The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

June 10, 2015

The Honorable Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: The State v. Richard Bill Niles, Jr.
Lower Court Case No. 2007GS2603363, 2008GS2604116, 2008GS2604117
Appellate Case No. 2012-213592

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Donald J. Zelenka, Esquire
Brendan Jackson McDonald, Esquire
Reid T. Sherard, Esquire
Jimmy A. Richardson, II, Esquire
Robert Michael Dudek, Esquire

The Supreme Court of South Carolina

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

ORDER

The petition for rehearing is granted with respect to the request that footnote 11 be deleted. All other grounds for rehearing raised in the petition for rehearing are denied. The attached opinion is substituted for the previous opinion, which is withdrawn.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

I would grant the petition for rehearing in its entirety.

s/ Costa M. Pleicones J.

Columbia, South Carolina
June 10, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27510
Heard June 25, 2014 – Refiled June 10, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and Solicitor Jimmy A. Richardson II, of Conway, for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, and Reid T. Sherard, of Nelson Mullins Riley

& Scarborough, LLP, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Richard Bill Niles, Jr. was convicted of murder, armed robbery, and possession of a weapon during the commission of a violent crime. The court of appeals reversed Respondent's murder conviction and remanded for a new trial, finding the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. *State v. Niles*, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012).[1] We reverse.

FACTS/PROCEDURAL BACKGROUND

This case arises from the shooting death of James Salter (the victim) in a Best Buy parking lot in Myrtle Beach. It is undisputed that Niles, his fiancé, Mokeia Hammond, and Ervin Moore met the victim at the parking lot to purchase marijuana from him.[2] Niles and Moore testified at trial,[3] and Niles's version of events matched Moore's version, except as to whose idea it was to rob the victim and whether Niles or the victim fired the first shots.[4] Thus, the evidence at trial focused on whether Niles was the aggressor in the deadly encounter.

On the afternoon of April 9, 2007, Niles and Hammond encountered Moore at a convenience store in Trio, South Carolina, and invited Moore to accompany them to Myrtle Beach. Niles and Moore were acquaintances, having known each other through various family members. On the way to Myrtle Beach, the trio smoked all of the marijuana that they had brought with them.

---

[1] Niles did not appeal his convictions for the remaining offenses. *Niles*, 400 S.C. at 531 n.1, 735 S.E.2d at 242 n.1.

[2] Hammond and Moore were also charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State, whereby he pleaded guilty to voluntary manslaughter, armed robbery, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond at their joint trial.

[3] Hammond chose not to testify in her defense.

[4] Niles admitted he shot the victim and that Moore and Hammond were unarmed.

Therefore, Niles contacted the victim[5] via telephone and arranged to meet him at the Best Buy parking lot to purchase marijuana. Niles testified that his conversation with the victim had a dual purpose. Not only was he meeting with the victim so that Moore could purchase a pound of marijuana from him, but he claimed that the victim owed him $5,000 as payment for other drug transactions. According to Moore, however, Niles subsequently decided to rob the victim instead.[6]

Once in Myrtle Beach, the trio made several stops at various motels so that Niles could sell crack cocaine before meeting the victim at the designated meeting spot at approximately 7:00 p.m. Hammond was driving Niles's rental vehicle, with Niles riding in the front passenger's seat and Moore riding in the back seat. Hammond parked the rental vehicle next to the victim's vehicle. Moore testified that his role in the robbery was "to identify the weed" for Niles. Therefore, Moore approached the victim's vehicle first. Moore joined the victim in the victim's vehicle, and the victim produced the bag of marijuana for Moore to inspect.

Moore testified that as he returned to Niles's vehicle, Niles had already exited his vehicle, and Moore told Niles that the victim had the drugs. Moore testified that as he returned to his place in Niles's vehicle, Niles was leaning inside the passenger-side door of the victim's vehicle and was speaking to the victim.[7]

Moore testified he heard two shots and saw Niles leap into the back seat of his vehicle behind Hammond.[8] Moore then heard the victim fire a weapon in

---

[5] While Niles testified that he and the victim did not know each other personally, they had engaged in drug transactions for the past six to nine months. Niles testified he knew the victim by his nickname, "Spice," and that the victim knew him by his nickname, "Rich Boy." Niles testified that he and the victim were "in the business of selling drugs."

