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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2016-UP-073 (S.C. Ct. App. Filed 02/24/16)

10-GS-36-00503, 11-GS-36-00505

THE STATE,

RESPONDENT,

V.

MANDY LENORE SMITH,

APPELLANT

APPELLATE CASE NO. 2016-001087

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

I. Does this case present a novel and important question that shows that the precedent of *State v Knoten, 347* S.C. *296, 555 S.E.2d 391 (2001)*, should be overruled because it is unworkable, not grounded in sound principles, is not in the interest of justice and if strictly complied against the interests of both parties by encouraging a compromise and incorrect verdict [sic], as reflected by Mandy Smith's theory at trial being completely incompatible with manslaughter?

II. Where the State made a Petition to Argue against Precedent to overrule *State v. Knoten,* which was granted, did the Court of Appeals may have [sic] misapprehended that the State's concession that that the manslaughter instruction should have been given where it was conditional based its position with *Knoten?*

III. Where harmless error concerning the failure to instruct on voluntary manslaughter exists from a reasonable reading of the record based upon the incompatible theories by both the defense and State, did the Court of Appeals err in granting a new trial when the failure to instruct could not have contributed to the verdict of guilt and made evidence of murder overwhelming?

IV. Does harmless error exist where the only potential evidence to support a voluntary manslaughter charge was in Appellant's first statement, which she later recanted and denied while testifying at her trial and which was inconsistent with her defense that another person committed the crime and that it was not the result of sudden heat of passion or sufficient legal provocation?

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals properly found that the trial court erred in failing to charge the jury on voluntary manslaughter where the State conceded that such a charge was warranted by the solicitor's admission of Respondent's first written statement to police, consistent with this Court's holding in State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001)?

II. Whether this Court properly held in Knoten that the State's admission of a recanted statement of the defendant which contained evidence of voluntary manslaughter required a jury instruction on voluntary manslaughter, such that there is no reason to overrule this established precedent where the State chose to admit Respondent's statement in this case?

III. Whether the Court of Appeals properly found that the failure to charge voluntary manslaughter was not harmless error?

COUNTER-STATEMENT OF THE CASE

Indictment and Trial

On August 5, 2011, the Newberry County Grand Jury indicted Respondent Mandy Lenore Smith of (1) murder; (2) possession of a weapon during the commission of a violent crime; and (3) desecration of human remains. R. 11, ll. 3-12; R.1103 – 1104; R. 1106 – 1107; R. 1109 -1110.

On October 7, 2013, Smith proceeded to trial before the Honorable R. Knox McMahon and a jury. Smith was represented by Charles Verner, and the State was represented by solicitor David Stumbo and assistant solicitor Christopher Scott. R. 1.

On October 11, 2013, the jury found Smith guilty of murder and desecration of human remains. The jury found her not guilty of possession of a weapon during the commission of a violent crime. R. 1052, ll. 13-22.

On October 14, 2013, Judge McMahon sentenced Smith to consecutive terms of forty years for murder and ten years for desecration of human remains. R. 1077, ll. 12-20.

Direct Appeal

Smith filed a timely Notice of Appeal and raised the following issues on direct appeal:

> I. The Trial Court erred in charging the jury on the "hand of one is the hand of all" theory of accomplice liability where the State did not present any evidence of a common plan or design between Appellant and her alleged accomplice to commit murder and where the evidence established that it was either one or the other who committed the murder alone.
>
> II. Appellant's confession given on May 26, 2011 to police was inadmissible where she had advised investigators that she planned to retain an attorney before she turned herself in and spoke to police and the police interrogated her anyway without an attorney present thereby violating Appellant's rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.
>
> III. The Trial Court erred in refusing to charge voluntary manslaughter where the State presented at evidence at trial that the murder may have occurred after Appellant and the decedent had a heated argument after which he hit her numerous times and then she snapped.

> IV. The Trial Court erred in holding evidence that Appellant's co-defendant Wise had previously shot and killed her dogs without justification was inadmissible under Rule 608 where Appellant did not offer such evidence to impeach her co-defendant's credibility, but rather offered such evidence to show her state of mind after the murder to explain why she feared for her life and why she engaged in certain actions after the murder.

App. 1 – 45. The Attorney General's Office filed its brief, in which it conceded that that under the applicable precedent of State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001), the trial court erred in failing to charge the jury on the law voluntary manslaughter. However, the State argued that the error was harmless. App. 67 – 113. The Reply Brief of Appellant focused on the State's concession and argued:

> A. The State's admission into evidence of Appellant's first written confession alone necessitated the voluntary manslaughter charge.
>
> B. The State's admission into evidence of Appellant's first written confession created a factual dispute to be resolved by the jury and would support a verdict of voluntary manslaughter if the jury believed the content to be true such that the failure to charge voluntary manslaughter cannot be harmless beyond a reasonable doubt.
>
> C. The harmless error analysis in the present case is unaffected by the purported strength of the State's case, whether and how evidence was developed and argued by defense counsel, and the jury's notes and verdict.

App. 46 – 66.

On January 19, 2016, the State filed a motion to argue against the precedent of Knoten at oral argument. App. 114 – 120. Though bound by this Court's precedent, the Court of Appeals granted the State's motion to argue against precedent.[1] App. 121. The Court of Appeals held oral argument in the case on February 9, 2016. App. 122.

[1] Notably, the Order granting the motion to argue against precedent was signed by the Clerk of the Court of Appeals and not by any of the individual judges of the Court. App. 121.

