

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2013-GS-26-05243
Appellate Case No. 2016-001385

RECEIVED

JUN 20 2017

SC Court of Appeals

State of South Carolina Respondent,

v.

Heather Elizabeth Sims Appellant.

INITIAL REPLY BRIEF

L. Morgan Martin # 3667
LAW OFFICES OF L. MORGAN MARTIN
1121 Third Ave.
Conway, SC 29526
(843) 248-3177
(843) 248-2842 (facsimile)
mmartin@lmorganmartin.com

B. Alex Hyman # 75416
THE HYMAN LAW GROUP
1208 Third Ave.
Conway, SC 29526
(843) 248-2024
(843) 248-3230 (facsimile)
alex@thehymanlawgroup.com

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Arguments	1
A. The State’s new factual theories do not support the trial court’s decision to charge voluntary manslaughter	2
B. The State relies on precedents that are meaningfully distinguishable. Neither <i>State v. Lowry</i> nor <i>State v. Knoten</i> are informative	4
C. Presenting alternative arguments to the jury is easy and demonstrates the respect the trial court, the jury, and the opposing party deserve	6
D. There can be no retrial on involuntary manslaughter. The jury entered a verdict of acquittal and there is no evidence Heather shot involuntarily	8
Conclusion	8

TABLE OF AUTHORITIES

Cook v. State,
415 S.C. 551, 784 S.E.2d 665 (2015) 3, 7

State v. Brayboy,
387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) 3

State v. Cooley,
342 S.C. 63, 536 S.E.2d 666 (2000) 8

State v. Dickey,
394 S.C. 491, 716 S.E.2d 97 (2011) 6

State v. Douglas,
411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) 8

State v. Durden,
264 S.C. 86, 212 S.E.2d 587 (1975) 7

State v. Jones,
416 S.C. 283, 786 S.E.2d 132 (2016) 8, 9

State v. Knoten,
347 S.C. 296, 555 S.E.2d 391 (2001) 1, 4, 5, 6

State v. Lowry,
315 S.C. 396, 434 S.E.2d 272 (1993) 1, 4, 5

State v. Morris,
307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991) 7, 8

State v. Niles,
412 S.C. 515, 772 S.E.2d 877 (2015) 3

State v. Starnes,
388 S.C. 590, 698 S.E.2d 604 (2010) 2, 6, 7

Other Jurisdictions

United States v. Scott,
437 U.S. 82 (1978) 8

ARGUMENT

The State offers three factual hypotheses in support of voluntary manslaughter. These were not argued below and they bear no resemblance to anything the State offered at trial. They are also not instructive. They are either (a) not supported by evidence or (b) do not actually support voluntary manslaughter.

Similarly, the precedents the State uses to support its argument are meaningfully distinguishable. *State v. Lowry* and *State v. Knoten* contain evidence of both legal provocation and heat of passion. Here, the record does not contain any evidence Heather lost control of her actions. She knew what she was doing. Once the jury rejected the State's claim of murder, the only lawful verdict was self-defense.

Heather respectfully disagrees with the State's suggestion that it is impractical for parties to make alternative arguments to the jury. Presenting alternative arguments is easy and demonstrates the respect the jury and the opposing party deserve. And though the decision is certainly the Court's decision to make, Heather believes it is deeply troubling for a prosecutor's office to pick a theory of the case and argue it relentlessly, only to turn around after the jury reaches a compromise verdict and argue against the prosecution's own prior contentions. That conversion of convenience raises doubts about a party's motivation. It looks like the goal is to "win" a conviction—*any* conviction—not see justice done.

Finally, there can be no retrial. Murder is off the table due to acquittal. Involuntary manslaughter is off the table because—as with murder—the jury expressly entered a verdict of acquittal. There is also no evidence Heather shot involuntarily.

This Court should reverse.

A. The State's new factual theories do not support the trial court's decision to charge voluntary manslaughter.

The State's first theory is that Heather and David's marriage was deteriorating. This is true. The State then posits David started a final argument escalating into a physical altercation during which Heather feared for her well-being. This is also true. The State then claims—without citation to evidence—that Heather shot David out of fear, anger, or some combination thereof, and that this supports manslaughter. (Resp. Br. p.14).