[6] Niles, on the other hand, testified that it was Moore's decision to rob the victim, and he did so without warning Niles beforehand.

[7] Niles's fingerprints were found on the victim's vehicle near where Niles was allegedly standing, corroborating Moore's testimony.

[8] Other witnesses to the shooting testified that they saw a "heavyset" black male running from the victim's car back to a dark sedan, which the State argued closely matched Niles's description, as Moore had a much smaller build than Niles.

response. Niles and the victim shot back and forth multiple times. Niles had the drugs with him that Niles had stolen from the victim.

In contrast, Niles testified that Moore acted alone. Niles stated he merely set up the meeting, but Moore went over to the victim's vehicle to purchase the drugs while Niles and Hammond sat in the car and discussed their upcoming wedding. Niles said he then saw Moore and the victim fighting in the victim's vehicle, and realized that Moore was robbing the victim. Niles testified that Moore exited the victim's vehicle with the stolen drugs, and as Moore dove back into Niles's vehicle, Niles saw the victim draw his gun and shoot at them, knocking out the rear windows of Niles's vehicle. Therefore, Niles grabbed his gun, and returned fire. According to Niles, he was concerned with stopping the shooter and for Hammond's safety:

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

After the shooting, Niles instructed Hammond to drive away from the scene, and the trio abandoned the vehicle at a nearby trailer park. Niles then called a taxicab to transport him and Hammond to a local motel. At that point, he and Hammond parted ways with Moore, and Moore kept the marijuana. The victim died at the scene from a gunshot wound.

On these facts, the trial court instructed the jury on the law of murder and self-defense, but refused Niles's request to instruct the jury on voluntary manslaughter, reasoning that the evidence showed Niles was either guilty of murder or he was not guilty of any crime based on his claim of self-defense.

The court of appeals reversed Niles's murder conviction and remanded the case for a new trial, finding the evidence compelled a jury instruction on the lesser-included offense of voluntary manslaughter. *Niles*, 400 S.C. at 534, 735 S.E.2d at 244. Specifically, the court of appeals found there was evidence of sufficient legal provocation based on Niles's testimony that he shot at the victim only after the victim began shooting first. *Id.* at 535, 735 S.E.2d at 244. Further, the court of appeals found that there was evidence that Niles acted in a sudden heat of passion

based on Niles's testimony that he took Moore to meet the victim to buy marijuana; that Moore, without warning, decided to rob the victim; and that Niles did not fire his gun until after Moore perpetrated the robbery and the victim shot first. *Id.* at 536, 735 S.E.2d at 245. Therefore, the court of appeals concluded that there was evidence that Niles did not have an opportunity for cool reflection, and as such, there was evidence Niles acted in a sudden heat of passion. *Id.*

We granted the State's petition for a writ of certiorari to consider the State's argument that the court of appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter because there was no evidence at trial that Niles acted in the sudden heat of passion.[9]

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). Thus, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

ANALYSIS

The State maintains the trial court did not err in refusing Niles's request for an instruction on voluntary manslaughter because Niles failed to present evidence that he acted in the sudden heat of passion. We agree with the State that there was no evidence that Niles acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than

---

[9] We note that the State has not challenged the court of appeals' finding that there was evidence of sufficient legal provocation.

the greater, offense. *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005). When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant. *Pittman*, 373 S.C. at 572–73, 647 S.E.2d at 168.

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Smith*, 391 S.C. 408, 412–13, 706 S.E.2d 12, 14 (2011). To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

> The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court. *State v. Hernandez*, 386 S.C. 655, 662, 690 S.E.2d 582, 586 (Ct. App. 2010) (citation omitted).

Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*. Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in *Cole*, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense. In *State v. Childers*, we explained:

> Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.
>
> If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court . . . . Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.

373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007). Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.[10]

We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking lot to rob the victim during the drug transaction. Niles further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored. *See Pittman*, 373 S.C. at 575, 647 S.E.2d at 169 ("In determining whether an act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." (citation omitted)). In other words, there was nothing *sudden* about Niles's decision to shoot the victim.[11]

---

[10] Undeniably, murder, self-defense, and voluntary manslaughter may coexist under the right factual circumstances; here, however, Niles's testimony went to the elements of self-defense, not voluntary manslaughter.

