THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of General Sessions
W. Jeffery Young, Circuit Court Judge

Appellate Case No. 2015-000718
S.C. Supreme Court Opinion No. 27693

The State, ... Respondent,

v.

Michael Vernon Beaty, Jr., ... Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the appellant, Michael Beaty, petitions for rehearing because this Court overlooked or misapprehended the points discussed in this petition. As discussed below, this Court did not discuss the facts of the case, explain why the two Constitutional violations do not require reversal, and address numerous issues raised by Mr. Beaty in his appeal.

I. ISSUES ADDRESSED IN THE COURT'S OPINION.

This Court found two constitutional violations but never explained why these violations do not require reversal under the facts of Mr. Beaty's case. Once these constitutional violations are considered in the context of the facts of this case, the need to reverse becomes apparent.

A. Opening Remarks.

This Court agreed that the trial judge, by "use of terms 'search for the truth,' 'true facts,' and 'just verdict,'" Slip Opinion, p. 3, departed from this Court's precedent in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), *State v. Alekesy*, 343 S.C. 20, 538 S.E.2d 248 (2000), and other cases relied on by Mr. Beaty in his Brief of Appellant, at pp. 28-37, and Reply Brief, at pp. 12-14. This Court found a constitutional violation and once again held, "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. After admonishing trial courts to avoid using these terms, this Court concluded, "Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal." Slip Opinion, p. 4. This Court found Mr. Beaty was prejudiced by the trial judge's unconstitutional comments but never explained why that prejudice as not sufficient to warrant a new trial.

This Court overlooked the Solicitor exploiting the trial judge's remarks in his closing argument. Rec. on App. 772, ll 4-12. This Court correctly observed, "[T]he Solicitor had informed the jury that it would have to pick between two competing theories." Slip Opinion, p. 3. Indeed, the parties did present the jurors with two competing theories, neither of which absolved Mr. Beaty of Emily Anna Asbill's death. Relying entirely on circumstantial evidence, the prosecution argued that Mr. Beaty intentionally strangled his girlfriend with a USB cord. Relying on his statement to

investigators, expert testimony, and circumstantial evidence, Mr. Beaty established his girlfriend tried to jump out of a moving car and he failed to safely secure her inside the car, resulting in accidental death by positional asphyxiation. The jurors' role never was to determine which competing theory best explained the circumstances of the crime or to render a verdict they believed best served their perception of justice. Rather, the jurors' role was to determine whether the State met its burden of proving Mr. Beaty guilty beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1990). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). The unconstitutional remarks, when considered with the Solicitor's opening statement and closing arguments, increase the need to apply this presumption.

This Court, additionally, did not apply the proper standard of review for a harmless constitutional violation when it held:

> Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins*, 210 S.C. 242, 42 S.E.2d 240 (1947) (trial court's choice of words and comments, while not "happy," did not require reversal).

Slip Opinion, p. 4. This Court, thus, required Mr. Beaty to not only show prejudice but also to show prejudice sufficient to warrant reversal. Rather, under the proper standard of review, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 286 U.S. 18, 24 (1967). The burden, therefore, is on this Court to explain

why the error is harmless beyond a reasonable doubt and not on Mr. Beaty to explain why a prejudicial, constitutional error is sufficient to warrant reversal.

This Court's reliance on *Coggins* is misplaced for two reasons. First, it was decided two decades before *Chapman* and, therefore, does not represent the appropriate standard of review for determining a harmless constitutional violation. Second, the trial court's "[un]happy choice of words" in *Coggins* "did not constitute [an] objectionable expression of the opinion of the judge." *Id.* 210 S.C. at 245, 42 S.E.2d at 241. Thus, this Court erred by applying a standard of review from a case where no constitutional violation occurred. This Court's error is further demonstrated by its complete failure to discuss the facts of this case.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

