STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

PRESTON SHANDS, JR.,

Appellant.

Appellate Case No. 2015-001199

FINAL BRIEF OF RESPONDENT

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II.

The grand jury process in Laurens County does not violate state law or due process, and Appellant failed to establish a record to determine if the alleged violations of the grand jury process occurred. There is no prohibition on hearsay testimony being presented to the grand jury, an investigative and accusing body, to determine if probable cause exists to issue a true bill indictment. Grand jury secrecy is an integral and necessary part of the process. No equal protection violation occurs simply because a different process exists for the state grand jury than the county grand jury. Appellant failed to establish actual prejudice from the asserted violations in his case, and providing Appellant a fair trial remedied any feasible violation. No fifth amendment violation occurred in this case – Appellant was provided adequate notice of the charges and facts surrounding his charges.

III.

The trial court did not err in admitting Appellant's prior conviction under Rule 609(a)(1), SCRE, because Appellant was on parole for that offense when he committed the crimes in the instant case, and because Appellant put his character into issue. Appellant was not prejudiced because his credibility was not critical since he agreed he committed the offenses, the evidence was overwhelming, and the trial court gave a proper limiting instruction to the jury.

IV.

Evidence did not support an instruction on involuntary intoxication and evidence supported an instruction on voluntary intoxication. The instruction on voluntary intoxication was not a charge on the facts.

V.

The trial court did not err in denying Appellant's motion to strike the prosecutor's argument that was not even objectionable. The argument was based on evidence in the record. Further, Appellant failed to move for a new trial, so the issue is not preserved and his argument is conclusory. The trial court did not abuse its discretion.

VI.

The implied malice charge was proper since no evidence was presented reducing, mitigating, excusing, or justifying the charge from attempted murder. The repeated stabbings occurred during the commission of a kidnapping. The instructions were a charge on the law and not the facts of the case. Any error is harmless beyond a reasonable doubt based on the abundant evidence of Appellant's malice beyond just his use of a barbecue fork to stab his victim.

VII.

The trial court did not err in failing to force the State to open on law and facts and reply only to "new" arguments of defense counsel; and the current procedure does not violate due process of the federal constitution or South Carolina Constitution.

VIII.

The kidnapping statute is not unconstitutionally vague and not overly broad as applied to Appellant; Appellant held Victim by her hair and trapped her in the garage when she wanted to leave; the evidence is sufficient to survive directed verdict.

STATEMENT OF THE CASE

Appellant Shands was indicted by the Laurens County grand Jury for first degree burglary, kidnapping, attempted murder, first degree assault and battery, and possession of a knife during the commission of a violent crime. Shands proceeded to jury trial on May 26-27, 2015 before the Honorable Edward W. Miller. Shands was found guilty of first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a crime. Judge Miller sentenced Shands to life without parole.

STATEMENT OF FACTS

Shands' wife decided to leave their house; Shands would not let her. Shands detained and then violently attacked his wife (Victim), repeatedly stabbing her with a barbecue fork. Shands smashed the windows of a neighbor's house and chased Victim out of the neighbor's house with a knife he took from the neighbor's kitchen.

Shands and Victim were married and lived with their eight year-old son, Jalen, and Victim's sixteen year-old son, Trey. Victim testified she arrived home at 6:30 p.m. on Sunday. Victim changed her clothes and started watching television when Shands asked her why she would not talk to him. He started cursing. She told Shands she was going to leave and told the sons to come with her. R. pp. 55-59. When Victim was trying to leave, she tried to open the garage door, but then Shands would close the door each time. R. pp. 66-67. Shands closed the car door on her leg. Victim recalled seeing Shands

on top of her son, Trey. Victim tried to leave but the garage door was half-way open. Jalen and Trey followed her in the garage, but Trey ran back in the house. Shands pulled Victim by the hair to try and get her back in the house. R. p. 59.

Trey came back, and Victim remembered Trey telling her to run. Victim and Jalen made it under the garage door. They went across the street to a neighbor's house. The neighbor was Bill Koon. R. p. 59. While inside Koon's house, she remembered glass shattering. Victim remembered trying to keep Shands from stabbing her. R. pp. 59-60. Victim suffered a number of wounds and scars. She did not know how many times she was stabbed, but she needed about forty to fifty stitches. R. pp. 62-65.

On cross-examination, Victim admitted nothing like this happened before. R. p. 70. Counsel asked Victim, "but the way Preston was acting that night, he was more agitated than usual right?" R. p. 70, lines 20-21. Victim answered, "I guess a little because he did stuff all the time." R. p. 70, line 22. Victim admitted Shands never physically harmed her before. R. pp. 70-71. However, on cross-examination, she testified in the months leading to the assault, he was "[c]ontrolling, we walked on pins and needles every day, we just didn't know what to expect." R. p. 71, lines 13-16. Victim did not smell alcohol on Shands. R. p. 69, lines 18-23.

Trey testified he was home earlier in the day with Shands. He saw Shands drinking a beer, but he did not know how much Shands drank. R. p. 73. Trey denied seeing Shands drinking from a clear glass containing cola. R. p. 80. When Victim arrived home, Victim and Shands started arguing after Shands asked why she would not talk to him. Victim told Trey and his brother they were leaving. Trey testified Shands shut the garage door to try to keep Victim from leaving. Shands also kicked the car door into her leg. R. pp. 73-75. Trey fell and Shands got on top of him. R. p. 75.

Trey managed to run back into the house and over to Koon's house. He told Koon to call 911

and ran back to his own house. Shands got off Victim long enough for her to run under the garage door towards Koon's house. However, Shands tackled Victim in front of Koon's house and started stabbing her. Trey grabbed Shands' hand to stop him from stabbing Victim. Shands left and returned with a hammer and started busting Koon's windows. Shands entered Koon's house and grabbed a knife. He chased Victim out of the house, but law enforcement arrived. R. pp. 75-77. Trey testified he thought Victim was going to die. R. p. 78.

Jalen confirmed an argument broke out between Shands and Victim. Jalen further confirmed Shands kicked the car door into Victim's leg while she was trying to leave. Trey told Jalen to call the police – that is when Shands got the fork. Jalen testified Shands held Victim by her hair and was trying to stab Victim's throat with the fork, but the fork was bent up. R. pp. 82-83.

Clarence "Bill" Koon, the neighbor, testified Trey was banging on his door, and when Koon opened the door, Trey told him Shands was stabbing Victim. Victim and the children ended up running to his house, soon followed by Shands. Shands and Victim struggled on the front-room floor. R. p. 87. Koon described the melee:

> He was trying to, he looked to me he was trying to cut her throat with some kind of object wrapped around his hand, I couldn't tell at the time what it was. But when I finally got to see the handle, it was white or it looked white. And it was wrapped around his hand like a pair of steel nooks. And he was trying to use the bottom end of it, the broke end part and he was trying to go across her throat with it.

R. p. 88, lines 1-8. Victim was covered with so much blood that Koon testified, "I didn't even see no part of her, all I saw was blood." R. p. 88, lines 12-13.

Koon went into the bathroom to tell his wife, but she was in the shower. Victim was screaming for Koon to help her. Koon grabbed his phone and called 911 from inside the shower. Returning from

the bathroom, Koon saw the two boys holding Shands' hand to keep him from stabbing Victim. Koon started back for the bathroom, turned around, and they were gone. R. pp. 88-89.

The temporary reprieve ended when Shands returned with a hammer. Shands started smashing the front windows and went to the back of the house. Koon went to the back door and locked it. He told Shands to "cool off" but Shands busted two more windows in the back of the house and demanded Koon let him in. Shands threw his hammer through the sliding glass door and entered the house. R. pp. 89-90. Shands grabbed a knife from the kitchen and headed out the front door just as a law enforcement officer pulled up to the house and drew his weapon. Shands dropped his knife under the officer's command. R. p. 90. Koon testified the house looked like a tornado went through it. Koon explained, "It took us a long time to get the blood off the floor and off the furniture. It was a nightmare." R. p. 94, lines 11-18 Koon told the jury, "that man was trying to kill that woman." R. p. 94, lines 19-22.

Counsel asked Koon if the events were out of character for Shands. Koon replied he did not know if it was out of character or not. R. p. 97. On redirect, the prosecutor asked, "How would Mr. Shands react if someone tried to speak to Ms. Shands?" Koon answered, "**He could get sometimes a little jealous** at times. I mean he would say something to her and get her attention." R. p. 97, lines 10-14 (emphasis added).

Martha Koon, Koon's wife, also testified. She was in the shower when she heard the screams. She came out and saw Shands on top of Victim. She did not see the weapon, but saw Shands holding something and was going for Victim's throat. Victim incessantly screamed and blood was everywhere. The older son tried to pull Shands off Victim. R. pp. 99-100. Martha went back to the bathroom to dress, and Shands was gone when she returned. But Shands returned with the hammer. When Shands

demanded Koon let him in, Koon told him no. Shands entered the house anyhow, smashing the sliding glass door. Shands went straight to the kitchen, took a knife, and started towards Victim. But the police arrived and he went outside. R. p. 100. Martha agreed Shands was always friendly and polite, except for that day of course. R. p. 103.

Sergeant Michael Gainey of the Laurens City Police Department responded to a 911 call about a neighbor trying to stab his wife. R. p. 105. Approaching the house, he heard Koon yelling "[H]elp, he is going to kill her." R. p. 106, lines 21-22. Sergeant Gainey saw Victim running out of the house, she ran towards his vehicle. A teenager also ran out of the house. Then Shands came out of the house with Jalen. His left hand was on Jalen's shoulder, his right hand held the knife. Sergeant Gaines pointed his revolver at Shands and told him to let Jalen go. Shands complied. Sergeant Gainey further demanded Shands drop his knife. Shands did. Shands also complied with Sergeant Gainey's request to get to the ground. Sergeant Gainey did not smell any alcohol on Shands. R. pp. 107-112.