On February 24, 2016, the Court of Appeals issued a *per curiam* opinion, reversing Smith's conviction and remanding the case for a new trial. App. 122 – 123 (State v. Smith, Op. No. 2016-UP-073 (S.C. Ct. App. filed Feb. 24, 2016) (Few, C.J., Short and Thomas, JJ.) (per curiam). The Court wrote:

> We find the trial court committed reversible error by refusing to charge the jury on voluntary manslaughter. Respondent admits the trial court erred in this regard under current South Carolina law but argues the error was harmless. We find the error was not harmless. *See State v. Belcher,* 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Middleton,* 407 S.C. 312,317,755 S.E.2d432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict" (internal quotation marks omitted)). Accordingly, we reverse Smith's convictions and remand for a new trial.

App. 122. Because the Court's decision on the voluntary manslaughter charge issue was dispositive, the Court did not address the three remaining issues raised in Smith's direct appeal. App. 122.

On March 10, 2016, the State filed a Petition for Rehearing. App. 124 – 143. The Court of Appeals denied the Petition for Rehearing on April 22, 2016. App. 144.

On May 23, 2016, the State filed a Petition for Writ of Certiorari in this Court. This Return follows.

COUNTER-STATEMENT OF FACTS

Smith was charged with murder and other offenses related to the death John Henry Mayers, her on-again/off-again boyfriend with whom she had a tumultuous relationship since she was a teenager. Smith was granted a restraining order against Mayers on April 8, 2011, after Mayers attacked her in her driveway. R. 841, l. 12 – 843, l. 23; R. 711, l. 22 – 715, l. 2. However, Smith soon resumed her sexual relationship with Mayers. R. 843, ll. 1-4; 844, ll. 6-23. On May 7, 2011, the night Mayers died, he and Smith rode to Judy B. Road, located in the Sumter National Forrest. When they arrived, Timothy Wise, a friend of Smith's who was infatuated with her, was already there.[2] R. 399, l. 3 – 403, l. 6; R. 856, l. 3 – 861, l. 4; R. 1085 – 1086. There was conflicting evidence presented at trial regarding what happened next.

The solicitor admitted into evidence Smith's first written statement after her arrest, dated May 26, 2011. R. 597, ll. 1-21; R. 1080 – 1083 (State's Ex. 19). Smith first described her long and abusive relationship with Mayers. Smith said that she had been "carrying around a gun for the past few weeks" because she lived in a constant state of fear from Mayers. R. 1081. She had gotten a restraining order against Mayers, but he told her that "nothing would keep him away from me and nothing did keep him away from me." R. 1082. Smith then described the heated argument the she got into with Mayers on May 7, 2011:

> **I did not want to end his life but I felt that it was me or John that night.** He had been smoking crack and drinking that night. Many people know how John has been treating me including his family his friends and my family and friends. John's family was telling him to stay away from me and my friends and myself have tried to keep him away. I was even in the process of moving to Newberry the first week of May. John did not like the fact of me moving – said he liked me close to Little Mountain. The first week of May was very hard on me with tring [sic] to avoid John knowning [sic] where I was moving to and when I was

[2] Wise and Smith met via Craigslist in 2009, had sex once, and then remained friends. R. 384, l. 5 – 385, l. 17; R. 828, l. 15 – 830, l. 14.

moving. **He [John Mayers] found out I was actually moving the night of May 7th 2011. Which started a one sided argument with me. I believe that it was him or me that night and it was almost me. I stayed away from everyone for the next week or so to hide my bruises and black eyes.** I can never heal my mind and heart totally over this whole thing. The gun used I had gotten from Tim shortly after the restraining order was given. John knew I had the gun since then but I knew I did [sic] have the heart to use the gun. **I don't remember a portion of what happen [sic]. I blacked out after John had hit me numerous times and when I came out of blackness I was holding gun [sic] and he was lifeless on ground in front of me. I sat there on my knees cring [sic] and tring [sic] to figure out what I did for 15 mins or so before I left. I tried to revive him though [sic] mouth to mouth when I first realized what I had done and when I couldn't bring him back I was so scared so I left.**

App. 1083. Smith also confessed to removing Mayers' head and taking it to a nearby river. Smith claimed that Wise "had no knowledge of what happen til [sic] it was done and he freaked out and left." App. 1083. According to the Captain Robert Dennis, Smith orally told him "that she thought she pretty much **snapped**." R. 594, l. 12.

On June 10, 2014, Smith met with law enforcement again, recanted her first statement, and gave a second written statement. R. 1084 – 1086 (State's Ex. 20). Smith wrote:

> May 7th, 2011 I Mandy Smith texted Tim Wise around 10 pm to call John Mayers so he would come hang out with me. I picked John up about a[n] hour and [a] half later. I texted Tim and let him know where I was going. I always let Tim know where I was going. Always!! When John and I got there Tim was there. I asked Tim why he was there and he said he had a feeling of need to be there. I just thought he was being protective. John, Tim, and I talked and laughed for a while. John and I was [sic] standing together, John was behind me holding on to me and we was [sic] talking and looking up at the night sky. From out of nowhere I was pushed and fell to the ground and I heard a shot when I looked up John and Tim was struggling with each other. I screamed out to Tim "No TC No." John took off running. He went between the trucks and down the road. I got to my feet and ran after them. Tim chased him down. Then I came past the trucks there was a second shot. I seen [sic] Tim in the woods. I ran to where Tim was and seen [sic] John on the ground laying on his back. I went to where John was on the ground. I was so scared and cring [sic] and screaming. Tim grabbed me and pulled me to Don's truck and told me to get in. I was so scared and in shock. Tim closed the door of truck [sic] and went back to where John was. I don't know what he did when he went back. When Tim came back to the truck Tim told me that he would kill me and my kids (animals) if I told anyone and that I had to be ready to sleep in the shed at his house by Sunday night. Tim followed me out of that place and I am sure he followed me home. I had given

