that defendant forfeited his claim that “the trial court improperly collapsed the three stages of the Batson hearing” by failing to raise it at trial). See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.”).

The Requested Remedy of A New Trial Would Be Improper And Should Be Limited To Remand if Step Three Was Not Done.

Second, the remedy that he suggests for this belated assertion is too broad. If in fact the trial judge failed to do a step three assessment, the appropriate remedy would only be for a remand to the Court of General Sessions for a special finding on that issue.⁵ In fact, the case the Appellant relies upon, U.S. v. Hill, 146 F.3d 337 (6th Cir. 1998) supports that proposition. In Hill, the 6th Circuit concluded that a remand to the trial court was required with regard to the Batson issue because the record lacked information necessary for appellate review, including the District Courts thought as to the weight it gave such factors in concluding that the strike was not made with discriminatory intent. The Vermont Supreme Court has observed:

⁵ Respondent recognizes that the Court cannot remand to Circuit Court Judge Baxley, who presided here, because he has since left the bench to take another non-judicial position. In similar circumstances, other courts have remanded to a new judge to complete the required Batson analysis. See People v. Davis, 368 Ill.App.3d 17, 305 Ill.Dec. 848, 856 N.E.2d 653, 655 (2006); State v. Scott, 829 N.W.2d 458, 467 (S.D.,2013). We are well aware of the “practical difficulties” this may present. See State v. Cannon, 41 P.3d 1153, 1158 (Utah Ct.App.2002). If the remand is done and a newly assigned judge determines that insufficient evidence exists to make the necessary findings, then and only then a new trial must be ordered. Nevertheless, the Appellant should not be entitled to the windfall of a new trial when purposeful discrimination was not proven when an appropriate remedy may exist to resolve it.

The decisions are uniform that unless the passage of time makes it impossible, the appropriate remedy where the trial court fails to follow Batson, and does not make a finding that the challenger has made out a prima facie case of discrimination, is a new Batson hearing in which the trial court must go through the three-step process mandated by that decision.

State v. Donaghy, 171 Vt. 435, 442; 769 A.2d 10 (2000) (collecting cases).

The Mississippi Supreme Court has recently addressed a similar scenario in Corrothers v. State, __ So.3d __, 2014 Westlaw 2894310 (Miss. 2014). The Mississippi court stated:

In Pruitt v. State, 986 So.2d 940, 946 (Miss.2008), the Court stated:

[I]n addressing a Batson claim, the Supreme Court has stated, “[w]e adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it.” Miller–El v. Cockrell, 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A number of courts have used this statement to reject the argument that a trial court must make specific findings of fact regarding the proffered race-neutral reasons. See [,] e.g., State v. Frazier, 115 Ohio St.3d 139, 152, 873 N.E.2d 1263 (2007) (while more thorough findings would have been helpful, “the trial court is not compelled to make detailed factual findings to comply with Batson ”); Lamon v. Boatwright, 467 F.3d 1097, 1101 (7th Cir.2006) (where a trial court failed to make findings on each proffered reason, it is sufficient if the appellate court can infer from the record that the trial judge engaged in the step-three inquiry); Messiah v. Duncan, 435 F.3d 186, 198 (2d Cir.2006) (“As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his Batson ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a Batson challenge.”)

We stated that, while the trial court should make on-the-record findings on each race-neutral reason provided by the State, as long as the record provides a basis in fact for the trial court's ruling, reversal is not required. *Id.* Further,

[w]here a trial judge fails to elucidate such a specific explanation for each race-neutral reason given, we will not remand the case for that Batson-related purpose alone. This Court is fully capable of balancing the Batson factors in cases such as this one. Continued remand of such cases only wastes the trial court's limited resources and acts to further delay justice.

Id. at 946–47 (quoting Burnett v. Fulton, 854 So.2d 1010, 1016 (Miss.2003)).

Corrothers v. State, *supra*.

Therefore, if this Court is of the opinion that Judge Baxley failed to address the claims of pretext that were argued to him, a remand would be proper, rather than assuming *arguendo* that the prosecutor acted with discriminatory intent where the Appellant initially asserts that the trial court never addressed his claims when the finding was to the contrary.

Pretext Was not Proven to the Trial Judge

Alternately, Respondent submits that the trial judge concluded that the Appellant had failed to show that the prosecutor's race neutral reasons for the four peremptory strikes were pretextual and that he had proven purposeful discrimination. Within the order denying the Batson conclusion, Judge Baxley rejected that pretext was proven. In particular, he found: "Also, I do not find that there is a pattern here of jurors being treated distinctly and separately among the races, one decision for one and another decision for the other. That would be opposite or inappropriate." Tr.p. 105, ll. 10-14.

In making an assessment comparing jurors, the potential jurors need only be alike "in all relevant aspects." State v. Scott, 406 S.C. 108, 749 S.E.2d 160 (S.C. App. 2013)⁶, citing Startzell v. City of Philadelphia, 533 F.3d 183, 203 (3d Cir.2008) (quoting Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). Therefore, in determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared.

⁶ In Scott, the Court of Appeals found that a white warehouse manager was not similarly situated to black teachers, and thus defendant's strike from jury of warehouse manager as a person whose "employment related to supervising and overseeing" was not purposeful racial discrimination so as to support state's Batson motion, since duties of teachers in general did not involve the same supervisory aspects as duties of warehouse manager, namely ability to hire, fire, or demote adult co-workers.

See State v. McCray, 332 S.C. 536, 540–41, 506 S.E.2d 301, 302–03 (1998) (finding three white jurors who were seated on the jury were not similarly situated to four black jurors who were struck from the jury because “[t]he white jurors did not have the same relationship to law enforcement as the black jurors” when the black jurors had relatives or friends who, at the time of the trial, were employed in law enforcement, and the relatives or friends of the white jurors were no longer employed in law enforcement); State v. Williams, 379 S.C. 399, 401–02, 665 S.E.2d 228, 230 (Ct.App.2008) (holding the trial court erred in finding an unemployed juror was similarly situated to an employed juror whose spouse was unemployed). An apparent uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a neutral explanation for the inconsistency State v. Cochran, 369 S.C. 308, 334, 631 S.E.2d 294, 308 (Ct.App.2006). See also State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct.App.1997) (holding, although the State applied its facially valid reason inconsistently in permitting a like-situated female juror to be seated, the State's explanation of mistake for the omission was gender-neutral).

JUROR 101

Further, there was a record basis to support the race-neutral reasons as being valid. As to juror 101, the prosecutor stated that he was struck because of the prior arrest for possession of cocaine and the fact that the Solicitor's Office that was prosecuting the Appellant's case had been involved in the earlier prosecution of juror 101. Tr.p. 96-98. The Appellant asserted he had shown pretext at the trial by the fact that juror 131, a white male had a rap sheet that included a dismissed charge of assault and battery with intent to kill, although the defense admitted that the

same juror had been struck by the defense and he had a son in law enforcement. Tr.p. 100-101, 106. Subsequent to the rejection of the claim, the Appellant added that juror 105, a white female, had a record of either unknown as to arrest or conviction on bad check or simple assault. However, he also acknowledged that juror 105 was the sixth strike by the defense. In denying the Batson claim, the Court found the reason that there had been previous, obviously, from that negative relationship with law enforcement and was a permissible reason for the strike, citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)

The Appellant concedes that the reason for the strike is a race neutral reason, but questions its validity. Under Batson, the assessment was still based upon a totality of the circumstances test. “[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.” Here, the jurors that h claims were similarly situated were clearly not similarly situated to juror 101. Alleged pretext juror 131 had a son-in-law in law enforcement - particularly the local Highway Patrol assignment⁷ - is an obvious reason why juror 131 was not shown to be similar to juror 101. Tr.p. 55, ll. 10-23. [Further, although he had an apparent *nolle pros* of an assault and battery charge, it was not shown that in this record that he had been prosecuted by this Solicitor’s office]. Nevertheless, the breadth of the difference was additionally shown by the fact that the defense struck juror 131.