Sergeant Gainey verified Shands suffered superficial injuries – he was treated for some lacerations on his hand. R. p. 118; p. 123. Sergeant Tony Lynch investigated the crime scene and recovered a knife, a hammer, and a broken fork with blood on it. He also found droplets of blood on the path between the two houses. R. pp. 147-152.

Andrew Heiney, a paramedic for the Laurens County EMS treated Victim, who appeared dazed. Her clothing was ripped, and blood was about her head, arms, and torso. The paramedics brought her into the ambulance where the lighting was better, and Heiney observed the blood was still wet. She was briskly bleeding from a laceration on her head; the hair was matted with blood. R. pp. 129-30. There were multiple stab wounds on her arms. R. p. 131. Victim was in pain and experienced difficulty breathing. R. p. 132. Heiney opined the wounds were life threatening. R. p. 132. EMS

decided, based on the severity of Victim's injuries, to transport Victim by helicopter rather than ambulance to the hospital. R. pp. 133-34.

Julie Medlin, also with the Laurens County EMS, was called by the defense, but on cross-examination confirmed Shands was alert and oriented at the time he was transported for medical treatment and explained, "that means he knew who he was, he knew where he was, he knew the events leading up to why we were called and just everything that was going on around him, like what day and time it is." R. p. 186, lines 9-12. Shands did not appear disoriented or intoxicated. R. p. 186, lines 13-16.

Shands was covered with small glass shards. P. 186, lines 17-19. Shands' injuries were "a laceration to the right hand, fifth digit; . . . a laceration to the outside of his left calf and an abrasion to the back of the left shoulder." R. p. 186, lines 20-24.

Shands testified in his own defense to claim he was intoxicated while he committed the brutal crimes. Shands started with a beer, but spilled it. So he found "this stuff I had bought at work." R. p. 191, line 21 - 192, line 2. Shands explained, "It was stuff that people told me was homemade moonshine. You couldn't smell it but you knew it was alcohol in it when you tasted it." R. p. 192, lines 8-13. Shands never drank moonshine before, but he started drinking it. It was so strong that when he tasted it straight, he spit it out of the cup. Shands mixed the moonshine with ice and two liters of coke. It still tasted strong. R. pp. 192-93.

Shands claimed he usually just goes to sleep when he drinks. R. p. 193, lines 14-24. Shands claimed the moonshine did not affect him this way though, instead it "took me clean out of my round." R. p. 194, lines 11-13. Shands speculated the moonshine "wasn't just alcohol" but "was something more strong and powerful in there, that they put in there other than alcohol. Because normally alcohol

just makes me drunk and fall out and go to sleep." R. p. 194, lines 13-22. Therefore, Shands concluded, the moonshine must have contained some drug. R. p. 194, lines 19-25.

Shands admitted he was responsible for what happened to Victim. He claimed he did not remember anything from the incident. R. pp. 195-96. Shands admitted that although the marriage was good at first, he became jealous and controlling when he started drinking. R. p. 199, line 22 – p. 200, line 2.

On cross-examination, Shands described the moonshine further:

> Q: So, tell me about this moonshine, is this something you bought from somebody you work with?
>
> A: Yes, ma'am.
>
> Q: So it is not something, now they sell moonshine in the liquor stores.
>
> A: I don't know if it is real moonshine, I don't know, I never tried it, it is my first time trying it.
>
> Q: But this is something you bought, do you know actually who made it?
>
> A: No, it is just the guys told me, before you quit drinking why don't you try the granddaddy of all, the cremator of all whiskey. It is the granddaddy, until you tasted the granddaddy you can never say you drunk anything.
>
> Q: So, you were home alone with two children and you decided to drink something that you had no idea where it came from?
>
> A: Yes, ma'am.
>
> Q: And you had no idea what was in it and you had no idea how you were going to react to it. That is what you are telling us?
>
> A: Yes, ma'am.

R. p. 201, lines 2-22.

Shands admitted he drank the moonshine of his own freewill, no one forced him to drink it. Shands admitted he knew it was stronger than normal alcohol. Even with the cola mixed in, it still tasted strong. R. p. 202. Shands did not deny his violent acts, he claimed, "I know I did it but I don't understand it; I don't understand what happened that night." R. p. 204, lines 9-10.

ARGUMENT

I.

The trial court did not err in denying Appellant's Batson motion because the prosecution stated a gender neutral reason for striking jurors – the criminal records of the three males struck by the prosecution. The female juror with a stale, isolated conviction who was seated on the jury was not similarly situated as the struck male jurors.

Shands claims the trial court erred by not granting his Batson motion challenging the prosecution's decision to strike three male jurors. However, the prosecution gave gender neutral reasons for striking three males: two were previously convicted of criminal domestic violence and the third had four prior lottery violation charges. A female juror with a stale, isolated conviction for check fraud was seated, but she was not similarly situated as the three male jurors.

The Supreme Court held in Batson v. Kentucky, 476 U.S. 79 (1986) that the equal protection clause prohibits a prosecutor from striking jurors solely on account of their race. The prohibition applies to both parties in criminal cases. Georgia v. McCollum, 505 U.S. 42, 59 (1992). The rule was further extended to prohibit gender discrimination in jury selection. J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994) ("Today we reaffirm what, by now, should be axiomatic: intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause . . . .").

A three-step procedure should be followed when an opponent raises a claim that a jury strike was exercised in violation of the Equal Protection Clause. First, the moving party must make a prima

facie showing the challenge was based on race or gender. Provided an adequate showing was made, the trial court must require the challenged party to provide a race or gender neutral explanation for the challenge. Last, the trial court must determine if the moving party has proven purposeful discrimination. State v. Giles, 407 S.C.14, 18, 754 S.E.2d 261, 263 (2014).

For the second step of the procedure, the explanation must be a "a clear and reasonably specific explanation of [the] legitimate reasons for exercising the [jury strike]." Miller-El v. Dretke, 545 U.S. 231, 239 (2005). However, the explanation need not be persuasive or even plausible. Giles, 407 S.C. at 21, 754 S.E.2d at 265.

At the third step, the moving party must show the facially race or gender neutral reason was actually mere pretext to engage in purposeful discrimination. State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006). This Court explained this step as follows:

> The opponent of the strike carries the ultimate burden of showing purposeful discrimination and must demonstrate the pretextual nature for the stated reason for the strike. . . . This burden is generally established by showing similarly situated members of another race were seated on the jury.

Id. (internal citations and quotation marks omitted). The burden of persuasion during a Batson motion remains at all times on the moving party. State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

In the instant case, the State struck two white males, a black male and a female. The defense struck seven females and three males. The jury was ultimately composed of nine women and three men. R. pp. 16-22. After Shands raised a Batson motion based on gender, the State offered its reasons for striking the three males. Juror 125 had a CDV conviction. The prosecutor noted the present case involved acts of domestic violence. Juror 156 likewise had a CDV conviction. Juror 115 violated the

lottery law four different times. R. p. 23.

The prosecutor also explained not objecting to other jurors that had contact with law enforcement. Juror 5, a female, was charged with "false info" but showed no disposition from 2004. Juror 54, a female, had a fraudulent check conviction from 2003, but the prosecutor noted that was from eleven to twelve years ago. Juror 53, a male, had a pending simple possession charge, but was not convicted yet. Juror 170, a female, had a nolle prossed unlawful neglect charge and a dismissed simple possession charge. R. p. 23.

Shands' challenge to this explanation was essentially an argument that all convictions are equal, so the State should have struck juror 54. R. p. 24. The State noted, though, a significant distinction between "someone who accidentally overdrew their bank account and someone who struck a household member, threatened to strike a household member. They are not similarly situated." R. p. 25, lines 3-7. The trial court denied the motion. However, Shands argued **after** the ruling[1] that the lottery charges and a fraudulent check conviction were similarly situated. R. p. 25, line 21 – p. 26 line 3.

A juror's criminal conviction is considered a neutral reason to strike. State v. Casey, 325 S.C. 447, 453, 481 S.E.2d 169, 172 n.2 (Ct. App. 1997). Shands argues the State's reasons for striking the jurors were pretextual because the State did not strike the female with an eleven year-old check conviction. "However, the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for inconsistency." Id. at 454, 181 S.E.2d at 173. The defendant bears the burden of proving the State's neutral reasons for striking the juror is pretext. State v. Kelley, 319 S.C. 173, 176,

[1] See Rule 18(a), SCRCrimP: "Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."

460 S.E.2d 368, 370 (1995).

The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). As our Supreme Court has explained:

> Typically the decisive question becomes whether counsel's race-neutral explanation for a peremptory challenge should be believed. . . . [T]here is seldom much evidence in the record bearing on that issue, and the trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous.

Evins, 373 S.C. at 415-16, 645 S.E.2d at 909-10 (quoting State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006)).

In the instant case, the prosecutor explained the differences between the three male jurors she struck and the female juror with the conviction. Two of the jurors had criminal domestic violence convictions. Obviously, due to the extremely aggravated domestic violence in this case, striking the jurors who also committed domestic violence was a foregone conclusion. Further, the remaining male juror, with four incidents of violating a lottery law, was not similarly situated with a juror with one lone, stale conviction for check fraud. That male juror, after multiple clashes with the justice system, was understandably not as suitable as a juror whose isolated conviction occurred over a decade ago. Accordingly, evidence supports the trial court's ruling as the State provided gender neutral reasons for its strikes, and Shands failed to show the reasons provided were mere pretext.