[11] Along the same lines, while the State has not challenged the court of appeals' findings with respect to sufficient legal provocation, we note that sufficient legal provocation cannot be found to exist where the victim is defending himself from a crime. *See State v. Knoten*, 347 S.C. 296, 314, 555 S.E.2d 391, 400 (2001)

Thus, we hold that the evidence did not warrant a voluntary manslaughter charge. *See State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 412–13 (1994) ("The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.").

CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

(Burnett, J., dissenting) ("A victim's attempts to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001)).

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the court of appeals was correct in its holding that there is evidence in the record entitling Niles to a charge on voluntary manslaughter.

If there is any evidence to support a jury charge, the trial judge should grant the request. *State v. Shuler,* 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Wharton,* 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Smith,* 391 S.C. 408, 412-413, 706 S.E.2d 12, 14 (2011). The sudden heat of passion needed to justify a voluntary manslaughter charge must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection and produce what may be called an uncontrollable impulse to do violence. *State v. Cole,* 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000).

In this case, a voluntary manslaughter charge should have been given if there were *any* evidence in the record from which a jury could infer that this killing was the result of sufficient legal provocation which caused Niles to experience an uncontrollable impulse to do violence. In my opinion, there is.

First, as the court of appeals noted, the unprovoked shooting by Salter amounted to evidence sufficient for a jury to infer that there was legal provocation. *See State v. Pittman,* 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held than an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). Second, I agree with the court of appeals that Niles's testimony that he immediately returned fire out of fear for himself and his fiancée provided evidence from which a jury could find that Niles was acting pursuant to an uncontrollable impulse to do violence. *State v. Wiggins,* 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (holding that the lower court properly charged the jury on voluntary manslaughter where defendant testified he was in fear of the threat of physical assault). Accordingly, I would affirm the court of appeals because I cannot say there is no evidence whatsoever tending to reduce this crime from murder to manslaughter.

Unlike the majority, I am unable to discern Niles' intent and state of mind on April 9, 2007, and to resolve numerous factual issues much as a jury might have done. For example, the majority states with certitude that Niles determined "to arrive at the scene armed with a deadly weapon," thus demonstrating he "clearly planned for

the possibility that he might have to discharge his weapon to accomplish the robbery . . . ." In light of this premeditated decision, the majority states "there was nothing *sudden* about Niles' decision to shoot the victim." In my opinion, the majority exceeds our scope of review in this law case by resolving disputed issues of fact in order to deny Niles a new trial. *E.g.*, *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014).

I would affirm the court of appeals.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Bill Niles, Jr., Appellant.

Appellate Case No. 2009-121246

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

Published Opinion No. 5034
Heard February 14, 2012 – Filed September 12, 2012

REVERSED

Robert Michael Dudek, South Carolina Commission on Indigent Defense, of Columbia and Reid T. Sherard, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Brendan J. McDonald, all of Columbia, for Respondent.

WILLIAMS, J.: On appeal, Richard Bill Niles, Jr. (Niles) argues the circuit court erred in declining to charge the jury on voluntary manslaughter because there was evidence that Niles was not the first aggressor. Niles asserts the circuit court incorrectly reasoned Niles was either acting in self-defense or shot the decedent

during the commission of an armed robbery. Because voluntary manslaughter and self-defense are not mutually exclusive, Niles contends he was entitled to a charge on voluntary manslaughter. We agree and reverse.

FACTS/PROCEDURAL HISTORY

On April 9, 2007, James Salter (Salter) was shot in a Best Buy parking lot in Myrtle Beach, South Carolina. Salter later died from his injuries. Niles, his fiancée Mokeia Hammond (Hammond), and Ervin Moore (Moore) were arrested and charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State whereby Moore pled guilty to armed robbery, voluntary manslaughter, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond. Niles and Hammond were tried jointly on March 9, 2009.