Similarly, the dissimilarity between juror 101 and juror 105 a white female were readily apparent. Juror 105 was reported to have a rap sheet showing a bad check and simple assault, but the dispositions were not clear. Nevertheless, juror 105 was also the same juror who indicated that she had been involved as a victim in two separate accident 18 and 20 years before

⁷ Juror 131 indicated that he had a son-in-law in law enforcement with the Highway Patrol who was assigned to Chesterfield County which is where this crime occurred.

and were involved in the prosecution of those matters. Tr.p. 56, l. 11-57, l. 16. She considered herself to be a victim of a violent crime and her response to the court as to whether she anything would prevent her from being fair and impartial gave a response “I don’t think” which caused the trial judge to asked an additional follow-up question as to whether she was certain of it. Tr.p. 57, l. 5-12. Again, the evident dissimilarity was shown, and the defense used a peremptory challenge, #6, to have her removed. Under the totality of the circumstances, the Appellant failed to prove pretext by the fact that the prosecutor did not strike juror 105 and 131 before they were struck by the defense.

Juror 33

As to juror 33, an African American male who was the prosecution 5th strike, the prosecutor asserted that he was struck based upon the advice from the Chief of Police of Pageland that the potential juror had been involved in a tumultuous relationship with his girlfriend/wife. Since this case involved alleged domestic violence between the Appellant, his girlfriend and his wife, the basis of the strike was due to this information. The defense urged that the claim that someone told the prosecutor that the person would not be a good juror was insufficient and left it up to the court – although he noted that juror 33 had not indicated that he had any criminal domestic violence charges which the venire was questioned. Tr.p. 102. The trial judge rejected the claim of pretext for the same reasons as juror 101.

The failing to show the pretext jurors 105 and 131 were similarly situated are weaker here were the dissimilarity is even stronger. Juror 33 was struck based upon law enforcement information which revealed a potential bias in the actual prosecution based upon the juror own life experience in his own domestic relationship. Although juror 33 had not been charged with a

crime, the information would suggest to any reasonable prosecutor that it could impact upon the juror's treatment of a similar domestic situation. There was no similarity to either juror 131 who had a son in law enforcement or juror 105 who considered herself to be a victim of a violent crime and prosecution witness. As Judge Baxley recounted, this incident arose from a criminal domestic violence situation which is similar to the contentious situation concerning juror 33. The trial court plainly saw the evident difference and credible basis for the prosecutor's use of the strike. Tr.p. 107-108.

Juror 117

The Prosecutor stated that he struck potential juror 117, an African American female primarily as being unemployed, but noted that she had also gone to school with the victim. Tr.p. 99, citing Tr.p. 30-31. Solicitor Redmond declared that unemployed had been found to be a race-neutral reason by the courts. Tr.p. 99. Rollcall List for Panel, p. 10.⁸ The prosecutor also noted that knowing the victim may work both ways, since it was shown that the defense had struck juror 128 who asserted she knew the victim's family as seeing them "all the time" where she works. Although he saw that the juror had known the victim in school as a matter that raised concerns, he stated the main reason for the strike was the unemployment. Tr.p. 99. It was not

⁸ Solicitor Redmond made a correct statement of law in support of his use of the strike. See State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991) (unemployment is a race-neutral reason). In State v. Williams, 379 S.C. 399, 403, 665 S.E.2d 228 (S.C. App. 2008), the Court of Appeals unequivocally stated "employment, or lack of it, is a well-understood and recognized consideration in the exercise of peremptory challenges. State v. Haigler, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (stating unemployment is a race-neutral reason for a strike); State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding place of employment is a race-neutral reason for a strike); see State v. Adams, 322 S.C. 114, 125, 470 S.E.2d 366, 372 (1996) (finding type of employment is a race-neutral reason for a strike." In Williams, the Court found pretext was not shown where "Jurors 78 and 81 are both white and they are not "similarly situated," as Juror 81 is unemployed and the spouse of Juror 78 is unemployed." In State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987), and State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988). In Martinez the court found racially neutral reasons stated for strikes against black jurors of the same age and sex as the defendant who had possible criminal records and against a black juror who was unemployed. Martinez, 294 S.C. at 73, 362 S.E.2d at 642.

contested that the potential juror 117 was unemployed. However, the defense asserted that he had shown pretext with juror 128 because she knew the victim's family, but did not address the stated reason of unemployment and made no showing that any unemployed white potential jurors were not struck by the state. The trial court, however, found the main reason the state struck the juror was because she knew the victim and had gone to school with her and concluded that it was "valid and non-racial reason for the strike." Tr.p. 105, l. 2-9. However, the trial judge cautioned that using unemployed should not be a reason for a strike in this locale. Tr.p. 105, l. 6-9.

Assuming arguendo that the main reason for the strike was knowing the victim and having gone to school with her, the situation with juror 128 is dissimilar. Juror 117 stated that she had gone to school with the victim, but had not seen her for some time. However, the motivating reason stated by the prosecution was the juror's unemployment. In contrast, the alleged pretext juror #128 was not only employed, but stated that she "knows the victim's family" [but did not state that she knew the victim] and that "they come into where I work all the time." This reflected present contact with the grieving family members, but no response about knowing the victim herself. The Appellant contended that juror 128 was the first juror addressed and the state did not strike her. However, he ignores the evident differences between knowing the victim in school and that she had not seen her for some time,⁹ in contrast to seeing the members of victim's family where she works "all the time" including the present time after the

⁹ According to the Rollcall, p. 10, ROA __, juror 117 was born in 1983. The crime occurred on January 1, 2010. The juror was 27 years old at the time of the crime. The victim was 25 when she died, two years younger than juror 117. Tr.p. 615. It was not presented when the last time juror 117 she saw the victim other than it being some time. It should be noted that the victim had been convicted previously of a violent crime against the Appellant's wife in 2009. Tr.p. 561-563. As the prosecution feared, the prior knowledge about the victim was potentially dangerous to the state's case where the defense was claiming the victim was the aggressor.

death. There was no information that juror 128 actually knew the victim, only the victim's family, unlike 117. In addition, juror 117 did not state that she was friends with the victim, a concept that underlies their present argument. The Appellant speculates in their Initial Brief of Appellant that: "it would be difficult to imagine a better juror for the State than one that had known the victim and been to school with the victim."¹⁰ *Initial Brief of Appellant*, p. 13. To the contrary, where the victim had a history of violent conduct against others and the Appellant's theory was that he feared for his own life and that she assaulted him the night of her death, juror 117 could be the worst juror for the prosecution! Tr.p. 603-611. Further, the defense used its first peremptory strike against juror 128, reflecting his concern about that jurors potential leanings in the state's favor. Plainly, these jurors situations are dissimilar.

Juror 126

Juror 126 was struck by the State based upon his reason that the juror was late and concerns about a disinterested demeanor when she returned late. Tr.p. 98-99. The state asserted that this questioned their confidence that she would be a conscientious juror in this serious case. Id. Although the defense asserted that it did not notice any jurors being late or admonished, the trial court corrected him and found that juror 126 was at least 10 minutes late after a break. Tr.p. 102 – 103. The trial judge found that the reason and demeanor and being disinterested was a valid reason, citing State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (1997). In addition, Judge Baxley found that being late to court was also a valid reason, citing State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991).