> Tim the gun back a couple of weeks before the 7th of May. I have never shot that gun before. Around the 18th of May or so Tim took me for a ride which ended up back at the place where John was and he made me get his head and put it in a bucket then went to a river and Tim tossed it in. Tim was not suppose [sic] to be there that night. Was suppose [sic] to be just John and I. I love John and yes he was a mean mean person most of the time but he did not deserve to die by Tim's hand. This whole situation has caused me a lot of mental harm. This past week I found out that Tim is "in love" with me and has been working at destroying my life over the past 3-4 months. He destroyed my relationship with my landlord, my boyfriend (Kris), my relationship with Don and he hated John. When Tim first met my mom he took her out for breakfast and asked as if almost drilled her for information about me and my past. My mom told him many things about my past such as my mom's dad sexually abusing me and the trouble I went thur [sic] with that. She told Tim about me being in Epworth Children's Home and the struggle with that. I feel as though Tim has preyed on my mental status when it comes to men and he "played" me. I never knew he was in love with me. If I would have I would not of been [sic] so close of friends with him. Tim used me for some sick twisted game.

R. 1085 – 1086.

At trial, Smith testified in her own defense and again disavowed the May 26, 2011 statement. R. 917, l. 19 – 918, l. 4; R. 932, l. 12 – 934, l. 14. Smith testified that she and Mayers were planning to have a sexual encounter at the location off of Judy B. Road that night and she was surprised to see Wise there when they arrived. R. 852, l. 4 – 858, l. 10. When she asked Wise why he was there, he responded that he "just felt the need to be there." Smith thought Wise was lonely and did not think too much of it. R. 860, l. 20 – 861, l. 4. After talking near the trucks for about forty-five minutes, Smith and Mayers walked over towards a grassy area in the middle of the road. Mayers had his arms around Smith, and the next thing she knew, she was pushed to the ground and there was a gunshot. She did not know where Mayers was hit. R. 861, l. 12 – 864, l. 4; R. 866, l. 5 – 869, l. 11. When Smith looked back, she saw Mayers and Wise struggling over a gun and Mayers yelled at her to run. Mayers ran in the opposite direction, but Wise chased him and she heard another shot. When Smith got to Mayers, he was lying on his back and Wise pulled her away. After sitting in the truck, crying and "trying to figure out what just happened," Smith drove

herself home. R. 871, l. 17 – 879, l. 25. Smith was not aware that Wise intended to harm Mayers that night and denied forming any agreement with Wise for him to do so. R. 874, ll. 13-18. Smith later asked Wise "why he did what he did" and he told her that "she would never be away from Mayers any other way." R. 874, l. 19 – 879, l. 25. Smith said she did not go to police because Wise kept a close eye on her and threatened her. R. 880, ll. 1-16.

Regarding the desecration charge, Smith testified that on May 19, 2011, Wise told Smith they were going fishing and had their gear in his truck. As they were heading toward the area where Mayers had been shot, Smith asked Wise where they were going and why. Wise responded: "You will see." When they got to the end of Judy B. Road, Wise pulled Smith out of the truck and took her to the body. He stood next to her with a gun, made her put on a pair of gloves, and forced her to remove Mayers' head. Wise told her if she did not do it, he would kill her dogs and family. Smith put the head in a bag, which Wise put in a bucket. Wise then drove to the river, where he threw the bag into the water and the bucket into the woods. R. 885, l. 5 – 897, l. 6.

Timothy Wise, who testified as a State's witness at Smith's trial, also gave multiple statements to police prior to Smith's arrest. His first written statement was provided on May 20, 2011. Wise said that he gave Smith a 9mm handgun after the restraining order was issued against Mayer "for her self protection."[3] Wise claimed that at Smith's request, he called Mayers at 9:45 on May 7, 2011 and told him that Smith was leaving the area and did not want Mayers around her anymore. He said that Mayes said "that was fine" and that he had stuff to do. Wise said that he did not see Smith again until the next day, Sunday. He claimed that Smith returned the gun to him on

[3] At trial, Wise claimed that gun he allegedly loaned Smith was a.9 mm pistol that belonged to his father. Wise said that he told his father that he was going to "loan out that gun." App. 390, ll. 4-24. However, officer Dennis testified that he spoke with Wise's father, Carol Wise, who had no knowledge that his gun was missing. R. 632, ll. 2-5.

the following Wednesday with a spent shell casing lodged in the chamber. Wise said that it was his "opinion that she [Smith] has something to do with Mr. Mayers' disappearance" and that she has "exhibited anger issues." In response to police questions, Wise said that Smith had not told him that anything happened to Mayers, but that she was capable of hurting or killing Mayers in self-defense or in "fear or blackout rage." Wise also responded that he did not kill Mayers or have a role in his disappearance. R. 210, l. 16 – 211, l. 3; R. 238, l. 14 – 240, l. 4; R. 1089 – 1091 (State's Ex. 30). After Wise gave his statement, officers retrieved the gun from the center console of Wise's truck. Though the bullet analysis was inconclusive, the State's firearm and tool mark examination expert opined that the shell casing found near Mayers was from that gun. R. 353, l. 20 – 354, l. 6; R. 363, l. 23 – 366, l. 2; 372, ll. 8-11. There was no evidence presented at trial as to any fingerprints found on the gun.