There is no testimony Heather shot her husband because she was mad. The following reflects an attempt to capture the pertinent dialogue from the trial. (Tr.v.2p.241, line 24 - p.242, line 6; v.3p.354, line 6 - p.356, line 5; v.3p.381, line 9 - p.384, line 12; v.5p.99, line 11 - p.101, line 6; v.5p.102, line 25 - p.103, line 11; v.5p.151, lines 11-17; p.422, lines 6-18). *David* was mad. (Tr.v.5p.100, lines 2-16). Heather was scared. *Id.*

The State also never articulates why a killing in these circumstances would have any criminal liability at all. Fear must cause the defendant to lose control and succumb to an irresistible impulse to do violence. *State v. Starnes*, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010). Fear alone is not enough. People who shoot in self-defense are afraid. Anyone would be afraid while being physically attacked by his or her spouse.

Theory #2 is that David and Heather were wrestling for control of Heather's phone and that David was not attempting to seriously injure Heather. Then, David disengaged from the struggle and lunged at Heather in self-defense, after she drew the gun. (Resp. Br. p.15).

This theory has no support in the record. The State cites Allyson Brown's testimony but fails to mention Brown essentially corroborated Heather's story, which was that David

lunged at Heather exclaiming “I’m going to knock your [expletive] teeth down your [expletive] throat, you [expletive] whore” as Heather was backing *away* from him. (Tr.v.3p.355, line 9 - p.356, line 3; p.381, line 9 - p.384, p.11). That does not sound like David was acting in self-defense. Heather’s backing away does not look like heat of passion.

Theory #3 is that David stabbed Heather but no longer had the knife when Heather shot him. (Resp. Br. p. 15). There is no citation to evidence supporting this hypothesis; just a statement that the jury might have found this based on “evidence including [Heather’s] conflicting statements.” *Id.*

If the threat had subsided, where is the legal provocation for the killing? A killing in those circumstances would be murder, not something less. That was the position the State took in *State v. Brayboy*, a case testing the propriety of an involuntary manslaughter charge. 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). Also, where is the evidence of heat of passion? Heather shot one time, belying any contention she was out of control given the Supreme Court’s prior observation that shooting twice is not evidence the defendant could not control his actions. See *Cook v. State*, 415 S.C. 551, 558, 784 S.E.2d 665, 668 (2015) (describing *State v. Niles*, 412 S.C. 515, 519, 772 S.E.2d 877, 879 (2015)). Heather also said her decision to shoot was a “reaction” because she was afraid. (Tr.v.5p.100, line 24 - p.101, line 6). The Supreme Court has already held similar testimony did not support manslaughter. *Cook*, 415 S.C. at 558, 784 S.E.2d at 668 (“before I knew it, I fired a shot” does not show lack of self-control). Each of the State’s scenarios has legal and evidentiary problems.

These arguments bear no resemblance to the State’s contentions at trial, and some of what happened at trial was unsettling. The State said next to nothing about voluntary

manslaughter, summarily contending supporting facts were “in the record” when challenged to validate the charge immediately following its closing argument, which never mentioned manslaughter. (Tr.v.5p.351, lines 12-16). At the post-trial hearing, the State argued voluntary manslaughter would be appropriate when a wife responds with deadly force after her husband reaches out to physically harm her. That hits a disturbing note for domestic violence victims, who apparently must suffer abuse or face the prospect of criminal liability for protecting themselves. It seems self-defense would be a no-brainer there.

The trial court believed voluntary manslaughter was appropriate because Heather testified “she pulled the weapon up and it just kind of went off.” (Tr.v.5p.262, lines 10-12). The record does not support this—Heather said she shot David when he lunged at her because she was scared. (Tr.v.5pp.100-101). The trial court’s reasoning did not accurately summarize Heather’s testimony. Respectfully, the record contains no sensible explanation for why this charge was given and no sensible explanation is conceivable.

B. The State relies on precedents that are meaningfully distinguishable. Neither *State v. Lowry* nor *State v. Knoten* are informative.

The State believes this case is like *State v. Lowry*, which the State characterizes as a heated argument that grew into a dangerous physical altercation. (Resp. Br. p.14).

Heather’s case and *Lowry* are similar only in that both cases involve confrontations where someone ended up dead. There was evidence in *Lowry* that the defendant actively pursued the decedent: The decedent was the initial aggressor, approaching the defendant in a grocery store parking lot and berating him, but the defendant then loaded a firearm, shot it into the air, and followed the decedent into the grocery store before shooting the decedent.