¹⁰ This speculation was never raised to the trial judge by the defense.

In the *Initial Brief of Appellant*, the Appellant does not argue that pretext was shown for the stated reasons for the strike of juror 126. *Initial Brief of Appellant*, p. 12-13. Since it was not argued in his brief, Respondent submits that he has abandoned any claim related to the strike of juror 126. An issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal. Rule 208(b)(1)(D), SCACR; Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000)(Department of Revenue stated it was not waiving issue but failed to make any argument on the issue); State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for an appellate court to consider issues not raised to it); State v. Duell, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995). An issue is also deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998)(a one sentence argument is too conclusory to present any issue on appeal).

Here, the abandonment was reasonable, because there is no merit to a claim that it was pretext. Essentially, the defense argument in the trial court was the defense did not notice any juror being late so that state's stated reason must be pretext. However, the trial judge corrected the defense and found that two jurors were 10 minutes late after a break and one of the jurors was juror 126, consistent with the stated reason. Tr.p. 102-103. This finding of fact has deference in the appeal on a Batson issue. See State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822–23 (2009) (noting, in determining whether a Batson violation has occurred, appellate courts give the trial court's findings great deference on appeal; the trial court's determination concerning

whether purposeful discrimination has occurred rests largely on the court's evaluation of demeanor and credibility; the demeanor of the challenged attorney will often be the best and only evidence of discrimination, and an evaluation of the attorney's mind lies peculiarly within a trial court's province); State v. Garris, 394 S.C. 336, 353, 714 S.E.2d 888, 897 (Ct.App.2011) (“The trial court's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous.”).

The trial court assessment that the reasons were race neutral was also supported by the caselaw. In the absence of contrary evidence in the record, demeanor is a race-neutral basis for exercising a jury strike. See State v. Cochran, 369 S.C. 308, 317, 631 S.E.2d 294, 299 (Ct.App.2006) (“The demeanor of a prospective juror is generally a race-neutral reason for employing a preemptory challenge.”); State v. Tucker, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999) (“[C]ounsel may strike venire persons based on their demeanor and disposition.”); Cochran, 369 S.C. at 317, 631 S.E.2d at 299 (“An express finding by the trial court will, unless clearly erroneous, trump counsel's stated perception of a prospective juror's demeanor and disposition.”); State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (“Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an ‘evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.’ “ (first alteration by court) (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991))). See also, State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (two black males struck because they were late); State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991) (struck juror had disinterested attitude and demeanor).

The Appellant relies upon State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891(1989) to suggest that merely showing a non-struck white juror with a similar characteristic is sufficient to prove pretext. However, the strength of his statement fails when it is shown that the non-struck jurors are not “similar.” While the Appellant may assert that there were only small difference in the non-struck jurors, these differences revealed exactly why those particular juror would be a qualified but favorable juror to the prosecution theory of the case against Appellant. These prosecution-desired jurors were a juror whose son-in-law was a local highway patrolman (juror 131), a female juror who considered herself a victim of a violent crime who had testified for the prosecution previously (juror 105); a female juror who saw the grieving victim’s family at her work “all the time” (juror 128). The basis for the prosecution to seek to have these jurors on their panel was self-evident to the prosecution, the defense and the court. Similar traits were not shared with the struck jurors. This was not a question of a pattern of disparate treatment by the Solicitor, but reasoned decision-making. The defense recognized the soundness of the prosecution decision in striking each of the jurors themselves.

The issue was whether purposeful discrimination was proven in the use of any of the strikes. The trial judge concluded that it was not and that a pattern was not proven. Tr.p. 104-107. This assessment was based upon the totality of the circumstances, including the demeanor of the prosecutor contrasted against the record of information provided for each of the jurors and that type of case being tried. His claim otherwise is without merit.

ARGUMENT II

II. The trial court properly denied an objection to the prosecution closing argument when it argued that malice can be inferred through the use of a deadly weapon. This action was consistent with the opinion in State v. Belcher which did

not restrict prosecutorial argument concerning reasonable inferences from the evidence concerning malice.

In his second argument, Stewart contends that that the mandates of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 were violated when the prosecution in its closing argument made reference on three occasions that malice may be inferred through the use of a deadly weapon. Tr.p. 657, l. 23- p. 658, l. 1; p. 658, l. 5-6; p. 659, l. 12-13. In his argument, the Appellant equates the prosecution closing argument with the instructions on inferred malice through the use of a deadly weapon which the Court abolished under certain circumstances in Belcher. However, the Appellant completely failed to recognize that Belcher expressly allowed prosecution argument concerning inferences of malice through the use of deadly weapon. His claim must be rejected.

The Holding in State v. Belcher Expressly Allows Inference of Malice Arguments

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009). In Belcher, the jury convicted the defendant of murder and possession of a firearm during the commission of a violent crime. Id. at 600, 685 S.E.2d at 803. During a gathering of family and friends, the victim and another man began arguing. The defendant intervened, and later shot and killed the victim. Id. at 601, 685 S.E.2d at 805.

Testimony at trial demonstrated conflicting versions of the event. Id. The State's evidence tended to show that after the defendant confronted the victim, the defendant retrieved a gun and without justification, fatally shot the victim. Id. The defendant presented evidence that the victim confronted him without provocation, and with a gun, following the apparent resolution of the argument. Id. The

defendant claimed he subsequently retrieved a gun and fired on the victim as he approached. *Id.* In accordance with long-standing practice, the trial court instructed the jury that “malice may be inferred by the use of a deadly weapon,” and the jury convicted the defendant of murder. *Id.*

The Supreme Court reversed, and rejected the traditional jury instruction as inconsistent with our policy-making role in the common law:

The use of the term “intentional” is instructive. Say for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because “if one intentionally kills another with a deadly weapon, the implication of malice may arise.”

Id. at 610, 685 S.E.2d at 809. Importantly, the Supreme Court concluded:

Today we return to the rationale underlying Hopkins, Levelle and Jackson and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. [FN 9] The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

FN9. The standard implied malice charge remains valid, as does the general permissive inference instruction: “If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.” **In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging. “Do jurors need the court's permission to infer something? The answer is, of course not.” Bruce A. Antkowiak, *The Art of Malice*, 60 *Rutgers L. Rev.* 435, 476 (2008).**

State v. Belcher 385 S.C. 597, 612, 685 S.E.2d 802, 810 (S.C., 2009) (emphasis added).

Therefore, the inference of malice assertions may be appropriate for argument after

Belcher. His claim must fail.

HOW THE ISSUE WAS RAISED AT TRIAL

AT the close of the state's case, in response to the motion for a directed verdict, the prosecution noted that it had presented evidence of motive, based upon the victim taking out a warrant and order of protection against the defendant two days before her death, the prosecution noted that while the court cannot instruction the inference of malice by use of a deadly weapon, he was still entitled to argue the use of the weapon was evidence of malice. Tr.p. 493.

Subsequently, the trial judge instructed the jury on criminal intent, noting that "criminal intent may be inferred from the circumstances shown to have existed both before and after the fact." Tr.p. 636, l. 4-10. The trial judge charged on murder and the element of malice. As to malice that court noted that malice may be expressed or inferred. Tr.p. 639-640. As to infer malice, Judge Baxley instructed:

Malice is hatred or ill will or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the la will infer an evil intent . . .

