STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

J. Mark Hayes, II, Circuit Court Judge

Opinion No. 2015-UP-382 (S.C. Ct. App. filed 7/29/2015)

11-GS-23-06315-06316

THE STATE,

RESPONDENT,

V.

NATHANIEL BERNARD BEEKS,

PETITIONER

APPELLATE CASE NO. 2015-002165

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 16, 2015. App. 14-15.

QUESTIONS PRESENTED

Did the Court of Appeals err by finding that any error in the jury instructions that words alone would not produce sufficient legal provocation, and the trial judge's refusal to instruct the jury that legally sufficient provocation includes a very emotional argument, was harmless in light of the Court of Appeals' finding that no voluntary manslaughter charge was necessary in the case because the argument between Petitioner and the deceased did not amount to sufficient legal provocation?

STATEMENT OF THE CASE

On August 16, 2011, a Greenville County grand jury indicted Petitioner for murder (2011-GS-23-6315) and grand larceny (2011-GS-23-6316). R. 254. The prosecution, represented by Judy Munson, called the case for trial before the Honorable J. Mark Hayes, II, and a jury on August 12, 2013. Randy Chambers represented Petitioner. R. 1. At the conclusion of the state's case, Judge Hayes granted Petitioner's motion for a directed verdict on the charge of grand larceny because the prosecution failed to present evidence as to the value of the car, which was allegedly stolen. R. 173, line 21 – R. 174, line 8. Judge Hayes indicated there was sufficient evidence to send the lesser-included charge of petty larceny to the jury, however. R. 174, lines 9 – 18. Thereafter, the prosecution moved to amend the indictment to a petit larceny. R. 174, lines 19 – 25. When Petitioner did not object, Judge Hayes granted the motion to amend the indictment. R. 175, lines 5 – 11. The jury found Petitioner guilty of murder and guilty of petit larceny. R. 228, lines 15 – 21. Judge Hayes sentenced Petitioner to life imprisonment for murder, and to thirty days' imprisonment for petit larceny. He ordered the sentences to be served concurrently. R. 237, line 23 – R. 238, line 2; R. 256.

Petitioner filed a timely notice of appeal, which was perfected. On July 29, 2015, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Beeks, Op. No. 2015-UP-382 (S.C. Ct. App. July 29, 2015); App. 1-3. Specifically, the Court held Petitioner was not entitled to a charge on voluntary manslaughter. The Court based its opinion on evidence in the record that Appellant and the deceased had an argument regarding the deceased's decision to end their romantic relationship. App. 1-3. Petitioner filed a petition for rehearing on August 13, 2015. App. 4-13. The Court of Appeals denied the petition on September 16, 2015. App. 14-15. Petitioner now files a petition for writ of certiorari in this Court.

ARGUMENT

The Court of Appeals erred by finding that any error in the jury instructions that words alone would not produce sufficient legal provocation, and the trial judge's refusal to instruct the jury that legally sufficient provocation includes a very emotional argument, was harmless in light of the Court of Appeals' finding that no voluntary manslaughter charge was necessary in the case because the argument between Petitioner and the deceased did not amount to sufficient legal provocation.

Relevant facts

The state's case against Petitioner

Petitioner and Marsha Smith, the deceased, had been romantically involved since 1999. R. 11, line 22 – R. 12, line 6; R. 90, lines 1-6. Darlene Bartee, the deceased's coworker, testified that the deceased had met someone new - a love interest - shortly before her death. R. 59, lines 9-20. On the Thursday before her death, the deceased and Bartee discussed how the deceased would end her relationship with Petitioner. R. 60, line 25 – R. 61, line 10.

On Friday, April 22, 2011, Petitioner and the deceased were joking and getting along well according to the deceased's daughter, Faith Smith. R. 30, lines 8-25. On Saturday, Petitioner and the deceased visited in the home of the James Crawford. R. 49, lines 8-18. According to Crawford, something the deceased said to Petitioner "triggered him off something." Petitioner jumped off the couch and walked out the front door. Petitioner returned and engaged in additional conversation with the deceased. Petitioner then threw a beer under the coffee table and left again. Petitioner was very upset and had "sweat popping off him." R. 50, lines 10 – R. 51, line 21.