315 S.C. 396, 398, 434 S.E.2d 272, 273 (1993). The defendant was entitled to a voluntary manslaughter charge because there was evidence of a heated encounter, an imminent physical assault, and because there was evidence the defendant had criminal fault. There was no reason for the defendant to follow the decedent into the grocery store after their parking lot encounter was over. *Lowry* was a case of imperfect self-defense—a case where the defendant was acting in self-defense but was not himself free from blame.

Here there is no evidence of a prior conflict or that Heather was ever the aggressor. The only evidence is that Heather spent the day avoiding confrontation—from the time she and David were preparing to leave the house for lunch until the time David walked into the bathroom where he died. (Tr.v.5p.87, line 7 - p.99, line 10). There is also no evidence David disengaged from their confrontation or that Heather followed David and shot him because she was blinded by rage. The defendant in *Lowry* shot the victim, then cursed at the victim, and then shot the victim *again*, this time in the head. 315 S.C. at 398, 434 S.E.2d at 273. Heather shot her husband once, called for help, and began CPR. (Tr.v.5p.101, line 7 - p.102, line 24). *Lowry* has evidence of heat of passion. Heather's record does not.

The State also says Heather's case is similar to *State v. Knoten*, which the State reads as establishing an unprovoked knife attack constitutes legal provocation.

The defendant in *Knoten* gave multiple statements to police including one in which he admitted raping and then killing the victim after she assaulted him with a knife. 347 S.C. 296, 301, 555 S.E.2d 391, 393-394 (2001). The defendant recanted this statement later. He was entitled to a voluntary manslaughter charge based on a different statement claiming the victim attacked him with a knife following consensual intercourse and chased him out of the

house. The defendant, who said he was chased outside in the nude, retrieved a steel bar from his car to protect himself and re-entered the house, where he killed the victim when she attacked him with the knife again. 347 S.C. at 303-304, 555 S.E.2d at 395.

Assume for the purpose of argument that David's unprovoked knife attack—like the wildly different knife attack in *Knoten*—counts as legal provocation. There must still be evidence of heat of passion: There must still be evidence, as the Supreme Court explained in *Starnes*, that Heather was out of control and under an irresistible impulse to do violence. 388 S.C. at 599, 698 S.E.2d at 609. There is no such evidence here. Heather said this encounter “happened so fast” and that she reactively shot *because* she was scared. (Tr.v.5p.101, lines 2-5, p.121, lines 14-16). Heather's circumstances are not like *Knoten*. They are more comparable to the circumstances that were present in *State v. Dickey*, where the defendant (a security guard at an apartment complex) admittedly acted out of fear, but in a controlled manner. 394 S.C. 491, 504, 716 S.E.2d 97, 103 (2011).

C. Presenting alternative arguments to the jury is easy and demonstrates the respect the trial court, the jury, and the opposing party deserve.

The State argues it would be impractical for a prosecutor to argue “if not murder then manslaughter.”

Prosecutors can handle alternative arguments easily. First, the prosecutor might summarize the State's theory that Heather's story about a fight in the bathroom is a fabrication. The prosecutor might then emphasize that the State's belief does not count but that the facts are for the jury to decide. Next, the prosecutor might explain the evidence the State believed showed heat of passion and legal provocation if the jury did not think the

State's primary theory was correct. Again, the prosecutor might emphasize that it is the jury's role to decide the genuine facts.

What the State calls "hedging" is actually being forthright with the trial court, the jury, and the defendant—articulating a lucid argument supporting a jury charge instead of taking a haphazard approach. A solicitor's duty is not to convict a defendant, but to see that justice is done. *State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975). It is difficult to see how the State's laissez faire approach to lesser-included offenses squares with the cautionary notes sounded in *Cook v. State*, 415 S.C. at 559, 784 S.E.2d at 669, and *State v. Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991).

The reason the State's theory of voluntary manslaughter does not work is because it was spackled together after-the-fact. The State spent the trial relentlessly arguing Heather Sims was a murdering liar. Now, it needs Heather and David's fight to have happened in order to meet manslaughter's legal provocation prong. But once the State buys the testimony about a fight, it cannot avoid the same witnesses' testimonies that Heather shot her husband as he was charging her and she was backing away. The State cannot piecemeal this evidence, buying some of a witness's testimony but not all of it.