Malice aforethought may be either expressed or it may be inferred The terms expressed and inferred don't mean different kinds of malice, but they merely mean the manner in which malice may be shown to exist; that is either by direct evidence or by inference from the facts and circumstances shown to have existedmalice may also be inferred from conduct showing a total disregard for human life."

Tr.p. 639, 3 - p. 640, l. 3.

The Solicitor's Closing Argument

During Solicitor Foard's closing argument, he asserted that malice existed as follows:

. . . you can find that malice formed at any point up until Thomas Jeffrey Stewart began striking the fatal blows with a knife to Bellany Clyburn.

It can be expressed or inferred. That means it can be through spoken words or it can be shown through actions or most importantly it can be inferred

from the use of a deadly weapon. And that is what we have her. We have the use -
--

Mr. Young : Your Honor, we object to that.

The Court: Objection noted.

Mr. Foard: It can be inferred from the use of a deadly weapon. Now we have multiple instances of malice in this case. . . .

Tr.p. 657 - 658.

Solicitor Foard then describes what he perceives as evidence of malice including the statement he gave indicating that he made a slitting throat motion as he approached the victim; that he laid in wait armed with a knife as signs of malice. Tr.p. 658-659. He then states:

That's just the expressed malice. Let's talk about inferred malice. Inferred malice is shown by a total disregard for human life or by use of a deadly weapon. We've already covered that. He armed himself. And by disregard for human life we're talking about all this. By the fact he didn't stop. He kept stabbing and stabbing and stabbing. You see it in the video. He makes a motion when he talks about it ladies and gentleman. Thirty-nine times.

A complete and total disregard for human life. We can stop there. He killed a human being. We've got instances of malice. He's guilty of murder. Said and done . . .

Tr.p. 659, l. 11- 23.

The Trial Court's Denial of the Objection

After the completion of the argument, Judge Baxley addressed the objection during the state's argument:

But the first one was an objection over counsel's reference to the fact that the malice may be inferred from the use of a deadly weapon. The Court did not charge that. I deleted it from my charge. You may have had it in your printed version, but it was removed. But that does not mean – the fact that the Court doesn't charge it the Court does not perceive that that takes away the ability of the State to argue from a factual standpoint. We simply did not provide that law, but nevertheless that doesn't change the factual inference that I believe the State is entitled to argue.

Tr.p. 672, l. 19- p. 673, l. 7.

STANDARD OF REVIEW

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). The appellate tribunal will not disturb the trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); see also State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996) (ruling test of granting new trial for alleged improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial).

In State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters of permissible prosecutorial argument:

In 23A C.J.S. Criminal Law § 1107, closing arguments, similar to that of the solicitor in this case, are discussed as follows:

"So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider."

Durden, 264 S.C. at 92, 212 S.E.2d at 590.

If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. *Id.* Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony. See State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976).

Recently a California court addressed a similar argument concerning the inference of malice:

And even if he had preserved the claim, we would reject it on its merits. **The prosecutor's statements accurately reflect the principles that “ [a] defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence’ ” (People v. Scott (2011) 52 Cal.4th 452, 488, 129 Cal.Rptr.3d 91, 257 P.3d 703) and that, in particular, “the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice.” (People v. Smith, supra, 37 Cal.4th at p. 742, 37 Cal.Rptr.3d 163, 124 P.3d 730.)** The jury was expressly instructed

that to find Millbrook guilty of attempted murder it had to find that he intended to kill Manoa. There was no misconduct.

People v. Millbrook, 222 Cal.App.4th 1122, 1151, 166 Cal.Rptr.3d 217, 241 (Cal.App. 1 Dist.2014).

ANALYSIS

The trial judge did not abuse his discretion in denying the defense motion to the prosecutor's argument that the inference of malice existed by the use of a deadly weapon in this case. The decision was in complete compliance with the footnote 9 in the decision in State v. Belcher which expressly allowed prosecution argument concerning the inference of malice through the use of a deadly weapon. The inference was particularly noteworthy here because it is wholly supported by the evidence where there was evidence of thirty-nine stab wounds to the victim. Tr.p. 342 - 343 (the autopsy revealed Miss Clyburn was she had at least 39 sharp force injuries identified in the body; and sharp force injuries he would define as stab wounds or an incise wound).

The focus of the Appellant's argument before this Court is an assertion that Belcher¹¹ should be extended to include inference of malice remarks that would be error if included in instructions after the Belcher decision. The point of Belcher, however, as recognized by footnote 9 was the sanctioning in the jury instructions of the inference. Here, the trial court did not include it. The Appellant essentially suggest that the inference of malice cannot rise by the use of a deadly weapon. This is folly and this case reflects why. Accepting the State's theory Stewart

¹¹ Respondent do not dispute that under Belcher, the trial court was correct in not instructing on the inference of malice through the use of a deadly weapon. Under a version of the Appellant's statements, there was some evidence, albeit not credible, that would "reduce, mitigate, excuse or justify the killing" under Belcher to preclude the instruction. Respondent notes that the jury was instructed on the lesser offense of voluntary manslaughter and self-defense. Tr.p. 640-642, 644-649.

was the aggressor and armed with the knife laid in wait and use the weapon in a malicious manner resulting in the victim's death and 39 stab wounds. It is extraordinary to suggest that the State would be precluded from arguing the most reasonable inference that malice existed by the use of the weapon, but that is what the Appellant naively suggests. Simply put, there was no error in the State's argument and to suggest otherwise is without merit.

The Appellant suggests that because the improper objection (under footnote 9) was sustained by the trial court, it gave an impression that the comment was endorsed by the trial court. This logic is dangerous because it ignores that the argument itself was within the bounds of the law. If the court were to accept this logic – something that was never asserted to the lower court by any argument or request for a curative instruction - it would allow defendants a windfall anytime reasonable inferences from the record were argued. This is not an endorsement by the court of the validity of the inference and evidence being argued. To the contrary, learned defense counsel should have been aware of the limitation in the Belcher decision and not made an objection rendered frivolous by the express terms of the decision. The footnote was a shot across the bow to criminal law practitioners of the effect of Belcher. The prosecution acted within its mandates in arguing that Stewart's actions satisfied the element of malice. His claim is without merit for a new trial.¹²

III. Since the state of mind of a victim is relevant evidence when the defense of self-defense is offered, the trial judge did not abuse his discretion in admitting evidence from the Appellant's statement that he had been violent against the victim

¹² In his brief, he speculated that the State would rely upon the harmless error assessment in State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). As stated above, there was no error in the prosecutor's actions under Belcher. However, like in Stanko, there was overwhelming evidence by the extraordinary number of stab wounds to the victim. However, unlike Stanko, the instructions did not include the inference of malice by use of a deadly weapon instruction. Also, at one point in the deliberations that jury was provided with a written version of the murder and malice instructions which did not include the inference. Tr.p. 675. Plainly, there was overwhelming evidence to show the evil intent supportive of the existence of malice.

previously. The admission of other evidence of the fact that an arrest warrant for trespassing and a restraining order by the victim against the Appellant within days prior to the crime was admissible as relevant evidence and part of the res gestae where it was argued that knowledge of the matters may have been a motive for the assault and reflected both the state of mind of the Appellant as well as the victim. The admission of other evidence concerning the conduct of the Appellant to the victim made the admission of the challenged evidence harmless error.

The Appellant challenges the admission of three separate items of evidence: the challenged portion of the Appellant's videotaped statement where he stated that he used to beat up the victim a lot "nine months back" (State Exhibit 7, 47:45-48:09), the December 27, 2009 arrest warrant for trespassing (State Exhibit 106), and the December 29, 2009 restraining order of protection (State Exhibit 20). The Appellant contends that the evidence was improperly introduced as evidence of the Appellant's character and propensity under S.C. Rule of Evidence, Rule 404. He claims that at the time of the introduction of the evidence that he had not put his character in issue and therefore the admissions were improper.