At the request of Captain Robert Dennis, Major Danny Gilliam, who knew Wise from the community, met with Wise on May 25, 2011. Gilliam asked Wise if he knew where Smith would go if she wanted to "put something somewhere." Wise told Gilliam about the location at the end of Judy B. Road and agreed to take Gilliam and Dennis there. As they got close, the officers put down their windows in case they could "pick up a smell" from a dead body. Gilliam thought it was curious that Wise covered his nose prior to when the smell "hit." The officers parked and found the body of Mayers in the woods "a fair distance off of the road." They also found a spent cartridge casing and a cigarette butt. R. 292, l. 11 – 298, l. 4; R. 300, ll. 6-18; R. 304, l. 23 – 305, l. 24; R. 360, ll. 8-22; R. 563, l. 11 – 570, l. 11; R. 639, ll. 6-20. SLED was unable to obtain any DNA from the cigarette butt. R. 571, ll. 15-19.

After Mayers' body was found, Wise gave another written statement on May 25, 2011. In this statement, Wise again said that on May 7, 2011, he called Mayers at Smith's request to tell him

that she no longer wanted to have anything to do with him. Now he added that at 1:00 a.m. on May 8, 2011, Smith texted him that she was on Brasselman's Bridge Road and needed directions to I-26, which Wise gave to her. Wise claimed that he became suspicious of Smith when he learned that Mayers was missing and that Smith was "becoming paranoid." Wise still did not place himself at the scene of the crime. R. 577, l. 5 – 578, l. 14; R. 1092 – 1093 (State's Ex. 31). Law enforcement was unable to retrieve any text messages from Wise's phone to verify his claims. R. 578, l. 15 – 579, l. 20.

On May 26, 2001, Wise gave yet another statement, finally admitting that he was at Judy B. Road when Mayers was shot. Twice that day Smith texted Wise and asked him to call Mayers and tell him she was going to be at the stop sign by "Mr. J's." Wise called Mayers both times and relayed the message. Wise claimed that Smith texted him at approximately 11:30 p.m. and told him to meet she and Mayers at the end of Judy B. Road. Wise left his house at 11:45 p.m., went to the end of Judy B. Road and waited approximately twenty-five minutes. After Smith and Mayers arrived, they stood around talking for about thirty minutes. Mayers then walked away from them towards the woods, at which time he alleged that Smith "pulled out the gun I had loaned her, and fired, hitting Mr. Mayers in the right shoulder area." He claimed that Smith followed Mayers, shot him again, and said "he wasn't going to bother her anymore." They both left in their separate vehicles and never discussed what happened. Wise admitted that he and Smith returned to the end of Judy B. Road, where he said that Appellant removed Mayers' "skull" and then threw it into the Tyger River. R. 580, l. 1 – 584, l. 7; R. 1094 – 1096 (State's Ex. 32). After he gave this statement, Dennis drove Wise to the river where the additional remains of Mayers were recovered. R. 584, l. 8 – 587, l. 9.

Wise's testimony at Smith's trial was primarily consistent with his last written statement to police, at times even seeming verbatim. R. 396, l. 13 – 410, l. 1. Wise added that Mayers and Appellant were "hugging on each other" at Judy B. Road and eventually "walked off and was smoking crack." R. 404, l. 2-24. Wise also claimed that he "found" the gun in one of Smith's moving boxes later that week, at which time he took it by the barrel, wrapped it in some cloth, and put it in the console of his truck. R. 409, l. 15 – 410, l. 1. Wise denied being in love with, obsessed with, or infatuated with Smith. R. 402, ll. 5-10. Wise contended that while he had a part in the desecration of the remains, he had no part in the initial shooting. R. 420, ll. 13-24. Even so, Wise claimed that he only drove Smith back to Mayers body and that she acted on her own in removing the head, placing it in the bucket, and throwing it in the river. When asked why he returned to Judy B. Road with Smith, Wise said he was "helping a friend" and "trying to keep [her] from getting in any more trouble than she was already in." R. 411, l. 8– 413, l. 5. The murder charges against Wise were still pending at the time of Smith's trial and he admitted that he was hoping for leniency in exchange for his testimony.[4] R. 421, l. 25 – 422, l. 88; R. 513, ll. 5-7.

Respondent further incorporates the Statement of Facts set forth in the Final Brief of Appellant. App. 6 – 24.

[4] According to the public index, Wise ultimately pled guilty to accessory after the fact to murder and desecration of human remains. He was sentenced to consecutive terms of fifteen and five years, for a total sentence of twenty years. All other charges were *nolle prossed.*

ARGUMENT

I. The Court of Appeals properly found that the trial court erred in failing to charge the jury on voluntary manslaughter where the State conceded that such a charge was warranted by the solicitor's admission of Respondent's first written statement to police, consistent with this Court's holding in State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001).

The solicitor did not have to admit Smith's first written statement, given May 26, 2011, into evidence or elicit testimony regarding her oral statements made the same day, but ultimately made the calculated and strategic decision to do so. R. 26 – 130; R. 593, l. 19 – 597, l. 21; App. 1080 – 1083 (State's Ex. 19); see State v. Terry, 339 S.C. 352, 356, 529 S.E.2d 274, 276-77 (2000) (holding that a defendant who does not testify at trial cannot admit his own statement as a statement against penal interest); Terry v. State, 394 S.C. 62, 67, 714 S.E.2d 326, 329 (2011) (holding that a solicitors' decision not to present petitioner's statement which would have required an instruction on voluntary manslaughter did not constitute prosecutorial misconduct, but was rather a matter of trial strategy). Once the evidence was admitted, Respondent was entitled to instructions any lesser included offenses raised therein, specifically an instruction on voluntary manslaughter. See Knoten, 374 S.C. at 308-09, 555 S.E.2d at 397-98.