II.

The grand jury process in Laurens County does not violate state law or due process, and Appellant failed to establish a record to determine if the alleged violations of the grand jury process occurred. There is no prohibition on hearsay

testimony being presented to the grand jury, an investigative and accusing body, to determine if probable cause exists to issue a true bill indictment. Grand jury secrecy is an integral and necessary part of the process. No equal protection violation occurs simply because a different process exists for the state grand jury than the county grand jury. Appellant failed to establish actual prejudice from the asserted violations in his case, and providing Appellant a fair trial remedied any feasible violation. No fifth amendment violation occurred in this case – Appellant was provided adequate notice of the charges and facts surrounding his charges.

Shands argues his due process, equal protection, and Fifth Amendment rights were violated based on conjecture that the witness appearing before the grand jury was not the same person listed on the indictment or that the witness was an officer not involved in the case. Shands references an unpublished opinion and oral argument in State v. Carrier, Op. No. 2014-MO-043 (S.C. Sup. Ct. filed October 22, 2014), then claims he made an adequate record to review this issue. Shands, however, relies on conjecture the same way Carrier did in an attempt to establish his alleged violations.

Solicitor's proffer

Shands sought a proffer from the prosecution on the grand jury process in Laurens County. Deputy Solicitor Mowry advised the trial court about the process. Deputy Mowry explained the prosecutor assigned the case drafts an indictment and signs the indictment. When the grand jury is in session, a representative from each law enforcement agency will present the indictments for that agency. R. p. 27, line 24 – p. 28, line 11. Mowry advised the trial court he did not know the identity of any witnesses who testified before the grand jury. R. p. 28, lines 14-17. Mowry also advised the trial court that the Solicitor's Office does not keep track of who takes the cases before the grand jury. R. p. 28, lines 18-23. The Solicitor assured the trial court that no one from the Solicitor's Office appeared before the grand jury, and Shands' counsel advised the trial court he was not alleging a representative from the Solicitor's Office appeared before the grand jury. R. pp. 30-31.

Shands inaccurately claims in his brief that the prosecution proffered, "The testifying police officer, who is not the same law enforcement officer listed on the indictment, does not have any personal knowledge of the case." App. Br. p. 10. Shands later claims the State stipulated the witnesses listed on the indictments did not testify. These statements are the foundation of Shands' argument and are wholly inaccurate. As mentioned before, the prosecutor advised the trial court that he did not know who went before the grand jury, and nothing in the record indicates whether Hal Martin or Tony Lynch, whose names appear on indictments, or instead one of the other officers who testified at trial, or another officer from Laurens Police Department, appeared before the grand jury. Shands presented no evidence to prove that Martin or Lynch did not in fact testify before the grand jury, even though he was aware from Carrier of the evidentiary requirements necessary to present this claim to this Court.

Presumption of regularity

"Proceedings of the grand jury are presumed to be regular unless there is clear evidence to the contrary." State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." Id. at 502, 409 S.E.2d at 424; see State v Griffin, 277 S.C. 193, 196, 285 S.E.2d 631, 633 (1981) (citing 42 C.J.S. Indictments and Information §§ 38, 39 (1944) and noting it has been held grand jurors are presumed to have been sworn even when the indictment's caption does not indicate they were sworn) *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Carrier argument and opinion

Shands next references oral argument in Carrier, which is not a proper citation for any proposition of law. Nonetheless, Shands mistakenly asserted at trial and now on appeal that the

deficiencies of proof present in Carrier were cured in the instant case to review his substantive issues.

During oral argument in Carrier, Justice Kittredge remonstrated that Carrier's claims were unsupported by anything other than trial counsel's assertions. (2:00-2:15). Further, Chief Justice Toal noted that no attempt was made to determine if the witness named in the indictment, Haden, was present or not before the grand jury at the time the second indictment was presented. Chief Justice Toal bemoaned trial counsel's attempts to elevate his own assertions to an evidentiary basis. Noting trial counsel's experience, she commented that trial counsel could have used the separate proceeding to put up actual evidence and it was simply not done. (10:25-11:40). Chief Justice Toal later noted she has seen in her twenty-eight years of experience that evidence could be presented for the issue being determined, that evidence could be presented to show what the grand jury did or did not do. (11:50-12:40). Finally, Chief Justice Toal noted Carrier was represented by experienced counsel who deliberately and carefully determined how to present an issue, and noted the trial court was presented only with arguments and not evidence. (15:00-15:15).

In the instant case, contrary to Shands' argument, Shands presented no evidence showing any irregularity in the grand jury proceedings. No evidence was presented that neither Hal Martin nor Tony Lynch appeared before the grand jury for presentment of the indictments. There is also no evidence an officer without knowledge of the case presented evidence to the grand jury. Shands declined to present any evidence to determine the existence of any irregularity suggested by Shands now on appeal even though Shands' counsel very carefully and deliberately presented his argument to the trial court. The proffer made by the solicitor likewise did not provide a sufficient record for Shands' claims.

Hearsay allowed before grand jury/grand jury secrecy/grand jury role as an accusing and investigative body.

Shands complains about the possibility of hearsay being presented to the grand jury. The predominate view is that an indictment is proper even if entirely based on hearsay evidence. See State v. Tressler, 503 S.W.2d 13 (Mo. 1973) (finding indictment based only on hearsay is acceptable, in keeping with the predominate view of the states); Casey v. State, 491 S.W.2d 90, 92 (Tenn. Cr. App. 1972) (indictment may be based solely on hearsay); King v. State, 139 N.E.2d 547, 551 (Ind. 1957); State v. Matthews, 218 So.2d 743 (Miss. 1969) (error to quash indictment merely because it is based on hearsay testimony); State v. Blake, 305 A.2d 300, 303 (N.H. 1973) (rejecting claims that indictment should be quashed because it was based solely on hearsay testimony consisting of four written statements by complainants and their mothers, along with police reports and the testimony of only one police officer); State v. Wall, 159 S.E.2d 317 (N.C. 1968) (indictment sufficient although testimony was from officer who had no independent knowledge of the facts); Commonwealth v. Dessus, 224 A.2d 188 (Penn. 1966) (finding it was well-settled law in Pennsylvania that an indictment may be based on hearsay; "a contrary rule would revolutionize the practice of criminal law and would introduce into the administration of the criminal law a novel and vicious practice"); Douglass v. State, 163 So.2d 477, 489 (Ala. Ap. 1963) (indictment may be based on hearsay alone) *rev'd on other grounds*, 380 U.S. 415 (1965); State v. Parks, 437 P.2d 642 (Alaska 1968) (same); Commonwealth v. Walsh, 151 N.E. 300 (Mass. 1926) (finding no merit to contention that indictment should be quashed because sole witness had no independent knowledge of crime, the court will not inquire into whether competent evidence was heard); People v. Gable, 647 P.2d 246 (Colo. App. 1982) (finding the bulk of information presented to the grand jury or at the preliminary hearing may well be based on hearsay); United States v. Zielezinski, 740 F.2d 727, 729 (9th Cir.1984) ("Grand juries can properly indict suspects on the basis of hearsay"); see also State v. Carruthers, 35 S.W.3d 516, 532-33 (Tenn. 2000) ("It has long been the

rule in this State that the sufficiency and legality of the evidence considered by the grand jury is not subject to judicial review. Where an indictment is valid on its face, it is sufficient to require a trial of the charge on the merits to determine the guilt or innocence of the accused, regardless of the sufficiency or legality of the evidence considered by the grand jury.").

Of course, South Carolina follows this view also. State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974); State v. Boyd, 20 S.C.L. 288 (1834) (refusing to inquire into the character of evidence presented where the complaint appeared to be that written statements were submitted by witnesses instead of evidence being presented viva voce); see also Rule 1101(d)(2), SCRE (rules of evidence inapplicable to grand jury proceedings).

"A grand jury is an inquisitorial, informing, and accusing body, and it is not a trial body." 38A C.J.S. Grand Juries § 2 (including citation to State v. Bramlett, 166 S.C. 323, 164 S.E.837 (1932) at n. 17). The grand jury system originated in England and proved popular, despite its secrecy, as a fair method of instituting criminal proceedings, as aptly noted in Costello v. United States, 350 U.S. 359, 362 (1956). Costello observed the historical workings of the grand jury as follows:

> Grand jurors were selected from the body of people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.

Id. Our Supreme Court observed that in England "at the time of settlement of this country, [the grand jury was] an informing and accusing body only. . ." Bramlett, 164 S.E. at 875 (citation and internal quotation marks omitted).

Former Attorney General Daniel R. McLeod sought permission from the Supreme Court to appear on behalf of the State and have a stenographer present to take testimony. The Supreme Court

denied both requests, proclaiming, "No principle has been followed more closely than that which protects the secrecy of the proceedings of the grand jury . . ." Ex Parte McLeod, 272 S.C. 373, 377, 252 S.E.2d 126, 128 (1979).

In Douglass, the Alabama court observed the inability of an opposing party to confront witnesses is the bedrock rationale for excluding hearsay during a trial: "Before a grand jury, the suspect is given no opportunity to be represented. Hence, the hearsay exclusion would be without the adversary means to implement it." Douglass, at 489-90.

Refusing to inquire into the nature of the evidence presented to the grand jury, a Connecticut Superior Court observed:

> Proceedings before a grand jury are preliminary and ex parte and are only to establish probable cause. To establish such a rule would entail an unnecessary invasion of the secrecy which is essential to the nature of the grand jury proceedings and which is required by oath. Finally, an accused is not entitled to a rule which would result in delay and adds nothing to the assurance of a fair trial.