Respondent submits that the trial judge did not abuse his discretion in admitting the particular evidence. First, the prosecution was not admitting the Appellant's statement about having beaten the victim a lot previously to show his character or propensity under Rule 404, but to show the victim's state of mind to rebut the existing claim of self-defense. Second, the admission of the trespassing warrant and restraining order were initially introduced as part of the res gestae of the crime where the Appellant acknowledged in his statement that he had learned from his wife about papers and revealed why he claimed he was avoiding the police after he was at the victim's home hiding in a closet when the police had arrived earlier¹³ and further shows a

¹³ In his testimony, the Appellant described being in the victim's apartment, hiding in a closet when Crystal came over. Tr.p. 587. When he looked out to see if Crystal had left, he saw two police officers get out of their car, the Appellant stated he went down stairs and told Bellany that here were "two cops there" and "I'll see you later. I don't know what you did" and left. Tr.p. 588-589. When he returned the door was locked. After that he went to

motive for the subsequent assault on the victim after he had laid in wait. Tr.p. 373, 493, State Exhibit 7; 50:00 – 52:00.¹⁴ Additionally, the Appellant opened the door to the admission of these documents during his cross-examination of Chief Larry Brown concerning the basis for the warrants and order. Tr.p. 405-406, 415.

Finally, any errors in the admission of these items were harmless error. Under the facts of the case, the prejudicial effect of the items were slight and similar evidence of bad conduct was introduced by the defense on cross-examination of Chief Brown concerning an earlier order of protection in September 2008 and the acknowledgement that the problems between the Appellant and victim had gone on back to 2005 or “a lot longer” which opened the door to further admission of an assault and battery warrant of December 29, 2009. Tr.p. 407, 410-411, 416-417. In addition, any error in the admission was mooted when the Appellant testified and directly put his character in evidence in his claim of self-defense and being in fear of the victim.¹⁵

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “This Court is bound by the trial court's factual findings unless they are clearly erroneous.” *Id.* “The admission or exclusion of evidence is a

Marshville, North Carolina, claiming to go gambling. Tr.p. 590. During Chief Brown’s testimony, he stated that police were at the apartment complex that night, but were at a different apartment. Tr.p. 381-382.

¹⁴ In his testimony, Appellant denied that he said on the tape that he was aware that there were some papers (i.e., warrants) when he described trying to avoid the police. Contrary to the tape, he denied anything about knowing about papers, only claiming that his wife told him not to go to the victim’s apartment. Tr.p. 619 – 620. But see Exhibit 7 at 50:00-52:00.

¹⁵ During Appellant’s testimony, he tried to minimize and explain the challenged portion of State Exhibit 7 in addressing whether he had fault in his relationship with the victim. Tr.p. 563.

I had fault a few times, Nine months again, but when I said “nine months ago” on the tape I was talking about when I said I used to hit her bad I wasn’t meaning it that way. What I was meaning was this here: when she went to do that to my wife my son was in the car. My son was in the car. She took pictures. She had him take pictures of her trying to kill my wife. . . .
Tr.p. 563, l. 8-14.

matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

HOW THE ISSUE WAS RAISED BELOW

1. Videotaped Statement of Thomas Stewart – State Exhibit 7

At the outset of the trial, defense counsel Young stated that they had served a motion in limine regarding the videotaped statement of Thomas Stewart. Counsel stated that on the videotape at 47 minutes 45 seconds through 48 minutes 9 seconds the Appellant made comments regarding prior assaults on him by Bellany Clyburn and assaults by him on Bellany Clyburn. Tr.p. 113, l. 5-12. In particular, this portion of the videotape of the Appellant’s statement describes initially a discussion he had with an admission that he got into a heated argument with her. In this portion he stated that used to hit her lot years ago, “probably the last nine months,” “I used to beat her up real bad” “from nine months back.” State Exhibit 7, 47:45 – 48:08.

Counsel Young stated that he had been advised that the State did not intend to use the videotape as evidence under South Carolina Rule of Evidence Rule 404(b) or State v. Lyle, 1245 S.C. 406, 118S.E. 803 (1923) unless and until the defense puts Appellant’s character in issue. Counsel Young asserted that the Appellant’s statements would qualify as character evidence under Rule 404(b) and requested that it be redacted. Tr.p. 113, l. 13-18.

Solicitor Redmond responded clarified that he intended to introduce the evidence if the door was opened for him to respond, not that they intended to put in the evidence unless character was put in. He stated that it was his understanding that the defense, based upon comments Stewart made on the videotaped statements, present a defense of self-defense. Tr.p. 114, l. 13-20. He stated that if that defense is proffered, either through cross-examination or whatever, it might open the door for this and other evidence it has concerning other incidents. Tr.p. 114, l. 21- p. 115, l. 1. He stated that they were reserving the right, depending upon the nature of the defense to be able to respond in kind. He stated that when considering the defense of self-defense, given the prongs involved, some of the prior incidents may be relevant in the issue of self-defense. Tr.p. 115, l. 19-23. The trial court reserved ruling on the admissibility until the appropriate time when the tape is offered. Tr.p. 115, l. 20-24.

OPENING STATEMENTS

The State's Opening

In the state's opening, Solicitor Jones stated that they were there because Thomas Stewart murdered the victim; victim is the Defendant's mistress of 8 years and that in December of 2009 victim wanted to end the relationship. Tr.p. 132-133. He argued that the defendant couldn't let her go. He declared that he went to a friend and asked to borrow his car; took the car and parked it in the victim's apartment complex and laid in wait. He stated Appellant waited until the morning of January 1, 2010 when victim and her two sons were walking out of their apartment. He stated that Stewart approached victim carrying a knife, went back into her apartment complex and attacked her. Tr.p. 133. Solicitor Jones stated that the victim defended herself using mace and then ran out of the apartment. He stated that the defendant chased her

where he continued and completed the murder. Tr. 133. He stated the victim's 10 year old and 6 year old sons were witnessing the attack; one son ran to neighbor's asking for help and victim was able to walk herself over to that doorstep where she was laying waiting for law enforcement to arrive. Tr.p. 133-134.

Solicitor Jones stated that:

Our victim is not a saint. She made mistakes in her life. One mistake that she made was in 2009 she got in an altercation with the Defendant's wife. Not hard to imagine. But she pled guilty to an assault, and she was on actual probation at the time of this incident...

Tr.p. 134, l. 20-135, l. 4.

The Defense Opening

Defense counsel Secor at the outset of his opening argument declared that Stewart had said: "I thought I was fixing to die. I was scared, and I wanted to get away. I lost it over love" Tr.p. 135, l. 7-10. He stated the issue was whether it was murder, manslaughter or self-defense. Tr.p. 135, l. 17-24. He stated "Bellany and Thomas had problems for a long, long time. They were trying to carry on an impossible relationship. He point out also that that the State had told them that in April 2009 the victim had attacked the Appellant's wife with a lug wrench. "You think if stuff like that happened between two people they stay away from each other, but they didn't." Tr.p. 138, l. 14. He stay that they didn't stay away from each other after the victim got out of jail for attacking the wife. He noted the victim died two weeks after she got out of jail.

Counsel Secor attempted to summarize the case. He noted Bellany and Thomas were together on New Year's Eve at Bellany's apartment. Tr.p. 139. He stated that they were arguing about something. Tr.p. 139, l. 7-9. When some family came by, he hid in the upstairs closet. Id.