B. Closing Argument.

Adopting the reasoning of *Bailey v. State*, 440 A.2d 997 (Del. 1982), this Court found the Solicitor's closing arguments violated Mr. Beaty's right to due process. Citing *Chapman*, this Court concluded, "[T]he trial court's denial of [Mr. Beaty's] motion to require the State to open in full and limit its reply was harmless beyond a reasonable doubt." Slip Opinion, pp. 4-5. Once again, this Court neither discussed the facts of the case nor explained why the error was harmless. Although *Bailey* recognized the trial judge has

> a measure of discretion as to the application of the rule governing the scope of a rebuttal, that discretion is not so broad as to permit a Trial Judge to oversee a blow to a defendant's right to a fair trial via the State's sandbagging. Closing argument is an aspect of which is implicit in the Due Process Clause of the Fourteenth Amendment by

> which the States are bound. It is encumbent [sic] on the Trial Judge to protect the defendant's right to a fair trial through constant vigilance over the conduct of all officers of the Court. . . .

Bailey, at 1003 (internal quotations and citations omitted). Like the Court in *Bailey*, this Court recognizes the trial court's responsibility to "safeguard the rights of litigants," *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012), and the prosecution's "obligation to see the defendant is accorded procedural justice," *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001).

As Justice Few acknowledged in a separate opinion:

> After the solicitor made his final closing argument, Beaty's counsel told the trial court the solicitor had "sandbagged his entire argument" and argued it was "a gross violation of due process." Counsel then requested the opportunity to "go through a list of things that we would like to have had the opportunity to refute" if given the opportunity to reply to the State's argument. As to one specific point, counsel argued the State presented a factual scenario for the first time in its final argument. Counsel then argued he could not have anticipated such an argument, and Beaty deserved the right to reply to it. Counsel then listed numerous other points in the State's final argument he argued were misleading, and explained in detail how he would have structured his own closing argument to respond if he had the opportunity. Finally, counsel specifically requested he be allowed "to reargue before the jury" to protect Beaty's due process rights.

Slip Opinion, p. 8.

The "sandbagging" in Mr. Beaty's case is much worse than the "sandbagging" by the United States Attorney in *United States v. Maloney*, 755 F.3d 1044 (9th Cir. 2014).[1] In *Maloney*,

[1] Mr. Beaty cited *Maloney* during his oral argument on October 19, 2016, found at http://media.sccourts.org/videos/2015-000718.mp4 (last viewed January 8, 2017).

> [t]hough there was never any evidence introduced regarding whether Maloney had luggage with him on the trip, for the first time in rebuttal during closing argument, the prosecutor argued that Maloney must have lied about the details of his trip because he had not luggage with him when he was apprehended, a fact from which the jury could infer knowledge.

Id. at 1045-46. After oral argument in *Maloney*,[2] the United States Attorney conceded error and moved the Court of Appeals "to summarily reverse the conviction, vacate the sentence, and remand to the district court." *Id.* at 1046 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935) and *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993)).

In Mr. Beaty's case, the Solicitor not only argued facts outside the record, but also argued for the first time the State's theory about how Mr. Beaty allegedly strangled his girlfriend. The Solicitor argued the strangulation occurred in the driveway of the home of Mr. Beaty's mother and stepfather after his girlfriend was screaming loudly. Despite his request for a sur-rebuttal argument, the trial judge did not give Mr. Beaty an opportunity to refute the Solicitor's argument.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

II. ISSUES NOT ADDRESSED IN THE COURT'S OPINION.

This Court completely overlooked Questions I, II, V, VI, VII, and VIII raised by Mr. Beaty in his appeal. Mr. Beaty will elaborate on three of these Questions in this petition for rehearing: (a) the trial court's failure to instruct involuntary manslaughter, (b) the State's failure to produce substantial circumstantial evidence of Mr. Beaty's guilt,

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[2] The oral argument in *Maloney* is enlightening and can be viewed at https://www.youtube.com/watch?v=HgafGnA4Eow&feature=youtu.be (last viewed January 8, 2017).

and (c) this Court's failure to apply a cumulative error analysis. As discussed in more detail below, the cases cited by this Court in footnote 1 of its opinion, pursuant to Rule 220, SCACR, indicate it misapprehended the issues on appeal.[3]

A. This Court erred in failing to consider the facts supporting the request for a charge on involuntary manslaughter.

In holding that Michael Beaty had not established sufficient facts to create a jury issue as to involuntary manslaughter, this Court either failed to consider the facts established by Mr. Beaty or adopted a new rule as to lesser included offenses.