State v. Stallings, 206 A.2d 277, 278 (Conn. Super. Ct. 1964).

The United States Supreme Court found in Costello that an indictment could properly be found solely on hearsay. Id. Judge Hand observed in the Second Circuit opinion that, "Indeed, we conduct our most serious affairs upon the strength of [hearsay]; it would be impossible to carry on a day's business without it." Costello, 221 F.2d at 678.

The hearsay rule is not based on the precept that hearsay statements are without probative value or supply a logical basis for conclusions of fact. Parks, at 644. It is only inadmissible if objected to at trial, otherwise once admitted, the jury may properly consider the hearsay in their determinations. Id., accord State v. Frank, 262 S.C. 526, 205 S.E.2d 827 (1974) (failure to object to testimony renders

evidence competent and may be considered to the extent it is relevant). "Since hearsay evidence has probative force and may furnish a logical basis for conclusions of fact, it cannot be said that because evidence presented to the grand jury was hearsay it did not rationally establish the facts sought to be established." Parks at 644.

In the instant case, the secrecy of the proceedings prevents this Court or the parties to know what substantive evidence was presented to the grand jury, but obviously, from the trial court record, competent evidence supports the conviction beyond a reasonable doubt.[2] Therefore, evidence existed to meet the lower probable cause threshold. Merely because an officer, perhaps unconnected to the investigation, relayed statements of the victims and eyewitnesses, as opposed to an investigating officer or the officer that secured various warrants, does not render the charging decision of the grand jury unfair.

On point is State v. Matthews, 218 So.2d 743 (Miss. 1969). In that case, the sole witness was a police officer with no direct knowledge of the testimony given by him, but instead he testified from police department and FBI files. The court reversed the dismissal of the indictment, noting the sufficiency of evidence before a grand jury cannot be challenged, only an allegation of undue influence was tenable.

Shands relies heavily on Chief Justice Lewis' dissent in State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981). However, in that case, which dealt with the propriety of a prosecutor being a witness

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[2] The Supreme Court rejected the appellant's argument that the trial court should have required the State to disclose whether evidence favorable to the appellant was presented to the grand jury: "Changing the fundamental principle of [grand jury] secrecy should come as the result of a comprehensive study and evaluation of all facets of the question and not through a process of judicial erosion." State v. Whitted, 279 S.C. 260, 262, 305 S.E.2d 245, 246 (1983) (citation and internal quotation marks omitted).

before the grand jury, Justice Lewis' chief concern appears to be with the solicitor's role as an attorney rather than his role in law enforcement. Consider the following from his dissent:

> It is the duty of a solicitor not to convict, but rather to see that justice is done; however, it is also the duty of the solicitor to prosecute vigorously. . . . It is partly because of this role as advocate that he cannot also be a witness in a grand jury proceeding.

Id. at 874-75 (internal citation omitted).[3] Justice Lewis noted the rules of professional responsibility provide "the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Id. (citation omitted).

While Justice Lewis obviously was seeking changes to the grand jury system well beyond the question of whether a prosecutor should testify, it is obvious the gravamen of his concerns was the simple proposition that a prosecutor should not serve as both advocate and witness on the same case. An investigator or other law enforcement agency representative does not implicate the same concern.

An investigative officer may be the sole witness before the grand jury. State v. Whitted, 279 S.C. 260, 305 S.E.2d 245 (1983) *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). Rather than admit Whitted controls the result, Shands argues Whitted stated a requirement a law enforcement officer must have participated in the investigation of the case to be a witness before the grand jury. However, Shands does not explain what nexus is required or how such a rule would be workable without making grand jury proceedings a full blown, first-round trial rather than simply a determination of probable cause.

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[3] The Court did not agree with Chief Lewis' proposition that a prosecutor could never be a witness before the grand jury, but instead "strongly" suggested the practice should "be abandoned unless no alternative is available." Capps, 276 S.C. at 62, 275 S.E.2d at 873. For several years, the Supreme Court "also stated that this does not necessarily mean that it is error for a solicitor to be a sole witness before the grand jury." State v. Dawkins, 297 S.C. 386, 390, 377 S.E.2d 298, 300 (1989).

Fifth Amendment

Shands claims the Fifth Amendment as authority for his arguments. This is only a conclusory assertion and so this Court should not consider the matter. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal) *aff'd as modified*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). Further, his argument runs counter to State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980), which held the following:

> This court has previously noted that the fifth amendment requires only that the indictment be returned by a legally constituted and unbiased grand jury and that the indictment must be valid on its face. State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). The fifth amendment requirements implicitly recognized the traditional view that the deliberations of a grand jury must remain secret and inviolate. We adhere to that view. From the record before us, we cannot agree that the indictment should have been quashed. The length of time spent deliberating a matter, even if it could be established, does not control the effectiveness of the deliberation. The requirements of the fifth amendment were met.

Id. at 381, 264 S.E.2d at 422.

Equal protection

Shands further claims the legislative scheme for county grand juries violates the equal protection clause because of how it differs from the state grand jury statutes. However, a rational basis exists for the differing grand jury systems due to the special enhanced powers of the prosecution in the State Grand Jury system that requires more checks on prosecutorial power, unlike the county grand jury system, where the prosecution has hands off involvement.

Shands must overcome a strong presumption of constitutionality to successfully attack the constitutionality of a statute. The Supreme Court has declared:

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt.

State v. Harrison, 402 S.C. 288, 292-293, 741 S.E.2d 727, 729 (2013) (internal citations omitted).

The Equal Protection Clause of the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides no "person shall be denied the equal protection of the laws." S.C. Const. art. I, § 3. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

Not all classifications are unconstitutional, however, for "[t]he equal protection clause only forbids irrational and unjustified classifications." Bodman v. State, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013). If the statute "does not implicate a suspect class or abridge a fundamental right, the rational basis test is used" to determine whether the classification falls into the prohibited group. Id. (citing Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)). "A classification does not violate the Equal Protection Clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." Curtis v. State, 345 S.C. 557, 574, 549 S.E.2d 591, 599-600 (2001) (citing Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999)). "A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be

achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." Bodman, 403 S.C. at 69, 742 S.E.2d at 367.

As the Supreme Court recently explained in Bodman:

> We give great deference to the General Assembly's decision to create a classification. Consequently, those who challenge the validity of one under rational basis review must "negate every conceivable basis which might support it." Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. Moreover, "[t]he fact that the classification may result in some inequity does not render it unconstitutional."

Id. at 69-70, 742 S.E.2d at 367-368 (internal citations omitted). "Accordingly, [the Court's] entire equal protection inquiry revolves around interplay between the specific classification created and the purported basis for it, with a challenger coming under rational basis review facing a steep hill to climb." Id. at 70, 742 S.E.2d at 368.

The State Grand Jury System is a fairly recent development, enacted in 1987 and becoming effective in February 1989. 1987 Act No. 150 § 1. The legislature announced its intent in passing the act was "to enhance the grand jury system and to improve the ability of the State to detect and eliminate criminal activity." S.C. Code § 14-7-1610 (A).

An important purpose of the State Grand Jury is its ability to detect and investigate drug trafficking with multi-county significance. The State's ability to detect and investigate this illicit commerce is enhanced by a grand jury with authority to cross county lines. Section 14-7-1610(A). Likewise, the statutory scheme is designed to improve the investigation and prosecution of criminal gang activities (§ 14-7-1610 (B)), public corruption (§ 14-7-1610(C)), child obscenity (§ 14-7-1610 (D)); election fraud (§ 14-7-1610(E)), and environmental crimes (§ 14-7-1610(F)), on the basis that

enhanced grand jury powers were necessary for investigation and prosecution of those particular crimes.

The limited role of the prosecutor in county grand jury proceedings was greatly expanded in the State Grand Jury framework. In enacting Article 15, the legislature required the Attorney General or his designees to attend sessions of the State Grand Jury, to act as legal advisor to the State Grand Jury, to examine witnesses, present evidence, and draft indictments and reports under the direction of the State Grand Jury. S.C. Code § 14-7-1650 (A). The Attorney General is empowered with the ability to notify the presiding judge that the State Grand Jury is expanding its scope of inquiry. S.C. Code § 14-7-1690. Additionally, the Attorney General is able to require the Clerk of the State Grand Jury to issue subpoenas to appear before the State Grand Jury. S.C. Code § 14-7-1680.

Enactment and evolution of the State Grand Jury followed and overlapped with the "journey" to Anderson[4] described by Shands. When Attorney General McLeod proposed providing a representative from this office to examine and cross-examine witnesses before the county grand jury and for a stenographer to record the proceedings of the county grand jury, the Supreme Court sternly refused. The Supreme Court explained, "Adherence to the foregoing long established public policy has prohibited the prosecuting attorney from entering the grand jury room for the purpose of presenting evidence through the examination and cross-examination of witnesses." Ex parte McLeod, 272 S.C. 373, 377, 262 S.E.2d 126, 128 (1979).

In rejecting the request for the stenographer, the Supreme Court also soundly rejected the call by the Attorney General to revise the county grand jury despite that it might "in certain limited respects

[4] State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993) (announcing a prosecutor is prohibited from being a witness before the grand jury).

have some appeal." Id. at 378, 262 S.E.2d at 128. The Supreme Court soundly explained: "If, however, the fundamental principle of secrecy in grand jury proceedings as long followed in our prior decisions is to be changed, it should come as the result of a comprehensive study and evaluation of all facets of the question and not through a process of judicial erosion." Id.