He looked out the window and saw two police cars in front of the apartment. He felt because of the jealousy and dishonesty that existed between them that she was trying to get him in trouble. Counsel stated he snuck out of her house and left. In a telephone call that evening, he stated that she told him don't come back until he divorces his wife. However, that morning, he went back and "continued that stupid argument and try to clear things up."

Counsel argued that Stewart went back but Bellany and her boys were still sleep; door was locked so he just waited so he could talk to Bellany, disagreeing with the state's assessment that he was lying in wait. Tr.p. 140. He argued that when she woke up, she came outside with her sons, he said he wanted to talk, but she told him don't come back any more. However, he said that they went inside and had an argument and in his jealousy demanded to see her telephone. Tr.p. 140. "And then he did something really stupid. He picked up a knife that was in her apartment and demanded to see the phone. When he reached in her purse and she grabbed his hand and sprayed him in the face with pepper spray and they began a struggle over the knife. He claimed that he was blinded by the pepper spray and she got the knife away from him, cutting herself badly in the struggle. Tr.p. 141, l. 1-6. He stated that when she got the knife from him, he was doing whatever he could to defend himself cause he could barely see. Tr.p. 141, l. 7-14. He claimed she cut his ear when she swung the knife at him and his hands were cut.

Counsel argued that Bellany ran outside and Thomas was trying to wipe the pepper spray out of his eyes; he heard her yelling to him and other people to "get him out of my house." Tr.p. 141, l. 20-23. Thomas could barely see; he heard Bellany say "When you come outside you're going to get it." Tr.p. 141, l. 22-24. He claimed he saw a man at the door.

The defense stated that Stewart thought he was fixing to die and grabbed another knife in the apartment to try to get away. He ran out the door to try to get to his car; Bellany was between him and his car and she still had a knife too. Tr.p. 142, l. 13-19. "In that moment of fear and agony from the pepper spray Thomas reacted," and stabbed her and ran for his car. Tr.p. 142, l. 20-25. At that point, something came through the window and glass went everywhere; he drove off. Counsel stated that the jury was going to have to decide whether it was murder, manslaughter or self-defense. Tr.p. 142, l. 1-4

OPENING THE DOOR

Prior to the presentation in front of the jury, The Appellant's statement from State Exhibit 7 was played for the court. Tr.p. 213, l. 8-9. Solicitor Redmond stated that the defense was not asking that the part where Stewart talks about the victim beating up on him to be redacted and the State agreed that was admissible. The State claimed that the defense in the opening statement and made an allusion to the way the Appellant and the victim were toward each other. Solicitor Redmond stated that the door was open to the admission on the defense that was proffered in the opening statement. While conceding that the defense opening statement was not evidence, it can open the door and that the disputed portion of the tape should be played. Tr.p. 213-214.

The defense stated that the State mentioned the victim's assault and battery of a high and aggravated nature in their opening and that she was on probation for it and claimed that the State was suggesting that he opened the door by commenting on what the State had said it its opening. Tr.p. 214.

Solicitor Redmond clarified for Judge Baxley that he understood that the challenged portion of the tape concerning a comment from Stewart that within the last nine months that “yeah, I used to beat up on her and she would beat up on me.” Tr.p. 215. He asserted that based upon the statements made in the opening and the proffered defense of self-defense that the portion goes to the issue to rebut self-defense. He opined that in addition to the opening statement, he stated that this incident had begun in the victim’s home and that he indicated violence towards her in the past would give her reason to feel apprehension and goes to the heart of self-defense. Tr.p. 215.

Judge Baxley stated that the incident cannot be viewed in isolation, but was a tragic culmination of a history of interaction between the two. He found that while the defense mentioned the fact that there was a charge against the victim, Judge Baxley saw it as sanitizing the jury, but not a comment on character. Judge Baxley noted that the event was going to come out in the evidence. Where some of the event happened inside the victim’s apartment, the trial court concluded that the better course of action was to permit the evidence because it goes to the core and heart of the case. He found that while the State mentioned it first, the defense argued on the point sufficiently and that the door had been opened to permit this evidence in the case in chief. He refused to redact the portion. Tr.p. 216, l. 20- p. 217, l. 2.

The defense urged that the evidence did not satisfy either Rule 404(b) or Lyle because he claimed it was offered specifically for propensity and to try and demonstrate that Stewart was violent in the past and inevitably in this incident.

The State argued that the door was opened and that the evidence was relevant to show the victim’s state of mind as it relates to the incident because in opening statement they were

talking about self-defense and how Stewart felt that he was in danger at that time. He stated that because the argument began in her home that she had a right to protect herself under the Castle Doctrine. He stated that since the victim is not here, they were allowed to gauge her state of mind and based upon what Stewart said she knew he had a propensity for violence. Here, he was in her home and the evidence should be allowed to rebut what has been put out there on self-defense. He stated he did not consider this as Lyle evidence.

The defense responded that rebuttal evidence is allowed if they tried to show Stewart's good character for peace, but eliciting evidence about the victim's ABHAN on Melissa Stewart does not call the Appellant's character into question when he was not present nor allow the admission of evidence of his bad character. The Appellant also question whether the comment on the tape met the threshold for admissibility because there was no evidence other than the comment to show its admissibility and therefore not clear and convincing evidence. The defense note that the ABHAN by the victim against the Appellant's wife was admissible under Rule 405(b) and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). The defense asserted that the state's argument about self-defense must be based on the imminent threat. He disputed under self-defense that the victim had a right to judge him because she did not have the burden. Tr.p. 220. The defense further urged that the similarities between the bad act conduct alleged and the conduct charged increases the prejudice under Rule 403. Tr.p. 221.

The State noted that the evidence was relevant and should come in as *res gestae*. He stated it was relevant because it goes to what was personally perceived as danger. He suggested its heightened relevance under the self-defense elements and whether the victim had a reason to believe that she was in danger made it relevant.

Judge Baxley re-affirmed his ruling and permitted the evidence. He further opined under Rule 403 that it was not more prejudicial than probative. Tr.p. 222, l. 6-10.

OTHER CHALLENGED EVIDENCE

The Appellant also challenged the admission of evidence of an arrest warrant for trespassing dated December 27, 2009 (State Exhibit 106) and a restraining order of protection signed by the victim December 29, 2009 (State Exhibit 20). Tr.p. 358-359. The prosecution asserted that the trespassing warrant was stated in the context of the paper he found out about through his wife that the police were looking for him. The state stated that Appellant was using this warrant to explain his actions when the police arrived at the complex in Pageland that night. The state asserted the order of protection was admissible because of the same reasons as the earlier argument that it was part of the *res gestae* where the defense was claiming that he was acting in self-defense. The prosecution noted that the incident occurred in the victim's apartment and this would go to her state of mind as it relates to what Appellant has said and why the victim had trepidation at that time when he showed up at her residence. Tr.p. 359-360.

The defense stated that he objected to the admission. He stated that the evidence was being presented in rebuttal to the Appellant's videotaped statement that the State had also introduced. Tr.p. 360, l. 7-15. He asserted that being allowed to rebut the evidence that they presented as a ground for its admission did not make sense. Tr.p. 360. He stated that they had not shown how it could be admitted under Rule 404.

Order Limiting Admission to the Existence of the Documents

Judge Baxley admitted the evidence as to the fact that the documents existed at the time the event occurred, but was not going to allow the admission about who may have been involved in causing the issuance of the warrant or what the incident was that caused the issuance. He stated that goes beyond what is necessary as to the state of mind of the Appellant. He further concluded the evidence would be more appropriately in rebuttal after we hear the self-defense position taken in the case. He determined that the existence of the two documents goes not only to the state of mind of the Appellant, but that the state of mind and intent of the Appellant is a necessary part of the state's proof. Tr.p. 361, l. 13-22.