Either in ignorance of or disregard for Knoten, the solicitor fought against defense counsel's request for a charge on voluntary manslaughter, saying that "the defense has very clearly indicated that **they are going with this second statement**." R. 953, ll. 22-25 (emphasis added). Instructions to the jury are not determined by the theory or theories presented in an opening statement or implied in an attorney's examination of witnesses. Rather, the instructions to the jury are determined by the evidence admitted at trial. See State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) ("The trial [court] is to charge the jury on a lesser included offense if there is **any evidence** from which the jury could infer that the lesser, rather than the greater,

offense was committed." (emphasis added)); State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241 (1996) (stating that in determining whether there was any evidence that the appellant committed the lesser offense, "we are not confined to the State's version of the facts" but look to "the evidence presented at trial").

Defense counsel responded that the defendant is entitled to present inconsistent defenses "as long as there is some evidence," and that such was necessary in this case in light of the multiple theories of liability presented by the State.[5] R. 954, l. 10 – 955, l. 3. The trial court denied the defense's request for the voluntary manslaughter charge. R. 956, l. 15 – 957, l. 6. The Attorney General's Office conceded that the failure to charge voluntary manslaughter was error because Smith's first written statement and portions of her oral statement were sufficient to necessitate a voluntary manslaughter charge pursuant to Knoten. App. 100 – 105.

The Court of Appeals was well aware that Petitioner's concession that a voluntary manslaughter charge should have been given in Smith's case was based upon this Court's opinion in Knoten. The Court was likewise well aware that Petitioner desires to see Knoten overruled. Petitioner wrote in its Final Brief:

> Based upon the South Carolina Supreme Court's opinion in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), Respondent **concedes** that the trial court erred in denying Appellant's request to charge voluntary manslaughter as the charge was warranted based upon Appellant's first statement to law enforcement that she later repudiated.

App. 100 (emphasis added); and

> Accordingly, Respondent is constrained to **concede** that it was error to deny Appellant's request to charge voluntary manslaughter even though this lesser offense was repudiated by Appellant's later statements and the defense theory presented at trial.

App. 102 (emphasis added). Petitioner also included the following bolded section:

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[5] The trial judge had already indicated that he would charge "hand of one, hand of all." R. 553, ll. 3-4; R. 690, l. 22 – 692, l. 11.

> **At the appropriate time, should oral argument be held, permission to argue against precedent will be sought pursuant to Rule 217, SCACR. In particular, Respondent would petition to argue against the precedent set by *State v. Knoten,* 347 S.C. 296, 555 S.E.2d 391 (2001), which allows a jury charge on a lesser-included offense based on a previous statement that has been recanted, repudiated by a defendant, and held out by both the prosecution and the defense as false. Respondent submits that the precedent set by *Knoten* is unworkable as it fails to recognize the legal waiver of the instruction and creates a loophole by which a defendant could potentially escape liability altogether despite a jury's verdict finding the defendant guilty of a lesser-included offense.**

App. 105 (emphasis in original). Petitioner then filed a Motion to Argue Against Precedent on January 19, 2016. App. 114 – 118; Cert. Petition, pp. 20-21. In its Opinion, the Court of Appeals wrote: "Respondent [the State] admits the trial court erred in this regard under current South Carolina law but argues the error was harmless." App. 123. Thus, the Court did not misapprehend the State's "conditional" concession.

Moreover, regardless of Petitioner's desire to overturn the well-reasoned precedent of Knoten, the Court of Appeals was bound by Knoten. S.C CONST. ART. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Notably, similar to the present case, the defendant's testimony in Knoten was inconsistent with his prior statement that the victim had cut him with a knife before he hit her with a metal pipe. 347 S.C. at 304, 555 S.E.2d at 396. At trial, Knoten asserted that a co-worker of his confessed to killing the victim. Id. at 302, 555 S.E.2d at 394. The co-worker then threatened to kill Knoten's mother and sister if Knoten told police. Id. Knoten testified that he fabricated his confessions based on cues from the interrogating officers because he feared for his family's safety. Id. This Court rejected the State's argument that Knoten was not entitled to a charge on voluntary manslaughter because Knoten recanted the confession at trial. Id. at 305, 555 S.E.2d at 396.

Instead, the Knoten Court cited our State's longstanding precedent that:

> **In determining the issues to be submitted to the jury ... all of the testimony, both for the State and the defense, must be considered....** The fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for **the burden of establishing the offense charged rested upon the State.**

Id. at 308-09, 555 S.E.2d at 398 (citing Moore, 245 S.C. at 420-21, 140 S.E.2d at 781) (emphasis added). The Knoten Court thus found: "Because there was evidence—in this case introduced by the State—supporting a conviction for the lesser included offense of voluntary manslaughter, we reverse Appellant's conviction in the slaying of Kimberly Brown." Id.; see also State v. Grubbs, 353 S.C. 374, 382-83, 577 S.E.2d 493, 497 (Ct. App. 2003), *cert. denied* Mar. 18, 2004 (finding the trial court erred in failing to give a voluntary manslaughter charge where "a jury could believe the facts as represented by Grubbs in her statement alleging Smith pushed her and punched her in the eye" and there was "testimony of long term abuse of Grubbs by Smith").

Both heat of passion and sufficient legal provocation must be present at the time of the killing to reduce murder to voluntary manslaughter. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984). Like the defendant in Knoten, Appellant was entitled to a voluntary manslaughter instruction based on her initial statement that she shot the victim after he hit her "numerous times." When Appellant "came out of the blackness [she] was holding the gun and he was lifeless on [the] ground in front of [her.]" App. 1083. The defense also presented evidence of Mayers' past abuse toward Appellant, including a restraining order that Appellant placed against Mayers on April 8, 2011. Pursuant to Knoten, Appellant's conflicting testimony at trial that Timothy Wise shot the victim and threatened her if she told police, did not impact the necessity of the voluntary manslaughter charge.