Two years later, Chief Justice Lewis, in his dissent in State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981), advocated "retreating" from the Supreme Court's holding in McLeod by allowing the prosecutor to participate as an advocate (but not as a witness) and allow a stenographer to record the proceedings. Addressing the concern of a prosecutor being an attorney-witness, Chief Justice Lewis warned "the environment of one-sided proceedings before the grand jury increases the potential for abuse of the relationship and further heightens my concern." Id. at 67, 275 S.E.2d at 875.

As Shands notes, prosecutors were discouraged and ultimately barred from appearing before a county grand jury as a witness. State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993). In reaching this result, the Supreme Court cited favorably Chief Justice Lewis' reasoning in his dissent in Capps that "considering the authoritative nature of the relationship between a solicitor and the grand jury, the lone testimony of the solicitor as a representative of the State would be too potent to allow as the general rule." Anderson, at 187, 439 S.E.2d at 837.

Viewing the expansion of the prosecutors' role in State Grand Jury proceedings, in which they were allowed to examine witnesses, it is understandable the legislature wanted to counter this expansion of prosecutorial power in the setting of a unilateral proceeding by requiring a record of the proceeding be preserved as a check against potential (hypothetical) abuse by the State.

On the other hand, the legislature sought to preserve the long-held principals of grand jury secrecy in county grand jury proceedings as the prohibition against the solicitor examining or cross-

examining witnesses was maintained.

Thus, a rational basis exists between maintaining grand jury secrecy in county grand jury proceedings, but requiring a recording of the more expansive State Grand Jury proceedings. Therefore, the fact Shands chose to commit crimes without multi-county significance and otherwise outside the statutorily enumerated class of crimes leading to empanelment of a State Grand Jury investigation does not amount to a violation of his rights under the equal protection clauses.

III.

The trial court did not err in admitting Appellant's prior conviction under Rule 609(a)(1), SCRE, because Appellant was on parole for that offense when he committed the crimes in the instant case, and because Appellant put his character into issue. Appellant was not prejudiced because his credibility was not critical since he agreed he committed the offenses, the evidence was overwhelming, and the trial court gave a proper limiting instruction to the jury.

Shands claims the trial court erred in allowing the State to impeach Shands with his 1976 murder conviction. However, Shands was on parole for the conviction at the time he assaulted Victim, and the conviction was probative under Rule 609, SCRE. The prosecution limited the danger of unfair prejudice by asking him if he had a prior conviction for a violent offense. Further, Shands put his character into evidence by eliciting testimony from family and neighbors that he never acted that way before the assault, therefore, the State was allowed to rebut this character evidence with the fact of his conviction under Rule 404(a), SCRE, since Shands opened the door to this testimony. Accordingly, the trial court did not err. Further, any error was harmless in light of the overwhelming evidence of guilt.

The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct.

App. 2011). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); Howard at 178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); Howard at 178, 720 S.E.2d at 514.

Rule 609, SCRE

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year's imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The South Carolina Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). Prior convictions similar to the one for which the defendant is being tried are not automatically inadmissible; instead, "[t]rial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence." Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Colf at 627, 525 S.E.2d at 248.

Shands' prior conviction was within time limits of Rule 609 because Shands was on parole

and under the State's supervision at the time of the assault.

Rule 609 provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE.

Shands was convicted of murder in 1976 in Florida and sentenced to life imprisonment. He was paroled in 2003, and still serving parole at the time of the offense: Shands was supervised by Laurens County. R. p. 135, lines 23-25. Shands argues he was not in custody while on parole and, therefore, the conviction was more than ten years old pursuant to Rule 609(b). In State v. Scott, 326 S.C. 448, 484 S.E.2d 110 (Ct. App. 1997), the defendant was tried before the rules of evidence were adopted. He was tried in 1995, and the State sought to impeach a defense witness, Brock, with Brock's 1977 robbery conviction. Brock received a nine year sentence and was released on parole in 1980. The parole terminated in 1986. This Court, relying on Jones v. Cunningham, 371 U.S. 236, 243 (1963), held Brock was in custody while on parole, and therefore, was in custody until 1986, only nine years prior to the trial. Scott, at 451-52, 484 S.E.2d at 112.

In State v. Ellis, 397 S.C. 576, 726 S.E.2d 5 (2012), in addressing a sentence calculation, the Supreme Court found a probationary sentence did not start until the conclusion of parole for another offense, noting a "defendant's release from a sentence does not mean his mere release from physical custody." Id. at 583-84, 726 S.E.2d at 8-9. In the instant case, Shands was still in custody by virtue of being on parole, he needed to be supervised by the State; therefore, the ten year limit was not

implicated.

Generalized impact on credibility

Admittedly, murder is not a crime of dishonesty. However, that does not mean the offense, requiring malice, does not impact credibility. It is precisely the generalized impact on credibility which is contemplated by Rule 609(a)(1), SCRE. Merely because an offense is not a crime of "dishonesty or false statement" under Rule 609(a)(2), does not mean the offense lacks probative value for truthfulness. Otherwise Rule 609(a)(1) would not exist under the rules of evidence. In the instant case, the offense carried an impact on credibility that supports the trial court's ruling.

In State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012), the Supreme Court's analysis centered on the higher standard in Rule 609(b) pertaining to admission of remote convictions rather than the standard in Rule 609(a)(1) pertaining to convictions within ten years. Black, 400 S.C. at 18, 732 S.E.2d at 885. Although there was an extensive discussion regarding the impeachment value of prior convictions, that discussion must be taken in the context of the statutory presumption against the admission of remote convictions unless the trial court finds the probative value "substantially outweighs" its prejudicial effect. Indeed, in Black the Supreme Court noted that even though a conviction for a crime of violence is not particularly probative of the specific trait of truthfulness, its impeachment value is merely "limited." Id. at 23, 732 S.E.2d at 887. The Court did not hold the impeachment value was nonexistent.

This is because if the crime is "not probative of truthfulness," its probative value would **never** outweigh its prejudicial effect. Such a ruling would eviscerate the Rule and only allow impeachment with crimes of dishonesty or false statement. As a result, the judicial limitations on the exception contained in Rule 609(a)(2) would swallow the rule contained in Rule 609(a)(1) in its entirety. This

was clearly not the result contemplated by the Supreme Court in State v. Bryant, 369 SC. 511, 633 S.E.2d 152 (2006); after finding Bryant's prior firearms convictions "do not involve dishonesty," the Court nevertheless stated "their probative value should have been weighed against their prejudicial effect." Bryant at 517, 633 S.E.2d at 156. In State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015), the Supreme Court further clarified this interpretation. In other words, a balancing test pursuant to Rule 609(a)(1), SCRE, is always proper, even where the prior conviction and the current charge are identical.

In the instant case, the probative value of the prior conviction and its impact on credibility was heightened by Shands' cross-examination of several witnesses about his character. For instance, Shands asked Victim, "This is the first time he has ever done something like this, isn't it?" R. p. 70, lines 7-8. Shands also asked Victim, "But he never did anything like this before?" R. p. 70, line 23. Likewise, Shands asked Trey, "And other than this one incident [Shands] has never done anything like this that you have seen, has he?" R. p. 80, lines 6-7. Shands followed this question by asking, "But he, he could fuss and get irritable but he has never had stabbed anybody like this, has he?" R. p. 80, lines 9-10.

Shands cross-examined Jalen as follows:

> Q: Now, you said you were scared that night and I can understand that. This is the first time you have ever seen your dad do something like that with a fork, isn't it?
>
> A: Yes, sir.
>
> Q: And it was kind of out of the ordinary?
>
> A: Yes.
>
> Q: And you have never seen him in that kind of state of mind before, have you?

A: No.

R. p. 85, lines 16-25.

Shands asked Koon the following:

Q: And this was entirely out of character for Preston?

A: Well, see I don't know if that was out of character or not. I know he has been a neighbor to us.

Q: Right, he had always been a good neighbor to you?

A: Yes, sir.

Q: And you had never witnessed anything like this?

A: No sir, I have not.

R. p. 96, line 25 – p. 97, line 5. Shands also elicited testimony from Martha Koon that they were neighbors with Shands for several years and until that night, Shands was a good neighbor. Martha agreed "he seemed like a good guy." R. p. 102, line 15 – p. 103, line 3.

In the instant case, Shands' defense was an imperfect defense of intoxication and to this end he presented evidence that he was acting out of character the day of the assault. Therefore, the impeachment value[5] of his past murder conviction, described as "a violent felony," was enhanced beyond the usual probative worth of violent crimes because Shands' defense was premised on the idea that he was grossly intoxicated, and but for the gross intoxication, this would not have happened because it was out of character. Moving on to the remainder of the Colf factors, the murder conviction may have occurred years ago, but as discussed above, Shands' sentence had not ended as he was still on

[5] "[I]mpeaching must mean that which is outside the evidence already given, and impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony." Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938).

parole and monitored by Laurens County. The danger of unfair prejudice was limited by the fact that the jury was not told that the conviction was murder, a similar offense to attempted murder, but instead was told the conviction was a violent felony.

As to the final two elements of the Colf factors, Shands made the argument to the trial court for the State's benefit. He conceded his testimony was important and the credibility issue was essential to his defense. Shands remonstrated it would "devastate his credibility." R. p. 138. That purpose enhances, rather than decreases, the legitimate probative value of the challenged evidence because the purpose of admitting the evidence is to attack Shands' credibility and the danger of unfair prejudice would stem from the possibility of the jury considering the conviction for propensity purposes, which is minimized here due to the offense being referred to merely as a violent offense.

Shands put his character into evidence and opened the door to his prior conviction.