At bottom, the State is attempting to do what the Supreme Court cautioned against in *Starnes*—to "impermissibly blend the elements of voluntary manslaughter and self-defense." 388 S.C. at 599, 698 S.E.2d at 609. Some defendants want this blend because voluntary manslaughter is a step down from being convicted of murder. Today the shoe is on the other foot. Regardless of who wants it, the mix is still sour. Voluntary manslaughter is not a lesser-included offense of self-defense. *Id.* at 599-600, 698 S.E.2d at 609.

D. There can be no retrial on involuntary manslaughter. The jury entered a verdict of acquittal and there is no evidence Heather shot involuntarily.

The jury wrote “not guilty” next to involuntary manslaughter. (Tr.v.5p.400, lines 2-4). The State does not identify any authority permitting a second prosecution on a charge the jury has already considered and rejected.

State v. Cooley did not involve such an acquittal and does not control. 342 S.C. 63, 65, 536 S.E.2d 666, 667 (2000). *Cooley* correctly reasons that the conviction of a lesser-included charge is an implicit acquittal of the greater charge. Here, the jury expressly acquitted on the greatest charge (murder) and the smallest charge (involuntary manslaughter). Double jeopardy protects against the State retrying a person who has been acquitted for the same offense. *United States v. Scott*, 437 U.S. 82, 87 (1978).

Moreover, this Court’s decision in *State v. Morris* holds that involuntary manslaughter requires an unintentional act. 307 S.C. at 483, 415 S.E.2d at 821. Heather’s testimony does not describe an unintentional act. The trial court said Heather testified “she pulled the weapon up and it just kind of went off,” (Tr.v.5p.262, lines 10-12), but the record does actually support this. Heather said she shot David when he lunged at her because she was scared. (Tr.v.5pp.100-101).

CONCLUSION


The standard of review forecloses an argument Heather would like to have made. People have been granted immunity from prosecution in circumstances that bear little resemblance to the extenuating circumstances of this case. See, e.g., *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). Heather’s case is not that different from *State v.*

Jones, in which a woman was granted immunity for killing her live-in boyfriend. 416 S.C. 283, 286, 786 S.E.2d 132, 134 (2016). Even though the State’s expert in Heather’s case was exposed as contradicting his own opinions and having no command of the salient facts, there is some evidence supporting the trial court’s decision to deny immunity. The “any evidence” standard made the immunity argument a non-starter.

Voluntary manslaughter requires heat of passion—a state of mind in which the killer succumbs to what precedent describes as an “irresistible urge to do violence.” Here, both parties—the State and the defendant—went out of their way to prove Heather Sims had complete control of her faculties. Both parties sought to *disprove* the idea that Heather was *not* in control of her actions. Heather claimed she shot her husband as he brandished a knife and lunged at her. The State said it never happened. The natural result of these positions is the very thing that commands reversal: There is no evidence of heat of passion. The record will not support affirmance. This Court should reverse.

June 20, 2017

Respectfully submitted,



Blake A. Hewitt

John S. Nichols

BLUESTEIN NICHOLS

THOMPSON & DELGADO

P.O. Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2013-GS-26-05243
Appellate Case No. 2016-001385

RECEIVED
JUN 20 2017
SC Court of Appeals

State of South Carolina, Respondent,

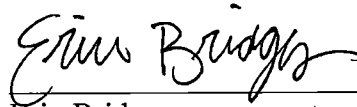
v.

Heather Elizabeth Sims, Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel with a copy of the *Initial Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

William F. Schumacher, IV
Alan M. Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211



Erin Bridges

June 20, 2017



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

June 20, 2017

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

JUN 20 2017

SC Court of Appeals

RE: State v. Heather Sims
Case Tracking No.: 2016-001385

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Reply Brief of in reference to this matter. I have also enclosed a Proof of Service upon counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Paralegal to Blake A. Hewitt

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO, LLC

/emb

Enclosures

cc: L. Morgan Martin, Esquire (by e-mail only)
B. Alexander Hyman, Esquire (by e-mail only)
William F. Schumacher, IV
Alan M. Wilson, Esquire
Jimmy A. Richardson, II