This Court has long held that involuntary manslaughter is a lesser included offense of murder even though involuntary contains the element of recklessness that is not present in murder. "Involuntary manslaughter is a lesser-included offense of murder . . . ." *State v. Scott,* 531, 414 S.C. 482, 487, 779 S.E.2d 529 (2015); *See also State v. Elliott*, 346 S.C. 603, 610, 552 S.E.2d 727, 731 (2001) (Pliecones dissenting) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

In determining if the lesser included of involuntary manslaughter should be given,

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[3] Regarding the other issues on appeal, the cases cited in footnote one do not explains this Court's failure to address those issues on the merits. *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016) addressed the application of the waiver rule when the defendant presents evidence. Mr. Beaty's case-in-chief did not fill in any gaps of the State's theory of murder. Rather, as discussed in more detail in Section II(A), the expert testimony presented by Mr. Beaty further supported the trial court charging involuntary manslaughter. The reason for citing *State v. Smith*, 230 S.C. 164, 94 S.C.2d 886 (1956) is unclear. Mr. Beaty did not seek to introduce the affidavit of Valerie Jones; rather, she was available to testify, and Mr. Beaty introduced the affidavit as a proffer of her live testimony. Although there was evidence of Mr. Beaty's intoxication, he was never offered a test to determine his level of intoxication and, therefore, never refused such a test. Regarding *State v. Vang*, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003), Mr. Beaty demonstrated the prosecution attacked the defense lawyers, thereby establishing prejudice for the trial judge not asking *voir dire* questions number 9. Finally, it is not clear that any of the cases cited by this Court in footnote 1 apply the *State v. Edwards,* 298 S.C. 272, 379 S.E.2d 888 (1989) instruction, as opposed to the involuntary manslaughter instruction. Footnote 1 failed to address the Cumulative Error Doctrine.

now Chief Justice Beatty has said, "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be *inferred* that the defendant committed the lesser, rather than the greater, offense." *State v. Sams*, 410 S.C. 303, 308 764 S.E.2d 511, 513 (2014) (emphasis added). And former Chief Justice Pliecones has also said, "The trial judge is to charge the jury on a lesser included offense if there is *any evidence* from which the jury could infer that the lesser, rather than the greater, offense was committed." *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) (emphasis added). Further, this Court has said, "Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was *unintentional*." *Tisdale v. State*, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (emphasis added). Against these standards, this Court has now said, without discussion, that the act of a drunken driver in pulling an intoxicated passenger back into a moving automobile, positioning her onto the front floor board of the automobile, not rendering her aid and not keeping her from dying of positional asphyxiation does not create, as a matter of law, facts from which a jury may infer Mr. Beaty was grossly negligent. This position is contrary to the position of this Court in *Tisdale*. In *Tisdale* the physical facts were the deceased was shot twice in the back of the head. These physical facts were inconsistent with the statement of the defendant who claimed the gun went off while the defendant and the deceased were struggling over the gun. This Court said, "The fact that Victim's wounds may have been inconsistent with petitioner's testimony that the gun fired while in Victim's hand is not overwhelming evidence that petitioner intentionally killed Victim." *Tisdale*, 378 S.C. at 126, 662 S.E.2d at 412. Here the exact opposite is true. The physical evidence is more consistent with the theory of the Defendant than that of the

State. The evidence at trial established that Ms. Asbill's hair was pulled up in a bun. The State's expert admitted that if the hair were up and the ligature mark did not go all the way around the neck of Ms. Asbill, then she was most likely pulled from behind. Rec. on App. at 526, ll 19-25. The State never presented any factual theory consistent with the evidence that would explain why the ligature mark did not go completely around the neck of Ms. Asbill. The only theory presented by the State was that the USB cord they contended caused Ms. Asbill's death was wrapped completely around her neck.