Additionally, Shands put his character in issue – repeatedly – as discussed above. Shands' counsel elicited testimony from Victim and her sons that Shands was acting out of the ordinary. Shands' counsel even asked Koon if Shands had acted out of character. These questions put Shands' character for peacefulness into play, and the prosecution was allowed, pursuant to Rule 404(a), SCRE, to counter Shands' assertions of good character. Under Rule 404(a):

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; . . .

"When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731

S.E.2d 604, 610 (Ct. App. 2012).

An appellant cannot complain of prejudice from evidence he has brought before the jury. State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991).

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citing United States v. Nobles, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." United States v. Robinson, 485 U.S. 25, 33 (1988).

Shands put his character into evidence early and often to establish that he was acting out of character. The State was allowed to counter this assertion of character with evidence rebutting the character trait he chose to put into evidence. Accordingly, it was not error for the trial court to allow Shands to be impeached with his prior conviction.

Any error is harmless since Shands never formulated a legitimate defense.

Further, any error is harmless. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

Shands' only defense was a sham involuntary intoxication defense where, beyond his own self-serving testimony, Shands could not even prove intoxication, and no evidence actually supported his contention the supposed intoxication was involuntary. Further, Shands clearly could control his actions once he was confronted with an armed officer instead of helpless victims. Shands admitted to the assaults and his assertion he was acting out of character was also rebutted by testimony that he had become controlling and jealous. Any error is harmless beyond a reasonable doubt.

IV.

Evidence did not support an instruction on involuntary intoxication and evidence supported an instruction on voluntary intoxication. The instruction on voluntary intoxication was not a charge on the facts.

Shands argues the trial court erred in failing to instruct the jury on involuntary intoxication and claims evidence supported the instruction. He further makes an offhand claim that the instruction on voluntary intoxication amounted to a charge on the facts. Shands voluntarily drank moonshine, and no evidence supporting a claim of involuntary intoxication was presented to the jury. Further, the instruction on voluntary intoxication was an instruction on the law, not on the facts. Shands' claim of involuntary intoxication was based on his claim of how alcohol usually affects him, but Shands admitted the moonshine was particularly strong and he never tried it before.

The South Carolina Supreme Court held that voluntary intoxication is never a defense to a crime unless it produced permanent insanity. State v. Vaughn, 268 S.C. 119, 125, 232 S.E.2d 328, 330 (1977). As the Supreme Court has explained:

> Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition. To grant immunity for crimes committed while the perpetrator is in such a voluntary state would not only mean that many offenders would go unpunished but would also transgress the principle of personal

> accountability which is the bedrock of all law. The effect of drunkenness on the mind and on men's actions is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences.

Id. at 125-26, 232 S.E.2d at 330-31 (citation, ellipses, and internal quotation marks omitted).

Shands' musing that the moonshine must have been spiked was insufficient to produce evidence of involuntary intoxication. In Cribb v. State, 45 S.E. 396 (Ga. 1903), the Georgia Supreme Court rejected a claim that the defendant's ale was drugged, holding:

> There was no evidence on which to charge as to the effect of drugging the ale alleged to have been used by the defendant, nor can the courts establish a precedent which would authorize a chemical investigation as to whether the liquor was good or bad, pure or impure, drugged or containing only malt, spirituous, or vinous qualities. Drunkenness voluntarily produced by one sort of liquor is no more an excuse for crime than that caused by any other kind of intoxicating drink.

Id. at 397.

California's Court of Appeals found a jury instruction on involuntary intoxication was not warranted based on the claim the defendant was unaware the marijuana cigarette he smoked was laced with PCP. People v. Velez, 175 Cal.App. 3d 785 (Cal. Ct. App. 1985). The court held "a reasonable person has no right to assume that a marijuana cigarette furnished to him by others at a social gathering will not contain PCP, nor may such a person assume such a marijuana cigarette will produce any predictable intoxicating effect." Id. at 796.

Further, evidence does not support an instruction on involuntary intoxication based on a claim the moonshine might have been doctored. Only rank speculation, not evidence, was offered on this point. For instance, in State v. Barr, 102 S.W.2d 629 (Mo. 1937), the defendant drank a considerable

amount of whiskey. He claimed he then took a drink from another person's bottle, it tasted bitter, and he began to feel funny. The defendant further claimed he blacked out, and when he regained consciousness, he was lying in bed at home and "had never felt that way before or since, though he had been drunk many times." Id. at 634. The Missouri Supreme Court found simply because the bottle of whiskey he shared with another person tasted funny was too vague to justify finding it was drugged and further rejected the assertion that the subsequent hangover established that the liquor was doctored: "Absent evidence we cannot take judicial notice that a headache 'in the cold gray dawn of the morning after' constitutes evidence tending to prove that one has imbibed drugged liquor." Id.

In People v. White, 264 N.E.2d 228 (Ill. App. Ct. 1970), the defendant testified he drank a couple of beers over a two hour period at a Legion bar, then two more beers at another bar. He went to the washroom, leaving a half full glass of beer at his seat, and returned to find his seat taken. He took his beer and moved elsewhere. Finishing his beer, he left the bar and later claimed he blacked out as he walked outside. When he came to, he was home. He was arrested for murder on his way to work and taken to a hospital because he had a bloody knee. The defendant claimed he requested a blood test at the hospital, although the treating medical personnel denied hearing this. Id. at 229-30.

The Illinois court rejected a claim the trial court should have instructed the jury on involuntary intoxication, finding, "The only evidence which was presented was the request for a blood test, which defendant stated he made, or the testimony of defendant that he left a glass of beer for about five minutes at the bar. We do not believe that this constituted sufficient evidence that defendant was drugged." Id. at 231.

As the Kentucky Court of Appeals observed, "Clearly, where one drinks of his own free will, the mere fact that he misjudges his own capacity, or the intoxicating effect of the particular beverage,

will not render his intoxication involuntary." Tackett v. Commonwealth, 266 S.W. 26, 27 (Ky. Ct. App. 1924).

In the instant case, Shands admitted he never drank moonshine before and merely surmised it was drugged because alcohol normally causes him to fall asleep.[6] This and the vague evidence he acted out of character is too speculative to support a jury instruction on involuntary intoxication. See State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008); State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (instructions are determined from evidence at trial). The appellant must show the failure to give an instruction is both erroneous and prejudicial. Gaines. No evidence supports the requested instruction. Further, the failure to give the instruction was not prejudicial in light of the fact that no evidence corroborated Shands' claim he was intoxicated, much less involuntarily so.

Shands also claims the instruction on voluntary intoxication was a charge on the facts. However, it is a statement of law. See Vaughn. Shands' assertion otherwise is unsupported by authority and should be considered too conclusory to review on appeal. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal) *aff'd as modified*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

Judges shall not charge juries with respect to matters of fact, but shall declare the law. S.C. Const. Art. V, § 21. Generally, the trial judge must refrain from all comment which tends to indicate an opinion regarding the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the

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[6] Of course Shands' own testimony demonstrated that the moonshine was not an ordinary drink, but the "cremator of all whiskey." R. p. 201. Shands' testimony merely shows he miscalculated the intoxicating effect of the moonshine. Further, none of the witnesses even noticed his attested intoxication.

accused, or facts in controversy. State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996). In the instant case, the trial court merely declared the law – voluntary intoxication is not a defense to any crime. Williams v. Southeastern Life Ins. Co., 197 S.C. 171, 171, 14 S.E.2d 895, 897 (1941) ("In our opinion, the proposition of law requested did not infringe upon the facts. It was nothing more than a statement of a legal conclusion which would result if the jury found certain facts alleged in the complaint to exist."). "Numerous cases uphold the proposition that a charge stating the legal conclusions which would result from the establishment of certain facts is not necessarily subject to objection as a charge on the facts, or as assuming the truth of the facts as stated." Id.

Further, Shands was not prejudiced by the lack of an involuntary intoxication charge. Shands' sons did not see him drink moonshine and none of the witnesses noticed his purported intoxication. Shands was sufficiently aware to drop his knife and drop to the ground at the officer's commands. Shands' testimony proves at most voluntary intoxication and he agreed he committed the offenses. The appellant must be prejudiced in order to reverse an appellant's verdict on the basis of an erroneous jury charge. State v. Lee-Grigg, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007). Shands was not prejudiced and the alleged error does not warrant reversal. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (noting to warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant).

V.

The trial court did not err in denying Appellant's motion to strike the prosecutor's argument that was not even objectionable. The argument was based on evidence in the record. Further, Appellant failed to move for a new trial, so the issue is not preserved and his argument is conclusory. The trial court did not abuse its discretion.

Shands argues he should get a new trial because the trial court "sustained" his objection during

closing argument but refused his request to strike the prosecutor's comments. The closing argument was proper and based on evidence in the record. Further, Shands was not prejudiced by the comments.

"A trial judge is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002). The prosecution "may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). A solicitor's closing argument is permissible where it stays within the record and reasonable inferences to it. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002).

In the instant case, Shands fails to argue on appeal why the argument was improper and objectionable. The issue is simply waived. State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding that the argument on appeal was so conclusory that it was deemed abandoned); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue."); see also State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon").