II. This Court properly held in Knoten that the State's admission of a recanted statement of the defendant which contained evidence of voluntary manslaughter required a jury instruction on voluntary manslaughter, such that there is no reason to overrule this established precedent where the State chose to admit Respondent's statement in this case.

Contrary to Petitioner's contention, Knoten is neither "unworkable" nor "badly reasoned." Cert. Petition, p. 21. The "waiver rule" that Petitioner suggests is aimed at pigeonholing defendants into the presentation of one theory of the case, even if the State pursues multiple theories of liability. Petitioner contends that the solicitor's "sole purpose" in admitting Smith's first statement was as evidence of Smith's consciousness of guilt." Cert Pet., pp. 17 and 20. Of course, no such limiting purpose for admitting the statement was expressed on the record, nor would any such limitation have been proper. R. 597. While Petitioner takes affront to the idea that the jury's verdict could be premised upon evidence "known to be false by both parties," the solicitor in Smith's case argued to the jury:

> [You] don't have to believe everything that Tim Wise said. In fact the Judge will tell you, you can believe part of a witnesses testimony, all of it or none of it. We have five written statements given after being read *Miranda* rights, three by Tim Wise, two by Mandy Smith, that all probably have a little bit of truth in it and a lot of deception. It has not been the State's contention all week that you should believe every word that comes out of Tim Wise's mouth. I don't think that just because we called him as a witness, folks.

App. 1013, ll. 4-13; Cert. Petition, p. 16. Petitioner overlooks that it is the jurors who serve as the impartial and ultimate fact-finders. Thus, it was for jury, not the solicitor or trial judge, to consider all of the evidence and determine whether the State had proven Smith was guilty of murder beyond a reasonable doubt. See Light, 378 S.C. at 651, 664 S.E.2d at 470 ("[T]he jury is entitled to resolve the question of how the shooting actually occurred."); McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 492, 626 S.E.2d 52, 56 (Ct. App. 2006) (holding it is "up to the jury, as the finder of fact, to judge the credibility of the witnesses and to resolve any conflicts in their testimony").

However, a jury can only properly perform its fact-finding function if properly instructed. See State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010) (noting that though character evidence was admitted at defendant's trial, "without an instruction the jury was not aware that it could consider this evidence in determining her credibility and her culpability").

As discussed *supra* in Issue I, the Knoten Court rejected the State's argument "that because Appellant recanted the confession at trial, he was not entitled to a charge on voluntary manslaughter." 347 S.C. at 305, 555 S.E.2d at 396. This is the same argument that the State repeats in the present case. Petitioner even relies on State v. Weaver, 265 S.C. 130, 217 S.E.2d 31 (1975), a case which the Knoten Court distinguished:

> In support of its second argument, that because Appellant recanted his statement he was properly denied the requested voluntary manslaughter charge, the State cites a single case, *State v. Weaver,* 265 S.C. 130, 217 S.E.2d 31 (1975). In that case, the Court held there was no error in denying the defendant's request to charge that if the jury found the arresting officer used unreasonable force in effecting the arrest, the defendant's resistance would not have been unlawful. At trial, the defendant denied that he resisted arrest. The officer testified that he did not use unreasonable force in effecting the arrest. The defendant had made no pre-trial statement which would have supported the requested charge. The record contained no evidence that the officer used unreasonable force, and therefore the requested charge was not warranted. *See State v. Cole, supra. Weaver* is distinguishable from the instant case.

347 S.C. at 308, 555 S.E.2d at 397; see Cert. Petition, p. 22-23.

The Knoten Court further wrote that "the State's argument does not accurately reflect the law of this State." Id. As discussed *supra*, the Court cited Moore, which held that it was reversible error for the trial court not to charge the lesser included offense of simple assault and battery despite evidence that the victim's injuries were slight. Id. at 308, 555 S.E.2d at 398. The Moore Court held: "In determining the issues to be submitted to the jury, however, all of the testimony, both for the State and the defense, must be considered." 245 S.C. at 421, 140 S.E.2d

at 781. Our Courts have repeatedly said that the trial court is required to charge a jury on a lesser-included offense "if there is **any evidence** from which it could be inferred the lesser, rather than the greater, offense was committed." Gourdine, 322 S.C. at 398, 472 S.E.2d at 241 (emphasis added) (holding error not to charge lesser included offense of accessory before the fact to strong arm robbery); State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542-43 (2004) (holding error not to charge ABHAN); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005) (holding error not to charge involuntary manslaughter).

The any evidence standard for determining the propriety of a jury charge applies even in cases where the defendant asserts defenses that are seemingly inconsistent. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) ("A self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is **any evidence** to support both charges." (emphasis added)); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (improper to hold that any evidence of an intentional shooting negates evidence from which any other inference may be drawn); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (error by trial court in not charging involuntary manslaughter, even though the trial court charged murder, voluntary manslaughter, accident, and self-defense); State v. Taylor, 261 S.C. 437, 441, 200 S.E.2d 387, 388 (1973) ("If, however, there is any evidence in the record from which it can be reasonably inferred that the accused inflicted the mortal wound but justifiably did so in self-defense, then the accused is entitled to a charge on the law of self-defense, despite his denial of having inflicted the mortal wound. These principles seem to be clearly established by the weight of authority in this jurisdiction as well as elsewhere."). "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. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