On Saturday night, Smith arrived to the home she shared with the deceased. When she arrived, Smith observed Petitioner leave the home, get into the deceased's car, and drive away.

R. 14, line 17 – R. 16, line 13. When Smith entered the home, she found her mother dead and the home in disarray. R. 16, line 20 – R. 17, line 18.

Darron Montgomery grew up with Petitioner. R. 93, lines 6-20. Montgomery and Petitioner discussed the deceased's death while the two were incarcerated in the detention center. R. 93, line 25 – R. 94, line 5. Petitioner told Montgomery that he and the deceased were in a heated argument. When the deceased "wouldn't shut up," Petitioner grabbed her and "just choked her." R. 94, line 24 – R. 95, line 3; R. 102, lines 20-23. Although Montgomery did not know why they were arguing, he knew the argument took place at the house. R. 96, lines 16-21.

Petitioner 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, Detective David Garrison, asked about the scratches, Petitioner 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. Petitioner told the arresting officer that the deceased told him she was seeing another man during their argument. Petitioner "snapped, ... grabbed her, threw her to the floor and started choking her." R. 131, line 18 – R. 132, line 2.

According to the pathologist, the deceased died as a result of manual strangulation. R. 165, lines 17-19. The deceased likely lost consciousness within twenty seconds and expired within a minute. R. 168, line 23 – R. 169, line 8. The bruising pattern on the deceased's neck was consistent with the assailant coming from the front. R. 169, lines 11-21.

Closing arguments

In the prosecutor's closing argument, she asked the jury to decide whether the evidence showed a man "shattered in grief over the loss of the relationship" or acting with malice. R. 196, lines 3-6. She asked the jury if the injuries suffered by the deceased were the result of "the

actions of somebody just snapping" or "the actions of someone committing an intentional, wrongful act without just cause or excuse." R. 196, lines 12-14. The prosecutor asked the jury what did the deceased do that would provide sufficient legal provocation to classify her death as manslaughter. R. 198, lines 16-23. After giving a litany of examples such as being wrapped in the arms of another man, breaking off an engagement, being pregnant with another man's baby, looking at "kiddie porn" on a computer, or killing someone's pet, the prosecutor argued the deceased did not do anything that equaled sufficient legal provocation. R. 199, lines 1-11. The prosecutor argued to the jury that Petitioner 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 Petitioner to support her inference that the two had fought prior to the deceased's death. R. 203, lines 8-17.

In closing, defense counsel argued that he did not intend to kill the deceased. R. 205, lines 4-6. Petitioner informed the jury that the only issue was whether he choked the deceased to death with malice or "was there provocation such that he was provoked to a sudden heat and passion." R. 205, lines 17-22. Petitioner argued that involvement in a physical altercation, a threat, and being involved in "a very emotional type of argument" were examples of legal provocation. The evidence showed that he and the deceased were engaged in a very emotional type of argument. The "very narrow issue" for the jury to decide was whether Petitioner was provoked such that he lost the reason a person of ordinary prudence and rationality would have and did he act with sudden heat of passion. R. 206, lines 6-17.

Petitioner disputed the prosecution's argument that the relationship between the deceased and Petitioner was not "much of a relationship" by pointing out the two had been involved since 1999. R. 206, lines 18-25. Petitioner argued that he was moved to "sudden heat and passion by

being told that she didn't want to see him anymore. And that she wanted to date somebody else." R. 208, lines 13-19. Petitioner argued "somebody acting with that kind of passion, you lose control of yourself. You snap." R. 211, lines 16-24. Petitioner elaborated: "And then confronted with the loss of this relationship and the thought of her being with someone else, in the midst of this very emotional argument, apparently he was getting physical even before he grabbed her and choked her. He snapped. He was provoked with sudden heat and passion." R. 214, lines 8-13.

