STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 2015-UP-382 (S.C. Ct. App. filed 7/29/15)
11-GS-23-06315-06316

THE STATE,

RESPONDENT,

V.

NATHANIEL BERNARD BEEKS,

PETITIONER

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit
305 E. North St., Suite 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nathaniel Bernard Beeks, Appellant.

Appellate Case No. 2013-001783

Appeal From Greenville County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2015-UP-382
Heard March 4, 2015 – Filed July 29, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

PER CURIAM: Nathaniel Bernard Beeks appeals his conviction for murder. He contends the trial court erred by (1) failing to instruct the jury that sufficient legal provocation includes a "very emotional argument" and (2) instructing the jury that words alone would not satisfy the sufficient legal provocation element of voluntary manslaughter. He asserts the trial court's instruction "would leave the jury unable to find [him] guilty of manslaughter."

We find Beeks was not entitled to a jury instruction on voluntary manslaughter and, therefore, affirm his murder conviction. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). "The law to be charged must be determined from the evidence presented at trial." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "To warrant a court's 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." *Id.* at 101, 525 S.E.2d at 513. "[S]udden heat of passion upon sufficient legal provocation is defined as an act or event that 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. Starnes*, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010) (internal quotation marks omitted); *see also State v. Tucker*, 324 S.C. 155, 171-72, 478 S.E.2d 260, 269 (1996) ("The provocation *of the deceased* must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection[.]" (quoting *State v. Franklin*, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999))).

During the trial, Detective David Garrison of the Greenville Police Department testified that after Beeks was arrested, he informed Detective Garrison that the victim had told him she was seeing someone else and, as a result, he snapped, grabbed the victim, threw her to the floor, and started choking her. Additionally, Darron Montgomery testified that Beeks stated he and the victim were arguing and he grabbed the victim around the neck because she "wouldn't shut the f*** up." We find this argument between Beeks and the victim regarding the victim's decision to end their romantic relationship does not amount to sufficient legal provocation as it would not produce in the mind of an ordinary person "the highest degree of exasperation, rage, anger, sudden resentment, or terror." *See id.*; *cf. State v. Cooley*, 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000) ("In general, South

Carolina has allowed marital infidelity to support a charge of marital voluntary manslaughter only when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation."). Thus, even if we were to find the trial court's voluntary manslaughter instruction to be incorrect, the error would be harmless. *See State v. Gadsden*, 314 S.C. 229, 232, 442 S.E.2d 594, 597 (1994) ("A jury charge misdefining an element of voluntary manslaughter that had no effect on any other aspect of the trial, evidence, or burden of proof would be harmless error absent evidence requiring the charge."); *id.* ("[W]here there is no evidence to support a jury instruction on voluntary manslaughter, a jury charge which effectively prohibits the jury from considering the lesser-included offense cannot be error.").

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

NATHANIEL B. BEEKS,

APPELLANT

Appellate Case No. 2013-001783

Appeal from Greenville County

J. Mark Hayes, II, Circuit Court Judge

Opinion No. 2015-UP-382

PETITION FOR REHEARING

On July 29, 2015, this Court affirmed Appellant's conviction and sentence in an unpublished opinion. State v. Beeks, Op. No. 2015-UP-382 (S.C. Ct. App. July 29, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter due to the significant points overlooked and/or misapprehended as explained below. This Court erred in two ways – legally and factually. The legal error involves this Court's misapprehension of the law concerning sufficient legal provocation, which was the foundation of Appellant's argument on appeal. Despite this Court's statements that the opinion did not address Appellant's argument concerning the jury charge requests, the only way the Court could determine that Appellant was not entitled to a charge on voluntary manslaughter would be if the Court also determined that words

alone do not constitute sufficient legal provocation where a deadly weapon is *not* used. This was the thrust of Appellant's argument before this Court. The factual error centers on this Court's reference to two items of evidence concerning what provoked Appellant to kill the deceased. In focusing solely on two items of evidence, this Court neglected to examine other evidence before the jury explaining that the provocation included a physical altercation between Appellant and the deceased.

Legal Error

In his brief, Appellant argued (1) the trial judge erred in instructing the jury that words alone would not satisfy the element of voluntary manslaughter requiring sufficient legal provocation, and (2) the trial judge erred in failing to instruct the jury that sufficient legal provocation includes a very emotional argument. Rather than directly address the issues raised, this Court held Appellant was not entitled to a jury instruction on voluntary manslaughter; therefore, the instructions, even if erroneous, given by the trial judge were harmless. This was a legal error. In arriving at this conclusion, this Court implicitly found that words alone cannot be sufficient legal provocation even when a deadly weapon is not used to effectuate the killing. This implicit finding misapprehends the law in this state. Therefore, Appellant respectfully requests this Court rehear this case to address whether Appellant was entitled to the jury charge on voluntary manslaughter and requests this Court make an explicit determination regarding the correctness of the jury instructions concerning sufficient legal provocation.