Petitioner cites to cases from Georgia, Texas, and Kansas in support of the overstated claim that other jurisdictions have held that statements repudiated by both sides are not a proper basis for an instruction on lesser offenses. Cert. Petition, pp. 23-24. A review of the litany of Georgia cases cited by Petitioner reveals that they are largely irrelevant. Cert. Petition, pp. 23-24. State v. Lawson, 406 S.E.2d 130 (Ga. Ct. App. 1991), and State v. Willis, 728 S.E.2d 857 (Ga. Ct. App. 2012), are the only two Georgia cases cited in which the defendant actually repudiated a prior statement. Notably, both cases are from the Georgia Court of Appeals and certiorari was not sought to the Georgia Supreme Court in either case. In Lawson, the defendant denied any involvement in the shooting at trial and said that the victim shot himself. 400 S.E.2d at 131. He requested a charge on involuntary manslaughter based upon his prior statements to the police that the rifle "just went off." Id. While the Lawson court noted the inconsistency between the trial testimony and prior statements, it ultimately held that Lawson was not entitled to an involuntary manslaughter charge based on the entirety of his statement. Id. Specifically, Lawson also said in his prior statement that he had just told him that he was "going to help him die" before pointing the gun at him. Id. Thus, the affirmance in Lawson was not ultimately based upon the repudiation of the prior statement.

In Willis, the defendant who was convicted of aggravated assault and related firearms offenses arising from two shooting incidents, one against his grandnephew Jacoby Jackson on September 27, 2008, and the against Jackson's father, Antonio Smith, on April 30, 2009. 728 S.E.2d at 861-62. Willis requested a charge on the lesser offense of reckless conduct as to the shooting involving Jackson, based on Willis' prior statement to police that he was shooting at a house and a tree rather that at Jackson. 728 S.E.2d at 866. However, Willis "specifically

repudiated his statement to the Jones County officers" at trial and testified that his brother shot at Jackson. Id. at 866-67. The Willis court ruled: "Here, the State asserted that Willis shot at Jackson intentionally and Willis asserted that he did not shoot at all. Thus, a reckless conduct charge was not supported by any theory of the case. Accordingly, the trial court was not required to charge the jury on reckless conduct as to charges from September 27, 2008." Id. at 867.

The Willis court cited Anderson v. State, 590 S.E.2d 729 (Ga. Ct. App. 2003) for the proposition that "[a] request to charge must be apt, a correct statement of law, and precisely adjusted to some theory in the case." Id. Notably, however, Anderson did not involve a repudiated prior statement. 590 S.E.2d at 731-33. Anderson was convicted of burglary and other offenses after he was caught running from the garage of a newly built home. Id. at 731. The trial court denied his request for a charge on the lesser-included offense of criminal trespass. Id. at 731. The officers testified that lights were turned on in the home, the stove inside had been moved out from the wall, and burglary tools were found in Anderson's van. Id. at 731-32. Anderson testified that he was just driving around looking at houses *and never got out of his car.* Id. at 733. The court held: "Since Anderson denied exiting his vehicle until ordered to do so, an instruction on criminal trespass would not have been adjusted to the evidence." Id. Thus, the Willis court appears to have misapplied Anderson.

A review of the Texas and Kansas cases reveals that they are supportive of the Knoten decision. Texas courts use a two-prong test for determining whether a defendant is entitled to a lesser-included offense instruction: "(1) the lesser-included offense must be included within the proof necessary to establish the offense charged, and (2) some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser included offense." Lofton, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001). "Anything more

than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." Bignall v. State, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

> The purpose of liberally permitting charges on lesser included offenses is clear. If no charge on the lesser included offense is given, then the jury has two options which are equally distasteful. The first option is to vote not guilty in a situation where they believe the defendant committed the lesser offense. The other option is to vote guilty of the greater offense, an offense they believe the defendant did not commit.

Id. at 25 (internal quotations omitted). In an *en banc* opinion, the Texas Court of Criminal Appeals wrote:

> In determining whether evidence has been presented which raises the issue of a lesser included offense, the language in a few opinions of this Court has implied that a defendant's testimony can "negate" such evidence, or that we will consider only the testimony of a defendant in reaching that determination. In light of the foregoing we find such an approach to be erroneous and expressly disapprove of same. **We will continue to consider *all* the evidence presented at trial in order to determine whether an instruction on a lesser included offense should be given.**

Lugo v. State, 667 S.W.2d 144, 147 (Tex. Ct. Crim. App. 1984) (en banc) (internal citations omitted) (emphasis added).

Of the three Texas cases cited by Petitioner, neither Bignall nor Lofton involved recanted statements. The Bignall court held that the defendant was entitled to a charge on the lesser-included offense of theft based testimony from himself and the co-defendant that there was no gun used in the commission of crime. 887 S.W.2d at 22-25. While noting that "the testimony of an accomplice is suspect," the Court reiterated that **"the jury is the sole judge of the credibility of the witnesses, and it does not matter whether the evidence is strong, weak, unimpeached or contradicted."** Id. at 24. In Lofton, while the trial court's refusal to charge resisting arrest, it did so because the defendant's denial of ever striking the officer was not sufficient to raise the issue of a lesser-included offense. 45 S.W.3d at 652. The only Texas case cited by Petitioner that did involve

a recanted statement was Roach v. State, in which the defendant was on trial for armed robbery. 2009 WL 399206 (Tex. App. 2009). However, the content of Roach's prior statement did not support a charge on the lesser included offense of robbery because Roach said that he knew his accomplice had a gun. Id. at *1. Thus, in both Lofton and Roach there was no evidence to support the giving of the charge on the lesser offense.

The Kansas case of State v. Harris, 269 P.3d 820 (Kan. 2012), is no more persuasive. Petitioner cites only to the Harris court's discussion of an attempted voluntary manslaughter charge. Cert. Petition, p. 23. Because the charge was not requested at trial, the appellate court employed "a more restrictive standard," requiring that the court reach "a firm conviction that, had the instruction been given, there was a real possibility the jury would have returned a different verdict" in order to grant relief. 269 P.3d at 826. It was the Harris court's discussion of the defense's request for a charge on voluntary manslaughter as to passenger Sloan that is far more illuminating to the present case. Id. at 824-25.