Charge Conference

During the charge conference, Judge Hayes informed the parties that when instructing the jury concerning voluntary manslaughter, he would explain that sufficient legal provocation was a necessary element. His charge would explain:

> Sufficient legal provocation must be the type that would make a person of ordinary reason and caution to become enraged and to lose control temporarily. The provocation needed for voluntary manslaughter, must come from some act of or related to the victim. Words alone, however vulgar or insulting are not enough to be legal provocation. Where death is caused by the use of a deadly weapon, the words must be accompanied by some overt, threatening act which would have produced the heat of passion.

R. 182, lines 2-11. Petitioner objected to the charge wherein the judge said "words alone are not enough. It has to be – – there has to be an accompanied act." Petitioner argued that "a very emotional argument" would satisfy the requirement of legal provocation, but the charge as given required something more than a verbal argument. R. 183, line 23 – R. 184, line 6. Petitioner argued that the judge's instruction informed the jury that an argument alone could not provide legal provocation. R. 185, lines 15-21. The prosecution *agreed* with Petitioner's argument. The prosecutor explained "these weren't just mere words. These were words that had effect." R. 185, line 24 – R. 186, line 12.

The evidence showed that the deceased had a new man in her life and told Petitioner about her new relationship during the course of their argument that precipitated her death. R. 187, line 15 – R. 188, line 5. Petitioner argued the lack of evidence that the deceased "didn't hit him, she didn't spit at him, she didn't really do anything to him other than say something to him" coupled with the judge's instruction that words alone were insufficient to satisfy the element of legal provocation of manslaughter would leave the jury unable to find the defendant guilty of manslaughter. R. 188, lines 6-17.

Petitioner provided the court with a suggested instruction. R. 239. Specifically, he asked the judge to charge the jury:

> A sufficient legal provocation is one that would cause a person of ordinary reason and prudence to become provoked and experience sudden heat and passion. A sufficient legal provocation need not overpower knowledge, rationality, and volition. Instead, it need only be sufficient to disturb or upset reason and render the mind of an ordinary person incapable of cool reflection.
>
> By way of example, and only by way of example, provocation that is legally sufficient to negate malice includes conduct: (6) like very emotional arguments.

R. 239. Petitioner distinguished South Carolina case law providing that when death is caused by a deadly weapon, words alone are insufficient to constitute legal provocation. Additionally, Petitioner cited controlling case law to support his position that a very emotional argument provides legally sufficient provocation. R. 191, line 2 – R. 192, line 15.

The judge denied Petitioner's request. R. 193, lines 7-20; R. 194, lines 5-9. The trial judge stated that the charge as a whole was proper and he would not change it to include the request made. R. 194, lines 11-16.[1]

Jury Instructions

[1] Petitioner renewed his objection at the conclusion of the jury instructions. R. 227, lines 13-16.

Concerning the elements of murder, the trial judge instructed the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." After giving the jury examples of deadly weapons, the judge explained:

> A hand or a fist is not normally considered a deadly weapon. However, under some circumstances, depending on the manner and the means of its use, the wounds inflicted and other relevant facts, a hand[] or fist may be considered a deadly weapon. It is for you to decide in this case, beyond a reasonable doubt whether or not a hand or fist has been used as a deadly weapon.

R. 223, lines 12-19. Then the judge instructed the jury on the elements of voluntary manslaughter:

> To prove voluntary manslaughter, the state must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat and passion, based on sufficient legal provocation. ... Sudden heat and passion may, for a time, affect a person's self-control and temporarily disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrollable impulse to do violence.
>
> Sufficient legal provocation must be the type that would make a person of ordinary reason and caution, become enraged and to lose control temporarily. The provocation needed for voluntary manslaughter, must come from some act of or related to the victim. Words alone, however vulgar or insulting are not enough to be legal provocation. Where death is caused by the use of a deadly weapon, the words must be accompanied by some overt, threatening act which could have produced the heat of passion.
>
> The exercise of a legal right, no matter how offensive it is to another, is never sufficient legal provocation for voluntary manslaughter.