Admission of Evidence and Order of Protection and Warrant

During the direct examination of Pageland Police Chief Larry Brown he identified (for identification only) State Exhibit 106 as an arrest warrant for trespassing signed by the victim on December 29. He also identified State Exhibit 20 as a Fourth Judicial Circuit Order of Protection signed by Bellany Clyburn against Thomas Stewart on December 29 at 2:30 P.M. Tr.p. 371-372. Chief Brown stated that he was aware of the documents because the victim had brought the order to the Police Department and he knew he had a warrant on him so they could arrest him. Tr.p. 373. Chief Brown confirmed that during the Appellant's statement he made an allusion that the police were trying to find him on some papers that they were trying to locate him to serve the papers on him. Tr.p. 373.

On cross-examination, counsel for the defense question Chief Brown about the fact that the victim had requested a protective order and a hearing on it. Tr.p. 405, l. 11-17. He questioned him as to the basis of it was an allegation of trespassing, but the witness responded that it was something about him approaching her at the Community Center and that he pulled

her arm and wrists. Tr.p. 405, l. 18-22. When asked what day she reported the trespassing and when she said it happened, Chief Brown responded that she reported it on the 29th and that it happened on the 27th. The defense pointed at the on the 28th she was at the gym with three law enforcement officers and the Appellant and apparently had not reported the trespassing the occurred the day before. Tr.p. 406, l. 6-25.

The defense also asked Chief Brown whether her allegations of things that Stewart did to her go back to 2005 and Chief Brown responded “probably longer than that.” Tr.p. 407, l. 15-20. When asked if he knew that the order of protection she requested on December 29 2009 was not the first time she had requested one, Chief Brown stated he was not aware of that. The defense then stated that she had received an order of protection in September 2008 before Melissa Stewart’s head was split open with a lug wrench. Tr.p. 409. The September 2008 Order was admitted as Defendant’s Exhibit 89. Tr.p. 410-411.

On re-direct examination, the State then introduce State Exhibit 20, the petition for an order of protection. Tr.p. 415, l. 6-19, p.421, l. 6-20.¹⁶ The defense objected asserting it was based on their prior objection. Judge Baxley, however, ruled that the objection was overruled because the Appellant “opened the door on cross-examination as to these issues.” Tr.p. 415, l. 12-19.

On re-direct examination, the State further introduced evidence of another warrant signed by the victim based on the cross-examination. Chief Brown stated that this item State Exhibit 107, was an arrest warrant for assault and battery that on December 28 Stewart grabbed Bellany

¹⁶ The Solicitor mistakenly referred to the order of protection as State Exhibit 20 when it was actually State Exhibit 106. The order of protection was the document introduced, not the trespassing warrant.

by the shoulder and continued to assault her by holding her by the wrist in the parking lot of Pageland Apartments signed on December 29th before the order of protection was taken out. Tr.p. 416. Chief Brown stated that the order of protection was not served on Stewart because they could not locate him. He stated the case was not heard in court “because he stabbed her to death before the warrant was served.” Tr.p. 417, l. 10-12.

ANALYSIS

The Appellant claims that the evidence of the Appellant’s admission that he used to beat up the victim “nine months back” was inadmissible because it was character evidence and he had not put his character at issue yet and had not decided on whether he would testify. He further claimed that evidence of the victim’s state of mind is not relevant in a self-defense case because the defendant’s state of mind is an element of the crime and self-defense, not the victim’s state of mind.

Respondent submit that the Appellant is in error on both counts. As stated above, the Appellant in their opening statement plainly asserted that the Appellant was raising a defense of self-defense. In the opening, they declared that the Appellant was in fear of the victim and was seeking a manner of escape. Though these claims dramatically contrasted to the state’s theory that the Appellant was lying in wait and the sole aggressor in the incident while warrants and restraining orders were present and the victim was defending herself in self-defense as aided by the Castle Doctrine, the Appellant fails to recognize that the victim’s state of mind may be relevant to rebut the claim of self-defense concerning who was the aggressor. While it may not be an “element,” like “motive” evidence of the victim’s state of mind is relevant and probative when a claim of self-defense is made.

A victim's fear of a defendant can be relevant to the defendant's guilt if the defendant raises a defense that turns on the victim's behavior. See State v. Blanchard, 315 N.W.2d 427, 432 (Minn.1982). For example, if the defendant claims to have acted in self-defense, the fact that the victim was afraid of the defendant might bear on whether the defendant's account is believable. *Id.* In the absence of such a defense, however, “[o]rdinarily, a homicide victim's state of mind is not relevant to whether the defendant committed the crime.” State v. Rossberg, __ N.W2d __, 2014 Westlaw 3844203 (Minn. 2014), citing State v. DeRosier, 695 N.W.2d 97, 105 (Minn.2005). In Stoll v. State, 762 So.2d 870 (Fla.,2000), the Florida court recognized that a statement by a murder victim may be admissible under the state-of-mind exception to the hearsay rule if the state of mind of the victim is relevant to an element of the crime, if defendant claims self-defense, that victim committed suicide, or that death was accidental, or if victim's state of mind is relevant to rebut a defense. Missouri law recognizes that a deceased's state of mind may be admitted when it is relevant. Specifically, where an accused argues self-defense, suicide, or accidental death of the deceased, state of mind hearsay evidence is admissible. See, e.g., State v. Ford, 639 S.W.2d 573 (Mo.1982), State v. Singh, 586 S.W.2d 410 (Mo.App.1979). A “victim's state of mind is relevant where it has been put in issue by the defendant.” Angleton v. State, 686 N.E.2d 803, 809 (Ind.1997) (citing Taylor v. State, 659 N.E.2d 535, 543 (Ind.1995)); see also Lock v. State, 567 N.E.2d 1155, 1159–60 (Ind.1991) (hearsay statements admissible to show the victim's state of mind, in part, because the relationship between the victim and defendant “was one of the contested issues at trial”); 13 Robert L. Miller, Jr., *Indiana Practice* § 803.103A at 613 (2d ed.1995) (admissibility under Rule 803(3) requires, among other things, that “the declarant's state of mind must be relevant to an issue in the case”) (citing United States v. Neely, 980 F.2d 1074, 1083 (7th Cir.1992)). In People v. Smelley, 775 N.W.2d 350 (Mich.App.2009) the court

recognized that a victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime. The most common of these relates to a defendant's claim of self-defense as justification for the killing. When such a defense is asserted, it has been held to be proper to permit rebuttal by admission of the victim's extrajudicial statements concerning his fear of the defendant, thus, rendering it unlikely that the deceased was the aggressor in the first instance. See, e.g., People v. Atchley, 53 Cal.2d 160, 171–172, 346 P.2d 764, 770 (Sup.Ct.1959), cert. dismissed, 366 U.S. 207, 81 S.Ct. 1051, 6 L.Ed.2d 233 (1961); State v. Singh, 586 S.W.2d 410, 418 (Mo.App.Ct.1979). In Ernst v. Commonwealth, 160 S.W.3d 744 (Ky.2005), the Court held several statements by different witnesses regarding the victim's state of mind were relevant where the defendant claimed self-defense. *Id.* at 753. See Commonwealth v. Magraw, 426 Mass. 589, 593–594, 690 N.E.2d 400 (1998) (“A murder victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide or a result of self-defense, that the victim would voluntarily meet with or go someplace with the defendant, or that the defendant was on friendly terms with the victim”).¹⁷