Harris gave a recorded statement to police, in which he confessed to shooting two men, Sloan and Overton. 269 P.3d at 823-24. The men had pulled into the parking lot of an apartment complex to buy drugs. Id. at 823. According to Harris, they called him over to their car and asked for someone named Trey. Id. Harris said he did not know anyone named Trey and returned to the car with Henry Sullivan. Id. Harris said that Sullivan and the driver "soon exchanged angry words during an altercation." Id. Harris "saw the driver's hands go down between the seat consoles" and believed he saw the handle of a gun, so Harris "reached into the car with a gun and fired twice into the driver's neck." Id. Harris paused and fired again at the passenger's head because the passenger said "what the fuck," and Harris "didn't know what else

to do." Id. At trial, Harris recanted his prior statement and said that he was somewhere else at the time of the shooting. Id. at 824.

The trial court based its denial of the request for a voluntary manslaughter charge on Harris' recantation of his prior statement. 269 P.3d at 825. While the Kansas Supreme Court ultimately affirmed, it wrote:

> **This holding is problematic to the extent the district court concluded Harris was not entitled to the voluntary manslaughter instruction based on his statements during the recorded interview simply because he recanted his confession and contradicted it with his own trial testimony.** This court recently held a defendant was entitled to lesser included offense instructions on second-degree unintentional murder and involuntary manslaughter **based in part on the defendant's recanted confessions.**

Id. (citing State v. Tahah, 262 P.3d 1045 (Kan. 2011) (holding trial court erred in refusing to charge lesser offenses supported by defendant's prior statement, which he recanted at trial, that gun "went off" when he was lowering it)) (emphasis added). The appellate court upheld the refusal to charge because Harris' prior statement said that he shot Sloan because he "didn't know what else to do," reflecting a change in Harris' purpose after he shot Overton. Id. at 825-26. Thus, it was the content of the prior statement, not its repudiation, which governed the Harris court's analysis. In sum, the case law from other jurisdictions cited to by Petitioner does not support the State's argument.

III. The Court of Appeals properly found that the failure to charge voluntary manslaughter was not harmless error.

Petitioner argues that regardless of whether this Court overrules Knoten, the trial court's error was harmless. This Court has long held that harmless error "should be employed guardedly . . . on a case by case basis." See State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986). As Petitioner admits, the Knoten Court did not analyze whether the error in failing to give the charge on the lesser included offense was harmless. Cert. Petition, p. 18; see also State v. Moore, 245 S.C. 416, 140 S.E.2d 779 (1965) (not applying harmless error to failure to give charge on lesser-included offense); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003) (same). The dissenter in State v. Middleton wrote: "It is not our prerogative to weigh the evidence and usurp the jury's function. The failure to give a lesser included offense where it is both supported by the evidence and requested by the defendant is *ipso facto* reversible error." 407 S.C. 312, 319-20, 755 S.E.2d 432, 436 (2014) (Pleicones, J., dissenting). Nonetheless, the majority in Middleton applied a harmless error analysis to the failure to charge the newly created lesser-included offense of assault and battery in the first degree as to one of the victims and found the error harmless. Id. at 319, 755 S.E.2d at 436 (majority opinion). The majority determined that the facts could be construed in "no other way" but that Middleton was attempting to kill the victims. Id.

A review of this State's jurisprudence reveals that Middleton was the ultimate outlier case, presenting an extremely rare, if not unique, circumstance where the harmless error analysis was applicable to the failure to charge a lesser-included offense. Yet, it has resulted in the State's indiscriminate assertion of harmless error even in a case like this, **where there was conflicting evidence that could only be weighed and resolved by the jury.** Petitioner continues to suggest that this Court consider: how the evidence was "developed" by the parties,

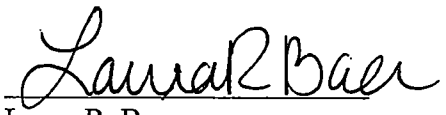
whether Smith's statement was read aloud to the jury, the recantation of Smith's statement, defense counsel's closing argument, the jury questions, and the jury's potentially inconsistent verdicts. Cert Pet., pp. 14-20. As more fully discussed in the Reply Brief of Appellant, these arguments are irrelevant and speculative. See App. 49 – 63; see also Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 1735 (2006) ("by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt").

To the extent that a harmless error test was even proper or necessary in Smith's case, the Court of Appeals correctly found that the failure to charge voluntary manslaughter was not harmless. As demonstrated in State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014), Middleton does not sanction an appellate court's imposition of its judgment of the facts. Rather, in determining whether the failure to give a manslaughter instruction "contributed to the verdict" the appellate courts are concerned with whether the evidence presented could be construed "as ***only showing*** that Appellant intentionally killed Victim." Battle, 408 S.C. at 122, 757 S.E.2d at 743-44 (emphasis added). The Battle Court determined that if the jury believed Battle's testimony, it would point to the killing being unintentional. Thus, the Court found that the failure to charge the lesser-included offense was not harmless. Id. Like Battle, the evidence in Smith's case involved conflicting evidence which did "not support one clear-cut conclusion." Id. Smith's first statement to police, if believed, supported a finding that she killed the victim in the sudden heat of passion upon sufficient legal provocation. Thus, the Court of Appeals correctly found that the failure to give the voluntary manslaughter instruction in Smith's case was not harmless.

CONCLUSION

Based on the foregoing, Appellant Mandy Smith respectfully requests that this Court deny the State's Petition for Writ of Certiorari.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT.

This 22nd day of June, 2016