At Niles' and Hammond's trial, Moore testified that on April 9, 2007, Niles and Hammond picked up Moore and headed to the beach where the trio "made a couple of drug sales at a couple of motels." Moore stated, "[W]e were smoking blunts in the car . . . [and when] we ran out of weed . . . we said we wanted to get some more weed." Moore maintained Niles "made a couple of phone calls," and they "ended up in the Best Buy parking lot." Moore testified Niles said "he was going to do a lick," which Moore understood to mean they were going to rob the drug dealer, later identified as Salter. Moore stated his job in the robbery was "to identify the weed" for Niles.

Upon arriving at the Best Buy parking lot, Moore exited his vehicle and got into Salter's vehicle. Moore stated Salter pulled a large ziploc bag of marijuana out from under his seat so Moore could see it. Moore maintained that by the time he inspected the marijuana, exited Salter's vehicle, and returned to the vehicle with Hammond, Niles had exited their vehicle. Moore testified he informed Niles that he saw the marijuana and stated, "The next thing I knew, I just heard two shots and I seen [Niles], he jumped back in the back seat behind [Hammond]." Moore further stated "after . . . [Niles] jumped in [the vehicle], after them two shots then the other guy fired a shot." Moore testified that after both Niles and Salter continued to fire shots at each other, Hammond drove out of the parking lot.

Though Moore testified on direct examination "the other guy didn't shoot until after [Niles] shot," on cross-examination, Moore admitted he did not actually see

Niles shoot first. Moore stated he originally testified Niles shot first because Niles admitted he shot first when Niles jumped back into the vehicle.

Niles testified in his own defense. He denied he told Moore he was "going to do a lick" and testified Moore asked him to purchase a pound of marijuana for him. Niles affirmed that when they pulled into the Best Buy parking lot, Moore got out of the vehicle and into Salter's vehicle. Niles testified he was talking to Hammond about their upcoming wedding when Hammond suddenly told him, "Baby, they are fighting." Niles stated he looked over to Salter's vehicle and observed Moore and Salter "tussling in the car." Niles stated he noticed Moore trying to exit Salter's vehicle and heard Salter state to Moore, "[Y]ou ain't getting out of this car with my weed without no money." Niles maintained that when Moore exited Salter's vehicle and jumped into the vehicle with Niles and Hammond, Salter pulled out a gun and began shooting at the vehicle that Niles, Hammond, and Moore occupied. Niles testified, "I grabbed my pistol and that's when I shot two times." Niles maintained he was being shot at constantly by Salter and he shot back.

The circuit court charged the jury on self-defense, but it refused Niles' request to charge the jury on voluntary manslaughter. The circuit court refused the voluntary manslaughter charge reasoning that "either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting . . . [and] killed the victim during the commission of an armed robbery."

Niles was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime.[1] Niles received a thirty-year sentence for murder and armed robbery and a five-year sentence for the conviction of possession of a firearm during the commission of a violent crime, all to be served concurrently. Niles appeals.

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). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id* If any evidence supports a jury charge, the circuit court should grant the request. *State v Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). To warrant

[1] While Niles was convicted of all charges, Hammond was only convicted of armed robbery and sentenced to fifteen years imprisonment.

reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Id*

LAW/ ANALYSIS

Niles argues the circuit court erred in failing to charge the jury on voluntary manslaughter because conflicting testimony was presented to support a jury charge on voluntary manslaughter.

To the contrary, the State asserts a jury charge of voluntary manslaughter was not appropriate in this case. The State argues only two scenarios are possible from the evidence presented at trial: (1) Salter shot first and Niles acted in self-defense by returning fire; or (2) Niles shot at Salter first, committing murder during the commission of an armed robbery. The State contends that Niles failed to present evidence showing legal provocation or sudden heat of passion, which are both prerequisites to support a charge on voluntary manslaughter. We agree with Niles.

"The evidence presented at trial determines the law to be charged to the jury." *State v Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010). "To warrant a court's eliminating the offense of [voluntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to [voluntary] manslaughter." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the circuit court views facts in a light most favorable to the defendant. *State v Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

"Voluntary manslaughter is the unlawful killing of a human being in [a] sudden heat of passion upon sufficient legal provocation." *State v Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Both sufficient legal provocation and heat of passion must be present at the time of the killing to support a jury instruction on voluntary manslaughter. *Hernandez*, 386 S.C. at 660, 690 S.E.2d at 585.