This Court based its determination on the testimony of David Garrison of the Greenville Police Department and Darron Montgomery, a jailhouse snitch. This Court noted (1) that Appellant told Garrison that when the deceased informed him that she was seeing someone else, he snapped and started choking the deceased and (2) that Appellant told Montgomery that he and the deceased

were arguing and he grabbed the deceased because she wouldn't shut up. After noting these two items of testimony, this Court found "this argument between [Appellant] and the victim regarding the victim's decision to end their romantic relationship does not amount to sufficient legal provocation as it would produce in the mind of an ordinary person 'the highest degree of exasperation, rage, anger, sudden resentment, or terror.'" Thereafter, this Court drew a comparison to State v. Cooley, 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000), in which the Court held that marital infidelity supports a charge of "marital voluntary manslaughter only when the killer finds the other spouse or paramour in a guilty embrace or flagrantly suggestive situation." Essentially what this Court held was that Appellant was not entitled to the charge on voluntary manslaughter because the evidence in the record to support sufficient legal provocation was a verbal argument unaccompanied by action. Another way to put the Court's holding was that a verbal argument was not sufficient legal provocation because words alone are not sufficient legal provocation *even* when a deadly weapon is *not* used.

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the

evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

Although it is a correct statement of the law that "mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation," this statement is correct *only* when "death is caused by the use of a deadly weapon." See State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362-363 (1996); State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996). In State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891), overruled on other grounds by State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (1991), the Supreme Court held the trial judge properly charged the jury that "provocation by words only, no matter how opprobrious, would not be sufficient" to support voluntary manslaughter. According to the Court, "[t]his broad statement of the doctrine must be understood as applying to a case where the death was caused by the use of a deadly weapon, as it may be different where the death results from the use of some agency not likely to produce death, as, for example, from a blow with the fist." Id.

The South Carolina Supreme Court "has held in several cases that it is proper to charge voluntary manslaughter where the defendant and the victim had been in a heated argument prior to the murder." State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000). The Court found a trial judge properly instructed a jury on voluntary manslaughter where there was testimony that at a Christmas party several hours before the shooting the defendant, who had been drinking, and his wife had been arguing. State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977).

In State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134-135 (1951), the trial court refused to charge the jury on voluntary manslaughter, and the Supreme Court found this was in error. In light of the evidence that a butcher knife and/or scissors were used to kill the deceased, the Court explained that "where death is caused by the use of a deadly weapon, words alone, however,

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opprobrious, are not sufficient to constitute a legal provocation." Id. at 104, 64 S.E.2d at 134. Thus, the evidence of a mere argument would not be sufficient for a charge on voluntary manslaughter because a deadly weapon was used. The Court noted that the evidence, which could be construed as "meaning nothing more than that [defendant]'s wife severely reprimanded or violently censured him, and that they became engaged in a heated argument," was not enough to charge voluntary manslaughter due to the use of a deadly weapon. On the other hand, the same evidence could be reasonably construed to indicate the deceased, who was the defendant's wife, had engaged in "some overt, threatening act or a physical encounter." Therefore, the defendant was entitled to a charge on voluntary manslaughter. Id. at 105, 64 S.E.2d at 134-135.

The Supreme Court held a charge of voluntary manslaughter was appropriate where a witness testified the defendant and the deceased had been "fighting." Based upon this testimony, the jury could fairly and logically deduce provocation and heat of passion. State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983). In a similar case, the Court found the record supported a charge of voluntary manslaughter where there was evidence that the defendant "was in a heated argument" with the deceased. Additionally, the defendant testified "he was afraid for his life because [the deceased] physically threatened him." According to the Court, "fear can constitute a basis for voluntary manslaughter." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998). In another case, the Court explained "verbal confession of adultery, no matter what the content, would be insufficient to warrant a voluntary manslaughter charge" where the killing was done with a deadly weapon because words alone are insufficient to constitute legal provocation in that circumstance. State v. Cooley, 342 S.C. 63, 68, 536 S.E.2d 666, 668-669 (2000).

This Court relied upon Cooley in arriving at its conclusion that Appellant was not entitled to a jury instruction on voluntary manslaughter because evidence of sufficient legal provocation in the

record was that Appellant learned the deceased wanted to end their relationship due to her involvement with another man. Specifically, this Court's opinion quoted language from Cooley: "In general, South Carolina has allowed marital infidelity to support a charge of voluntary manslaughter only when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation." What this Court neglected to consider regarding the Cooley case was that the killing was effectuated by use of a deadly weapon – a gun. Therefore, words alone were not sufficient to constitute legal provocation. In fact, in deciding that Cooley was not entitled to the charge on voluntary manslaughter, the Supreme Court quoted State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) for the proposition that "[w]here death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." Thus, it is clear the Court's determination was based upon the use of a deadly weapon, not merely whether an argument or confession of adultery could constitute sufficient legal provocation.