This Court further erred in relying upon *State v. Scott*, 414 S.C. 482, 779 S.E.2d 529 (2015). In that case this Court said, "Simply put, Scott has not presented any evidence that he acted with reckless disregard for the safety of others." *Id.* at 488, 779 S.E.2d at 532. This fact is simply not correct for Mr. Beaty in this case. Further, and perhaps most importantly, *Scott* further said, "As the trial court noted, if the jury accepted Scott's version of the facts as true, he would be entitled to acquittal because the killing would have been justified." *Id.* In this case, if the jury accepted Mr. Beaty's evidence as true, the jury would still conclude that Mr. Beaty was responsible for the death of Ms. Asbill. His defense was not a complete defense, but was a defense of a lesser included. *See State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 101-02 (1999) (involuntary manslaughter instruction required when "the evidence establishes that appellant was not attempting to strangle Victim with his hands").

This Court failed to note that an attempt to render aid, if recklessly done, can be a basis for finding a defendant guilty of involuntary manslaughter. As the North Carolina Supreme Court said, "Clearly there exists a conflict in our decisions regarding the propriety of submitting to the jury the issue of a defendant's guilt of involuntary

manslaughter where there is evidence that the killing was unintentional and occurred when the defendant attempted to prevent the victim from committing suicide." *State v. Tidwell,* 112 N.C. Ct. App. 770, 775, 436 S.E.2d 922, 926 (1993). The Court then held that a reckless act in attempting to prevent a suicide would entitle a defendant to a charge of involuntary manslaughter. The same principle should be applied in this case.

As noted above, in order for a trial judge to be required to charge the lesser included charge of involuntary manslaughter, a defendant is only required to produce evidence from which it may be inferred the defendant acted with gross negligence. In making the determination as to whether sufficient evidence has been produced by the defendant to make such a charge proper, this Court is not concerned with the weight of the evidence but the existence of the evidence. *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). Whether the standard of review be that there must be evidence from which a jury may *infer* a lesser included, whether there must be *any evidence* of involuntary or evidence the killing was *unintentional*, Mr. Beaty presented evidence to satisfy any of these standards of review this Court has used in the past.

As this Court said in this case, the "seek the truth charge," "may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. In this case, where Mr. Beaty never denied causing the death of Ms. Asbill, the only "justice" the jury could do is to convict Mr. Beaty of murder as that was the only choice they had other than setting him free. By depriving Mr. Beaty of the jury electing to convict him of

involuntary manslaughter, "the jury's perception of justice" insured a conviction of murder. The failure to charge the lesser included deprived Mr. Beaty of due process as guaranteed by the Fourteenth Amendment to the United State's Constitution and Article I, Section 3 of the South Carolina Constitution.

In the alternative, this Court might have affirmed the denial of the request to charge involuntary manslaughter based upon a change in the standard of review of lesser included offenses. In *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001), this Court applied a two-part test for determining whether an offense is a lesser included offense. Initially, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." *Id.* at 606, 552 S.E.2d at 728. *See*, Chris Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445 (1984). In *Elliott*, this Court, nevertheless, adhered to precedent recognizing that assault and battery of a high and aggravated nature is a lesser included offense of attempted criminal sexual conduct, even though the same elements test was not satisfied. After recognizing "the existence of a few anomalies," this Court concluded, "We will continue to consider offenses on a case-by-case basis, beginning with the elements test." *Elliott*, at 608, 552 S.E.2d at 730. If this Court applied the same elements test in this case, then the lesser include charge of involuntary manslaughter could not have been given. The reason is that involuntary manslaughter includes an element of recklessness that is not included in the charge of murder.

If this Court applied the standard of review used in *Elliott*, then the decision in this case would violate the *ex post facto* and due process clauses of the United States and

South Carolina Constitutions. By adopting such a standard of review, this Court would have adopted a rule not previously applied to a case of involuntary manslaughter being a lesser included offense of murder. While this Court could adopt such a rule, it could only have prospective application. *Bouie v. City of Columbia,* 378 U.S. 347 (1967).