Furthermore, a court is permitted to charge a jury on both voluntary manslaughter and self-defense if supported by the evidence. In *State v Gilliam*, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988), our supreme court held a jury charge on self-defense and voluntary manslaughter are not mutually exclusive, stating:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if

> supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

(internal citation omitted).

Here, we find Niles' testimony that Salter fired the first shot at him, and he subsequently returned fire provides sufficient evidence to support a jury charge on voluntary manslaughter. Viewing the evidence in a light most favorable to Niles, we believe a jury could find Niles acted in a heat of passion upon sufficient legal provocation, thus supporting a voluntary manslaughter jury charge.

I. Legal Provocation

First, we find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles.

An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. *State v Starnes*, 388 S.C. 590, 597-98, 698 S.E.2d 604, 608 (2010). In *Gilliam*, our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. *Gilliam*, 296 S.C. at 396-97, 373 S.E.2d at 597. Further, in *State v Linder*, 276 S.C. 304, 306-07, 278 S.E. 2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

> [W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when . . . [Salter] was shooting in the car. That's when my fiancé[e] started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter]

> was shooting in the car . . . I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. *See State v Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."); *see also State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.").

II. Heat of Passion

Second, we find evidence was presented at trial to show Niles acted in a heat of passion when he shot Salter.

To mitigate murder to voluntary manslaughter, sudden heat of passion, while it need not dethrone reason entirely, must be such that would "naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *State v Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotation marks and citation omitted). "However, even when a person's passion is sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled, the killing would be murder and not manslaughter." *Hernandez*, 386 S.C. at 661, 690 S.E.2d at 585 (internal quotation marks and citation omitted). "Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved." *Id.*

Niles testified that after Salter began shooting at his vehicle, Niles reached for his gun and returned fire. He stated:

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went

> pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé[e] got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. *See State v Knoten*, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the "the first thing that came to . . . [his] mind" supports that he was acting on impulse upon being shot at by Salter. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

Accordingly, viewing the evidence in the light most favorable to Niles, we find evidence sufficient to support a charge on voluntary manslaughter; therefore, the circuit court erred in failing to charge the jury on voluntary manslaughter. *See State v Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that if there is any evidence to support a jury charge, the circuit court should grant the request).

III. Prejudice

Furthermore, the error of the circuit court in failing to charge the jury with voluntary manslaughter prejudiced Niles. "The [circuit] court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v Harrison*, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000). However, even if the circuit court "refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *State v Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (internal citation omitted). The party complaining of the circuit court's refusal to give the requested instruction bears the burden of demonstrating prejudice to warrant a reversal. *Otis Elevator, Inc. v Hardin Const. Co Group, Inc* , 316 S.C. 292, 299, 450 S.E.2d 41, 45 (1994).

We find Niles met his burden of showing he was prejudiced by the circuit court's refusal to give the requested jury instruction. Here, the circuit court failed to give any instruction on voluntary manslaughter. The jury charges the circuit court gave regarding self-defense, murder, armed robbery, and possession of a firearm during the commission of a violent crime do not cover the substance of voluntary manslaughter, nor do they explain the elements of voluntary manslaughter. Based on the evidence presented at trial, viewed in a light most favorable to the defendant, a jury could have found Niles guilty of voluntary manslaughter. Therefore, Niles was prejudiced by the circuit court's failure to instruct the jury on voluntary manslaughter. *See Harrison*, 343 S.C. at 175, 539 S.E.2d at 76 (holding defendant was prejudiced when based on the evidence at trial, a different verdict might have been reached if the jury had been charged with the instruction requested by the defendant).

Because the circuit court erred in refusing to charge the jury on voluntary manslaughter and that error prejudiced Niles, we reverse the circuit court. *See Harrison*, 343 S.C. at 173, 539 S.E.2d at 75 ("To warrant reversal, a [circuit court's] refusal to give a requested jury charge must be both erroneous and prejudicial.")

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED.

THOMAS and LOCKEMY, JJ., concur.