In his brief, Shands lays out a long block quote of the prosecution's argument leading up to the objection; but even on appeal, it is unclear what portion of the argument was objectionable or why. The last sentence prior to the objection was the prosecution's argument that, "This isn't about he was drinking something that day, this is a jealous, controlling husband who was not going to let his property leave that house." R. p. 232, lines 6-9. Counsel objected to "the characterization" and claimed the

assertion was outside the record. The trial court replied, "Let's keep it to the facts." R. p. 232, lines 10-12. The prosecutor's argument is supported by the record, particularly from cross-examination of Shands. The prosecutor asked Shands, "And you got pretty jealous and kind of controlling, right?" Shands answered, "**Yeah**, I started drinking." R. p. 199, line 25 – p. 200, line 2 (emphasis added). So the argument was proper because Shands agreed with the prosecutor that he was jealous and controlling. Of course, Shands treated his victim like his property by pulling her hair to make her stay. The prosecutor's argument was a fair statement based on the evidence and was not remotely objectionable.

Further, the record does not support that the trial court's warning to "keep it to the facts" was actually sustaining Shands objection. This is evidenced by the trial court's decision to forgo striking any part of the argument. State v. Bamberg, 270 S.C. 77, 82, 240 S.E.2d 639, 640-41 (1977) (finding whether or not an argument is improper is a matter left to the trial judge's discretion).

Additionally, Shands was not prejudiced by the comment. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries, 351 S.C. at 373, 570 S.E.2d at 166. Shands committed the vicious assaults and agreed he committed the vicious assaults. Shands was not prejudiced by the characterization of his actions.

Further, assuming Shands' claim the judge sustained his objection is correct, Shands never made a motion for mistrial. "One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal." State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (not preserved due to failure to move for mistrial until after the verdict). An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352

S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002).

Finally, any error is harmless beyond a reasonable doubt in light of the abundant evidence of guilt, lack of a legitimate defense to the charges, and the extremely limited amount of prejudice from the prosecutor's comments. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

VI.

The implied malice charge was proper since no evidence was presented reducing, mitigating, excusing, or justifying the charge from attempted murder. The repeated stabbings occurred during the commission of a kidnapping. The instructions were a charge on the law and not the facts of the case. Any error is harmless beyond a reasonable doubt based on the abundant evidence of Appellant's malice beyond just his use of a barbecue fork to stab his victim.

Shands alleges the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon, relying on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Shands further argues the instruction was a charge on the facts. The trial court did not err in charging the jury the implied malice instruction as no evidence was presented tending to reduce, mitigate, or justify the attempted murder. The instruction is simply an instruction on the law, not the facts. Further, Shands was not prejudiced by the instruction, and any error was harmless beyond a reasonable doubt.

The trial court gave the following instruction:

> Inferred malice may also arise when the deed is done with a deadly weapon.
>
> Now, deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are examples of instruments which may be deadly weapons. A pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a sling shot, metal knuckles, a razor, gasoline, fire

> bomb, a Molotov cocktail. And a gun may be a deadly weapon even when it is not operating. Ordinary objects may become deadly weapons when the facts show that they have been used to inflict serious bodily harm or death. If that's all proven beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction this inference would simply be an evidentiary fact to be considered by you along with all the other evidence in the case and you may give it the weight that you decide it should receive.

R. p. 244, line 14 – p. 245, line 7. Note the trial court did not instruct the jury that a barbecue fork could be a deadly weapon.

A jury charge instructing malice may be inferred from the use of a deadly weapon is improper when evidence is presented that would reduce, mitigate, excuse, or justify the offense. Belcher, 385 S.C. 597, 685 S.E.2d 802, 803-804 (2009) (holding an inferred malice instruction was improper where evidence of self-defense was sufficient to reduce, mitigate, or justify the killing). On the other hand, if there is no evidence to reduce, mitigate, excuse, or justify the offense, an instruction on the inference of malice from the use of a deadly weapon is permitted. State v. Price, 400 S.C. 110, 732 S.E.2d 652, 654 (Ct. App. 2012). Even if a court errs in charging the jury on an inferred malice instruction, the error is subject to harmless error analysis, and harmless error may arise when evidence of malice is not limited to the use of a deadly weapon. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708, 714 (2013).

In Price, this Court held the trial court did not err in instructing the jury malice could be inferred from the use of a deadly weapon. Price, 400 S.C. at 114-15, 732 S.E2d at 654. The defendant was charged with ABWIK, and the trial court instructed the jury "malice may be inferred from the conduct of a person if that conduct shows a total disregard for human life," and it "may arise when the deed is done with a deadly weapon." Id. The trial court also charged ABHAN as a lesser-included offense. Id.

On appeal, the defendant argued his theory that the shooting was part of a drug deal gone wrong

and therefore, the evidence precluded the deadly weapon inference charge. In rejecting that contention, this Court determined the instruction on ABHAN was not warranted and further found no evidence tended to reduce, mitigate, excuse, or justify the crime, explaining:

> It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. Therefore, if the jury believed Price is the person who shot Deon, Price is necessarily guilty of ABWIK.

Id.

In Stanko, the defendant argued the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon when the defendant had presented an insanity defense. Stanko, 741 S.E.2d at 711. The Supreme Court held the defendant's evidence of insanity was sufficient to preclude the deadly weapon inference charge, but found the error in giving it was harmless. Id. at 264-65, 741 S.E.2d at 713-14. In reaching its harmless error conclusion, the Court distinguished Belcher:

> The State presented uncontested evidence that Appellant shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. *See* Belcher, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").

Id.

The Court also analyzed the trial court's jury instructions as a whole and found they were consistent with the evidence presented. The court observed:

> The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." **The trial court also stated that malice "can be inferred from conduct showing total disregard for human life."** Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, which it did, **the jury could also find that Appellant's conduct showed a total disregard for human life.** Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

Id. at 715 (emphasis added).

In the instant case, like Price, no evidence actually supported an instruction on the lesser included offense of ABHAN. Shands pulled victim's hair to keep her from leaving. She freed herself and ran across the street to a neighbor's house, but Shands tackled her in front of the house and proceeded to stab her repeatedly with a barbecue fork. The sons stopped Shands from stabbing Victim, but Shands retrieved a hammer, busted the windows in the front of the neighbor's house and entered through the sliding glass door in the back of the house, which he also smashed with the hammer. Shands retrieved a knife from the neighbor's kitchen and chased Victim to the front of the house where he was finally apprehended by law enforcement, although initially he was holding his own son hostage. Shands did not challenge this evidence when he testified; instead he claimed he did not remember the events due to his purported intoxication.

Further, as previously discussed, no evidence supported his contention that he was involuntarily intoxicated. Accordingly, no evidence supports the conclusion that he lacked the requisite mental state for malice. Moreover, an involuntary intoxication defense would negate all intent if believed, and therefore, the jury would not base its decision on an implied malice charge regarding the use of a deadly

weapon. As in Price, no evidence reduces, mitigates, excuses, or justifies the crime, so the trial court did not err in providing the inferred malice instruction.

Additionally, like Stanko, plenty of other evidence separate from his use of a barbecue fork supports a finding of malice. The violent incident starts with Shands cursing, pulling Victim's hair, fighting with the son, and tackling Victim on the neighbor's front porch. Shands committed the assault during a kidnapping and committed a burglary to pursue Victim, arming himself with the neighbor's kitchen knife. As in Stanko, plenty of evidence supports a finding of malice and any error is harmless. There was no other interpretation of the evidence except that Shands was attempting to kill Victim. See State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (finding error in failing to charge lesser included offense of assault and battery in the first degree was harmless beyond a reasonable doubt: "[T]he only conclusion established by the evidence is that Appellant was guilty of attempted murder . . . . [T]here is no other way to construe the evidence in this case but that Appellant was attempting to kill [the victims].").

Moreover, an instruction on a lesser offense is precluded because Shands stabbed Victim repeatedly during the commission of a kidnapping. State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (finding defendant was not entitled to an instruction on involuntary manslaughter because the homicide occurred during the commission of the felonies of robbery and kidnapping); State v. Avery, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) ("If a person intentionally kills another during the commission of a felony, malice may be inferred.") (citation omitted). Under the felony murder rule, he would not be entitled to an instruction on a reduced charge.

Shands also claims the implied malice instruction is an instruction on the facts. It is not, it is

merely an instruction on the law. Judges shall not charge juries with respect to matters of fact, but shall declare the law. S.C. Const. Art. V, § 21. Generally, the trial judge must refrain from all comment which tends to indicate an opinion regarding the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the accused, or facts in controversy. State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996).

In the instant case, the trial court was merely advising the jury that malice could be inferred from the use of a deadly weapon, an accurate statement of law. See Williams v. Southeastern Life Ins. Co., 197 S.C. 171, 171, 14 S.E.2d 895, 897 (1941) ("In our opinion, the proposition of law requested did not infringe upon the facts. It was nothing more than a statement of a legal conclusion which would result if the jury found certain facts alleged in the complaint to exist."). "Numerous cases uphold the proposition that a charge stating the legal conclusions which would result from the establishment of certain facts is not necessarily subject to objection as a charge on the facts, or as assuming the truth of the facts as stated." Id.

On point and controlling is Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). In Sheppard, the defendant argued that portions of the implied malice instruction constituted a comment on the facts, including the portion of the trial court's charge that, "[u]nder the law of our State a pistol is a deadly weapon." Id. at 663-64, 594 S.E.2d at 472. The Supreme Court rejected this argument because "under the law of South Carolina, a pistol is a deadly weapon." Id. at 664, 594 S.E.2d at 472. In the instant case, the trial court did not instruct the jury that a barbecue fork was a deadly weapon, but only gave other examples of deadly weapons, which, as in Sheppard, really were deadly weapons under South Carolina law. Accordingly, the trial court's instruction was not a comment on the facts. Sheppard.

VII.

The trial court did not err in failing to force the State to open on law and facts and reply only to "new" arguments of defense counsel; and the current procedure does not violate due process of the federal constitution or South Carolina Constitution.