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

B. This Court failed to consider that the theory used by the State to argue the basis for the conviction of Michael Beaty are speculation and is contrary to the undisputed facts in this case.

The State's theory of murder is based upon circumstantial evidence. As such, in reviewing the evidence this Court should be guided by the words of the United States Supreme Court in *United States v. Holland,* 348 U.S. 121, 135 (1955). "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." Here, the circumstances are hardly conclusive. No reasonable juror could conclude that other reasonable hypotheses have been excluded. The theory of the State, and the only theory, is that Michael Beaty wrapped a USB cord around the neck of Emily Anna Asbill and strangled her to death. If this theory is not correct, the State has no secondary theory to support the conviction. This Court failed to consider that when the undisputed evidence in this case is that the ligature mark did not go completely around the neck of Ms. Asbill, then the theory of the State is simply not proven. Dr. Ross agreed that if the mark did not completely around the neck, then she was being pulled from behind. Rec. on App. at 526, ll 19-25. Neither the facts nor the testimony of the State's own expert supports the position of the State.

The Seventh Circuit has said, "Where a witness' testimony is such that reasonable men could not have believed the testimony, however, then exceptional circumstances are present and the district court may take the testimony away from the jury. The exception is an extremely narrow one, however, and can be invoked only where the testimony contradicts indisputable physical facts or laws." *United States v. Kuzniar*, 881 F.2d 466, 470–71 (7th Cir. 1989) (internal citations omitted). The same principle should be applied when this Court reviews the State's theory in a circumstantial evidence case. Here, this Court failed to consider the fact that the State's theory is not just inconsistent with the physical facts established by the State, but the facts established by the State make the theory impossible.

And the State fairs no better when it contends that the USB cord was used to strangle Ms. Asbill. As noted in the Brief of Appellat, at p. 18, the expert for the State testified the DNA on the cord was more consistent with a mere touching and not the grabbing required to strangle someone. As the physical facts and expert testimony for the State do not support the only theory of the State, this Court erred in not holding the facts were insufficient to convict.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

C. Cumulative Error Doctrine.

The cumulative error doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

And see State v. Blurton, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of Solicitor's improper argument and improperly excluded evidence warranted reversal).

This Court's opinion demonstrates cumulative error. Regarding the trial judge's unconstitutional opening remarks, this Court held, "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. As pointed out in Section I(A) *supra*, the Solicitor exploited the trial judge's opening remarks during his closing arguments. Then, in his final rebuttal argument, the Solicitor for the first time argued facts outside the record and advanced a theory about the circumstances surrounding the alleged crime, thereby increasing the chances that the jurors would render a verdict they believed best served their perception of justice. This danger was enhanced by the Solicitor's appeal to the jurors to seek justice for decedent and her family. Rec. on App. 85, l 15 – 86, l 14; 824, l 16 –825, l 6.

Additionally, once this Court reconsiders the trial court's error in not instructing the jurors the lesser-included offense of involuntary manslaughter, an additional reason to apply the cumulative error doctrine becomes apparent. The Solicitor framed the trial as a choice between two competing hypothesizes, but the trial judge did not provided the jurors with the option of finding Mr. Beaty guilty of involuntary manslaughter. As discussed in Section II(A) *supra*, once the jurors concluded that Mr. Beaty was responsible for his girlfriend's death, they could find him guilty of murder as the verdict

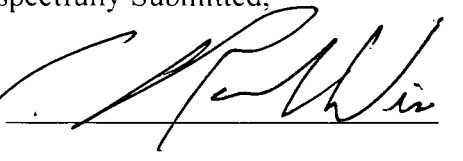
they believed best served their perception of justice, rather than holding the State to its burden of proof. Once the failure to instruct involuntary manslaughter is considered in connection with the trial judge's opening remarks and the Solicitor's closing arguments, the need to reverse is apparent.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

III. CONCLUSION.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

Respectfully Submitted,

By 

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