R. 223, line 24 – R. 224, line 5.

Discussion

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."

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained *no* evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). "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); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original)(holding that in murder cases, trial courts should charge manslaughter unless "there is no evidence whatsoever tending to reduce the crime from murder to manslaughter").

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as "the unlawful killing of another without malice, express or implied." S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). This Court made it clear that both of these elements

must be present in order to warrant a voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010); State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011). "The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence." Cooley, 342 S.C. at 67, 536 S.E.2d at 668. "Sudden heat of passion upon sufficient legal provocation" mitigating felonious killing to manslaughter "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. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)(quotations omitted).

The Court of Appeals quoted selective portions of the testimony by Montgomery and Garrison in arriving at its conclusion that Petitioner was not entitled to a voluntary manslaughter instruction. Specifically, the Court of Appeals pointed to Petitioner's statement to Garrison that when the deceased told him she was seeing someone else, "he snapped, grabbed the victim, threw her to the floor, and started choking her." App. 2. Additionally, the Court of Appeals quoted Montgomery's testimony that Petitioner said he and the deceased were arguing and he grabbed her around the neck "because she 'wouldn't shut the f*** up.'" App. 2. The Court of Appeals then concluded that "this argument" between Petitioner and the deceased regarding the deceased's decision to end their romantic relationship did 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.'" App. 2 (quoting State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)).

In essence, the Court of Appeals concluded that words alone are not sufficient legal provocation *even* when a deadly weapon is *not* used. In addition to arriving at this erroneous legal conclusion, which will be discussed infra, the Court of Appeals neglected to consider the entirety of the record, which cast the argument between the deceased and Petitioner in its proper light – that of sufficient legal provocation.

The Court neglected to consider Garrison's testimony that Petitioner said 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. The Court also overlooked other evidence in the record to support Petitioner's contention that the exchange between Petitioner and the deceased immediately prior to her death supported sufficient legal provocation. 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 in addition to a verbal altercation. At any rate, it was indicative of a verbal altercation that involved displacement of items in the home even if the parties did not engage in physical violence. The prosecutor actually argued to the jury that the evidence supported the conclusion that Petitioner and the deceased had a physical altercation.[2] 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 (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,

[2] 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.

it is clear the evidence before the jury supported the inference that Petitioner and the deceased fought physically prior to her death.

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.

This 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). This 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,

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. 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.

This 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, this 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 this 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, this 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).

On the other hand, this Court determined Locklair was not entitled to an instruction on voluntary manslaughter because Locklair used a deadly weapon – a gun – to kill the deceased and

the only evidence of provocation was that the deceased "got smart" with him. In light of controlling case law that when a deadly weapon is used, words alone were insufficient to prove legal provocation, the Court held Locklair was not entitled to the jury instruction. Locklair, 341 S.C. at 361, 535 S.E.2d at 424.

The Court of Appeals erred in determining Petitioner was not entitled to a voluntary manslaughter instruction based on the clear evidence in the record that Petitioner's conduct was the product of sufficient legal provocation and occurred during the sudden heat of passion. According to the testimony and the physical evidence, Petitioner and the deceased engaged in a heated argument regarding the dissolution of their relationship and the deceased's affair with another man. The Court of Appeals' decision was based upon the false legal conclusion that words alone were not sufficient to produce sufficient legal provocation even when a weapon was not used.

The Court of Appeals 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 the 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, this 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 this 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. The Court of Appeals' interpretation of the legal maxim refuses to give meaning to the phrase "when a deadly weapon is used" because the Court required 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. This 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 this 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 for the jury to find Petitioner 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 as requested and by charging the jury that words alone were insufficient. Specifically, Petitioner 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 Petitioner'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.

CONCLUSION

Petitioner respectfully requests this Court grant review and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of October, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

J. Mark Hayes, II, Circuit Court Judge

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

THE STATE,

RESPONDENT,

V.

NATHANIEL B. BEEKS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 23rd day of October, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of October, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2015.