Shands claims the trial court should have created a new rule of procedure and forced the State to open on the law and facts, and be allowed only a reply argument to defense counsel's closing argument. Historically, the right to the final closing argument has followed the party with the burden of proof. Stein Closing Arguments § 1:6: Right to open and close; order of argument (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof."); Nicole Velasco, Taking the "Sandwich" Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L.Rev. 99, 112 (2004) ("At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.").

In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). The initial closing argument must include a discussion of the law if demanded by the defendant; however, the solicitor is not required to open his initial closing with any argument on the facts although he may do so as a matter of discretion. State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (S.C. Oct 12, 2009); Rodgers, 269 S.C. at 25, 235 S.E.2d at 809.

Unlike the vast majority of jurisdictions, current South Carolina practice sets the order of closing arguments in criminal cases according to the evidence received at trial. See State v. Brisbane, 2

Bay 451 (S.C. 1802) (As a matter of practice, when a criminal defendant calls no witnesses, he has "the **privilege** of concluding to the jury.") (emphasis added); see also State v. Gellis, 158 S.C. 471, 471, 155 S.E. 849, 855 (1930) ("It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments."); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, 384 (1972) (same); State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122, 125 (Ct. App. 1995) (same).

In rejecting an equal protection challenge, the Florida Supreme Court explained the rationale of their rule that is similar to the practice in South Carolina:

> In all criminal proceedings, the prosecution takes the offensive at the outset, building through its witnesses a "case" for defendant's guilt. In most instances, defense counsel is limited to the defensive tactic of cross-examination to show the weakness of the State's evidence, and to create a reasonable doubt in the minds of the jury. Occasionally the defense will be in a position to take the offensive itself by calling witnesses to build its own case for innocence. In those instances where such an offensive tactic is possible, the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution's presentation. . . . In our judgment it was precisely to counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury.

Preston v. State, 260 So.2d 501, 504 (Fla. 1972).[7]

Totally denying a criminal defendant the opportunity for closing argument constitutes a denial of the defendant's basic right to make his defense. Herring v. New York, 422 U.S. 853, 858-859

[7] In 2007, Florida changed its rules to eliminate a defendant's right to make a final closing argument. See In re Amendments to the Florida Rules of Criminal Procedure–Final Arguments, 957 So.2d 1164, 1167 (Fla. 2007) ("In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing

(1975). While the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is not evidence. See, e.g., Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649, 653 (2006) (quoting S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct. App. 2003) ("'[a]rguments made by counsel are not evidence'")); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22, 24 (1987) ("the solicitor's closing argument is not evidence"). There is no constitutional **right** to a certain order or scope of argument.

The order of closing arguments is a matter of state procedural rule or practice rather than substantive law. State v. Huckie, 22 S.C. 298, 299 (1885) (alleged error in denying defendant final closing argument was "not a matter of error as to express law, but of practice"). The United States Supreme Court has consistently held the States are free to shape their own rules of procedure. See, e.g., United States v. Scheffer, 523 U.S. 303, 316 (1998) ("we thus stressed that the ruling [in Chambers v. Mississippi] did not 'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'" *quoting* Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

In the instant case, Shands was not deprived of last closing argument, but made a strategic choice to present a defense and forgo last closing argument. See Herring, 422 U.S. at 857-64 (a *total denial* of the opportunity to present a closing argument to the trier of fact is a denial of the basic right of the accused to make his defense).

As previously discussed, the **order** of closing arguments is a matter of state procedural preference which does not offend any constitutional right. Sheffer. Therefore, the trial court did not err in relying on well-established precedent and a longstanding practice – a practice that never deprives any

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argument and a rebuttal closing argument before the jury or the court sitting without a jury.").

defendant of the opportunity to present a closing argument.

Our Supreme Court previously concluded that denial of the right to last closing argument "is not the kind of error that would affect the entire conduct of the trial from beginning to end" and is "subject [to a] harmless error analysis." State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997). In Mouzon, the Supreme Court concluded that pursuant to state procedure the defendant was entitled to the right to last closing because he in fact did not present evidence. Further, the Court concluded the error was not harmless as Mouzon concentrated "on the murder charge and was acquitted of murder; he did not focus on the conspiracy charge and was convicted." Id. at 205, 485 S.E.2d at 922. The Court noted the prosecution "devoted a significant amount of attention to the issues of drug dealing and conspiracy. If Mouzon had been allowed to argue last, then he could have more adequately addressed the issue of conspiracy to distribute crack cocaine." Id.

Shands claimed surprise in a number of areas or claimed he would have countered on various points made by the prosecution, but in all instances, the prosecutor's arguments were straight forward and easy to predict. Shands' most absurd claim is counsel was unable to respond to the prosecutor's arguments about kidnapping. R. p. 255. The prosecutor made her theory of the evidence supporting kidnapping clear when responding to Shands' directed verdict motion:

> Your Honor, as far as the evidence, Ms. Shands testified, actually several people have testified that she was grabbed by the hair as she was attempting to leave, pulled back into the doorway of the house. There is testimony that she lifted the garage door and closed it and sort of ended up in kind of a halfway state where she would not have been able to get her car out and leave. That is confining her for purposes of the statute. . . .

R. p. 171, lines 12-19. Accordingly, Shands was disingenuous with the jury when he claimed during closing argument he did not know what evidence the State was going to rely on to prove kidnapping.

R. p. 224. Shands' decision to not present an argument on kidnapping, but feign ignorance, was a strategic decision to sacrifice a discussion of the evidence for the sake of creating a superficially beneficial record for this Court. Shands' sophistic play does not hide that he was well aware of the evidence supporting kidnapping and could easily anticipate the prosecution's arguments on the subject. In sum, Shands' explanation of prejudice is underwhelming even assuming the trial judge erred. See State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him.").

Further, even assuming error, any error was harmless beyond a reasonable doubt. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (noting error is harmless when it could not reasonably have affected the result of the trial). Shands advised the jury he did not deny the acts alleged but claimed intoxication. Of course, voluntary intoxication is not a defense and no evidence of involuntary intoxication was presented. Evidence was simply overwhelming regardless of the order of closing arguments.

VIII.

The kidnapping statute is not unconstitutionally vague and not overly broad as applied to Appellant. The evidence is sufficient to survive directed verdict.

Shands claims the trial court erred in denying the motion for directed verdict, and further, the kidnapping statute is unconstitutional as applied to Shands. Evidence readily meets the standard to survive Shands' directed verdict motion: Shands pulled Victim's hair, held her down while stabbing her, and kept her from leaving in her car by keeping her from opening the garage door. Further, the statute is constitutional and is not overbroad as applied to Shands.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016).

Under S.C. Code §16-3-910: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of [kidnapping]." Kidnapping is a continuous offense commencing when the victim is wrongly deprived of freedom and continuing until freedom is restored. State v. Tucker, 334 S.C. 1, 13, 512, S.E.2d 99, 105 (1998). Restraint of a victim during another crime still constitutes kidnapping, even if incidental to the commission of that other crime. State v. Hall, 280 S.C. 74, 77-78, 310 S.E.2d 429, 431 (1983) (finding defendant's restraint of rape victim's liberty during sexual assaults constituted a separate crime of kidnapping).

In the instant case, after Victim announced she was leaving and attempted to open the garage door, Shands prevented her from fully opening the garage door keeping Victim from driving away. Additionally, Shands pulled Victim by her hair to attempt bringing her back into the house. Further,

Shands held her down while trying to stab her with the barbecue fork. Shands begrudgingly acknowledges this evidence but seems to claim Victim needed to use the special term "restrained" for the State to prove its case. The argument strains credulity. Victim was not property, and Shands had no right to keep her from leaving the house by pulling her hair and blocking her car in the garage.

Shands further presents a conclusory argument that if the evidence were construed to to constitute a kidnapping, the statute would then be vague and overbroad as applied to Shands. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Our Supreme Court already found the statute is not vague. State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980) (finding section 16-3-910 is not unconstitutionally vague and finding the defendant lacked standing to challenge the statute as overbroad). In so finding, the Supreme Court explained as follows: "The terms of this statute are clear and unambiguous. It proscribes the forceful seizure, confinement or carrying away of another against his will without authority of law." Id. at 166, 268 S.E.2d at 277 (internal citation omitted). The Supreme Court further found that since Smith's "conduct fell squarely within the statute's terms," Smith lacked standing to claim the statute was overbroad. Id.

Any citizen could reasonably understand simple terms like "seize," "confine," and "abduct or carry away." Shands seized Victim when pulling her by the hair and later seized her by tackling her and holding her down to stab her. Shands confined Victim when he kept her from leaving in her car by keeping her from opening the garage door. Shands pulled her by the hair to keep her from leaving or to force her back into the house, in other words, by abducting her. Shands' conduct squarely falls within the statue's terms. Smith.

CONCLUSION

For the above reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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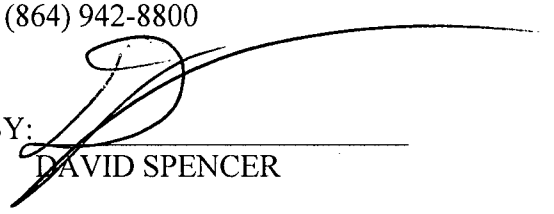

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September 16, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

PRESTON SHANDS, JR.,

Appellant.

Appellate Case No. 2015-001199

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]

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AFFIDAVIT OF SERVICE

The undersigned hereby certifies that the Final Brief of Respondent in the above-referenced case has been served upon Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his counsel of record, E. Charles Grose, Jr., Esquire, 404 Main Street, Greenwood, South Carolina 29646, this 16th day of September, 2016.

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