¹⁷ Where the defendant in a murder case admits killing the victim but has asserted a complete defense such as accident or self-defense, “the victim's mind is of particular concern to the jury.” (David) Clark v. United States, 412 A.2d 21, 25 (D.C.1980) (citations omitted); see also, 500 A.2d 994, 997–98 (D.C.1985) (concluding, in a case where defendant sought to introduce testimony to Hairston v. United States corroborate his claim that the decedent attacked him and that he killed the decedent in self-defense, that the trial judge erred in refusing to permit a witness to testify that a month before the shooting the decedent had told the witness: “Well, either I am going to kill [the defendant] or he is going to kill me,” because the threat fell within the state-of-mind exception to the hearsay rule and was more probative than prejudicial); Hill v. United States, 600 A.2d 58, 61 n. 3 (D.C.1991) (“It has long been recognized that where hostile emotion is to be proved, evidence that the same emotion existed in the same person at another time is admissible.”) (citations omitted). As appellant also correctly notes, we have upheld trial court rulings permitting the government to introduce against a defendant evidence of the defendant's state of mind toward the victim at a time long prior to the offense for which the defendant is being tried (and this notwithstanding that the evidence involves so-called other-crimes evidence, the admission of which generally is prohibited). See, e.g., Garibay v. United States, 634 A.2d 946, 948 & n. 5 (D.C.1993) (concluding that the trial court did not err in admitting evidence that the defendant, who was charged with assaulting his wife, had assaulted his wife fifteen months earlier, since it “show[ed] that appellant's malice toward his wife, rather than fear of harm, prompted his acts,” and recognizing that we had “held admissible prior assaults involving the same defendant and victim that have taken place as much as ten years before the crime charged” (citations omitted)); United States v. Bobbitt, 450 F.2d 685, 687, 689 (D.C.Cir.1971) (concluding that the trial court did not abuse its discretion in admitting evidence that defendant had

In Georgia, evidence which tends to show the victim's state of mind in regard to the defendant may be relevant in instances in which the defendant claims self-defense. See Massey v. State, 272 Ga. 50, 51(3), 525 S.E.2d 694 (2000); Dixon v. State, 256 Ga. 658, 660(2), 352 S.E.2d 572 (1987).

Respondent submits by stating that the defense would be self-defense, the State was placed in a position that he had to defeat the claim in its case in chief. The defense recognized this when he made a motion at the conclusion of the state's case for a directed verdict in favor of self-defense, citing State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Tr.p. 490-491. Cf. State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014) (the issue of whether defendant acted in self-defense when she stabbed the victim was for the jury where evidence was susceptible to more than one inference).

The state further urged the admission of the evidence was part of the *res gestae*. Under the *res gestae* theory, "evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (S.C. App. 2013); State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001); State v. Gilmore, 396 S.C. 72, 83 n. 9, 719 S.E.2d 688, 694 n. 9 (Ct.App.2011) (discussing the significance of *res gestae* in South Carolina law and its relation to Rule 404(b)). The Supreme Court adopted the reasoning set forth by the Fourth Circuit Court of Appeals:

threatened the decedent twelve years earlier with a shotgun, reasoning that "a criminal incident twelve years previous does not necessarily make the evidence too remote," and therefore was not necessarily too stale as proof of motive)

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate*636 context.... And where evidence is admissible to provide this full presentation of the offense, (t)here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae. As the Court said in *United States v. Roberts*, 548 F.2d 665, 667 [(6th Cir.1977)], cert. denied, 431 U.S. 920, 97 S.Ct. 2188, 53 L.Ed.2d 232[,] “(t)he jury is entitled to know the ‘setting’ of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge.”

United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (internal citations, some quotation marks, and footnotes omitted); see, e.g., State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996). Evidence considered for admission under the res gestae theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence. See Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). “Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quotation marks and citations omitted). “All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].” State v. Lee, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (2012) (alteration and emphasis in original; quotation marks and citations omitted).

Here, as the trial judge recognized the evidence of the turbulent relationship that existed between the victim and the Appellant was a part of the big picture in the case and revealed the

importance of the state of mind the victim would have had in either defending herself from the Appellant as an unlawful intruder or the actions of the Appellant in whether he was reacting to an assault or defense. The brief reference to the earlier concession that he assaulted the victim before, put into context the portion of his statement where he claimed that she then began assaulting him, yet continued in their relationship. It was not a one-sided setting. The evidence supported the bigger and more accurate picture. Further, the comment had minimal prejudicial impact in light of the more recent evidence of the aggressive behavior by the Appellant toward the victim in the days leading up to the crime which the Appellant admitted. Those events were more probative of both the Appellant and victim's state of mind and minimized the impact – both probative and prejudicial of the evidence of the Appellant's statement. The judge did not abuse his discretion in the admission of the challenged portion of State Exhibit 7.

Similarly, the evidence of the trespassing warrant and December 29, 2009 order were properly admitted as part of the *res gestae* of the crime. The state's theory was that the Appellant was lying in wait on the day of the deadly assault motivated by her actions concerning the pending warrant and order. Additionally, the evidence was also relevant from the Appellant's statement to give context to the reason he may have been hiding and then seeking flight from the Appellant's apartment earlier. Although the Appellant disputed in his testimony that he was aware of the "papers," he declared that he had learned about them from his wife in his statement. Again, the relevance and probative value of the existence of the document was reasonably determined by the trial judge when he admitted the limited portions of the exhibits without the basis for the documents. It was not until the Appellant opened the door on the substance and reasons for the documents that basis for the restraining order was admitted. Nevertheless, the

prejudicial effect of the documents was minimized where the defense admitted additional evidence of conflict before 2005 and an additional restraining order from 2008. His claim otherwise must be rejected.

CONCLUSION


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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BY: 
DONALD J. ZELENKA
S.C. Bar No. 5758

Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

August 22, 2014
Columbia, South Carolina.

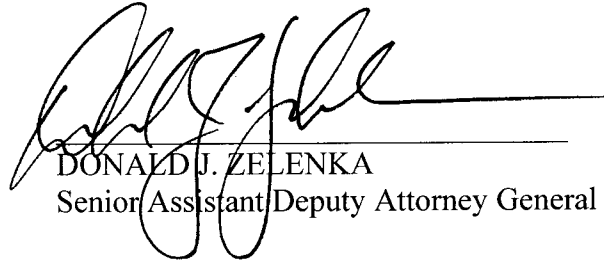
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Initial Brief of Respondent and Designation of Matter* in the foregoing action by depositing copies in the United States mail, postage prepaid to:

Jarrett O. Coco, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, SC 29211-1070

Robert M. Dudek
Chief Attorney
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

This 22nd day of August, 2014.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General



ALAN WILSON
ATTORNEY GENERAL

August 22, 2014

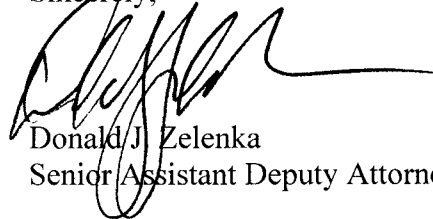
Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Thomas Stewart
Appellate Case No. 2012-213655

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent, along with a Motion to File Initial Brief Out of Time, in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Jarrett O. Coco, Esquire
Robert M. Dudek, Esquire
William B. Rogers, Jr., Solicitor
Trisha Allen, Victim Assistance

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AUG 28 2014

SC Court of Appeals

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AUG 20 2014

SC Court of Appeals

S.C. Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

**Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211**