Each and every case in South Carolina that discusses sufficient legal provocation makes clear that words are not enough only when a deadly weapon is used. This Court's interpretation of the legal maxim refuses to give meaning to the phrase "when a deadly weapon is used" because this Court requires more than words *even* when a deadly weapon is *not* used. Certainly, this cannot be the case. The words "when a deadly weapon is used" are not superfluous. The Supreme Court made this clear in Levelle when it said the legal principle "words only, no matter how opprobrious, would not be sufficient" "must be understood as applying to a case where the death was caused by the use of a deadly weapon." Levelle, 34 S.C. at 120, 13 S.E. at 320. The Court went further to explain that "it may be different where the death results from the use of some agency not likely to produce death, as, for example, from a blow with the fist." Id. More recently, this was made clear

in State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) where the Court said "when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault – by some overt, threatening act – which could have produced the heat of passion."

In the instant matter, the trial court correctly charged the jury that in order to find Appellant guilty of voluntary manslaughter, the state was required to prove beyond a reasonable doubt the defendant took the life of another in the sudden heat and passion, based on sufficient legal provocation. The judge correctly charged the jury on the definitions of sudden heat of passion and legal provocation. However, the judge erred by failing to give the jury clear instructions concerning conduct that constitutes legal provocation – a very emotional argument – as requested and by charging the jury that words alone were insufficient. Specifically, Appellant asked the trial court to tell the jury that legal provocation includes conduct like a very emotional argument. The judge's instruction that "[w]ords alone, however vulgar or insulting, are not enough to be legal provocation" left the jury with no option but to find a lack of sufficient legal provocation. South Carolina law provides that *only* when a deadly weapon is used to cause death does legal provocation require more than words alone. All of the evidence in Appellant's case pointed to manual strangulation; therefore, the cause of death would permit the provocation to occur from words alone.

The judge's charge was particularly problematic in light of his instruction that the jury could infer malice from a deadly weapon, which may include hands and fists. Although the charge was un-objected to, it clearly violated controlling Supreme Court precedent. In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), the Court held "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." The judge's instruction on voluntary manslaughter acknowledged that evidence was presented to reduce or mitigate the homicide.

The lack of evidence of clear instruction on what constitutes legal provocation in the absence of a deadly weapon coupled with the judge's instruction that words alone were insufficient to satisfy the element of legal provocation left the jury unable to find the defendant guilty of manslaughter. The judge's instruction permitting an inference of malice exacerbated the erroneous instructions concerning legal provocation. This Court erred by concluding that Appellant was not entitled to a charge on voluntary manslaughter because the decision was based upon a misapprehension of the status of the law in South Carolina. *Only* when the death is caused by a deadly weapon will words alone not be sufficient to satisfy the element of sufficient legal provocation. This Court should rehear the matter to correct this legal error.

Factual Error

This Court's opinion overlooked evidence in the record to support Appellant's contention that more than a mere argument took place between Appellant and the deceased immediately prior to her death. First, the deceased's home was in disarray when her body was discovered. R. 16, line 20 – R. 17, line 18. This was indicative of a physical struggle, not a mere verbal altercation. In fact, the prosecutor argued to the jury that the evidence supported the conclusion that Appellant and the deceased had a physical altercation.[1] Although the prosecutor's argument was not evidence, the prosecutor could only argue the facts in evidence and the reasonable inference drawn from those facts. See State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72

[1] The prosecutor argued to the jury that Appellant and the deceased had "a big ole fight." She pointed to the deceased's missing wig, broken fingernail, abrasions on her elbow and face, and two scratches on Appellant to support her inference that the two had fought prior to the deceased's death. R. 203, lines 8 – 17.

(2004)(holding the prosecutor's closing argument "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence"). Thus, it is clear the evidence before the jury supported the inference that Appellant and the deceased fought physically prior to her death.

Additionally, Appellant had fresh scratches on his face when he was arrested on April 28, 2011. R. 129, line 22 – R. 130, line 6. When the arresting officer asked about the scratches, Appellant explained the deceased had "slapped him or punched him or hit him or someway struck him to cause the scratches on his face." R. 133, line 12 – R. 134, line 6. Appellant told the arresting officer that the deceased told him she was seeing another man during their argument. Appellant "snapped, ... grabbed her, threw her to the floor and started choking her." R. 131, line 18 – R. 132, line 2. Again, this was evidence of something more than a verbal argument. Appellant had fresh injuries on his face caused by the deceased.

This Court's opinion completely overlooks these *two* essential pieces of evidence to support Appellant's argument that he was entitled to a charge on voluntary manslaughter and that consequently, he was entitled to a charge explaining sufficient legal provocation correctly. See State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989)(holding that a trial judge has the responsibility to craft the jury instructions to the facts of the case). Appellant respectfully requests this Court rehear this matter to correct this factual error.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 13th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL B. BEEKS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Nathaniel B. Beeks #227332, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 13th day of August, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day
of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Nathaniel Bernard Beeks, Appellant.

Appellate Case No. 2013-001783

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paula A. Thomas J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Susan Barber Hackett, Esquire
W. Edgar Salter, III, Esquire
John W. McIntosh, Esquire

FILED

September 16, 2015

William Walter Wilkins, III, Esquire
The Honorable J. Mark Hayes, II