STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County

The Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

Respondent,

v.

GREGORY LAMONT BROOKS,

Appellant.

Appellate Case No. 2016-002301

INITIAL BRIEF OF RESPONDENT

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II. Did the trial judge err by excluding two photographs of a .22 caliber gun as irrelevant and confusing or misleading to the jury, because the photographs (1) were found by police on the phone of a patron of the bar, where the shooting occurred and who was present during the shooting, (2) showed a gun of the same caliber as the shell casings found at the scene, and (3) the owner of phone had been in communication with an official suspect in the shooting and the defense was presenting evidence of third party guilt?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. During a murder trial, does a jury charge inferring malice from the use of a weapon violate *State v. Belcher* when the trial court was incorrect in determining that the evidence presented could reduce the killing from murder to manslaughter?

II. Notwithstanding any error from the court's malice instruction, did the evidence presented at trial firmly establish Appellant's guilt?

III. Despite the fact that the defense was proceeding on a theory of third-party guilt, was the trial judge, nonetheless, correct in excluding two photographs of a .22 caliber gun because the evidence failed to meet the heightened standard required of evidence offered to show the crime was committed by another party?

STATEMENT OF THE CASE

Gregory Brooks ("Appellant") was indicted by the Lexington County grand jury on charges of possession of a weapon during a violent crime (2015-GS-32-1347) and murder (2015-GS-32-1349). (Tr. p. 4, ll. 5-9). At trial, Appellant was represented by Aimee Zmroczek, Esq. Assistant Solicitors Rhonda Patterson, Esq. and Lester "Gill" Bell, Esq. prosecuted the case on behalf of the Eleventh Circuit Solicitor's Office. Both charges were tried before the Honorable Eugene C. Griffith, October 31st – November 3rd, 2016. (Tr. p. 1). At the conclusion of the trial the jury found Appellant guilty of both possession of a weapon and murder. (Tr. p. 691, ll. 12-21). Following the conviction, Judge Griffith sentenced Appellant to a concurrent five (5) years for the possession of a weapon charge and thirty-five (35) years for murder. (Tr. p. 704, ll. 13-17). Appellant filed a timely Notice of Appeal. Susan Hackett Esq., with the Division of Appellate Defense, submitted Appellant's Initial Brief on October 23rd, 2017. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

During the early morning of February 2, 2014, Brandon Ratliff, along with his good friends Andre Bunch and Fred Moss, were having a guy's night out around the Richland and Lexington County areas. (Tr. p. 268, l. 20 – p. 269, l. 22; tr. p. 299, l. 23 – p. 300, l. 12). The three had initially started their night in the Vista area of Columbia, but decided to make one last stop at the Cockpit Bar and Grill in Lexington. (Tr. p. 269, l. 23 – p. 270, l. 21; tr. p. 300, ll. 11-14). Earlier that night, Eric Brown, Arnold Banks, and Appellant had also arrived at the Cockpit.[1] (Tr. p. 555, 1. 18 - p. 556, 1. 25; tr. p. 569, 11. 12-14; tr. p. 584, 11. 14-24). Shortly after Andre, Fred and Brandon arrived, Fred Moss began talking with a girl at the bar. Little did he know, this woman was an acquaintance of Appellant and his group, and the fact that Moss was speaking with her angered them. (Tr. p. 271, l. 6 – p. 272, l. 10; tr. p. 302, l. 15-18; tr. p. 307, l. 16 – p. 308, l. 6; tr. p. 502, l. 19 – p. 17, l. 17; tr. p. 587, l. 9 – p. 588, l. 2).

After being aggressively confronted by Appellant and his friends, Brandon, Andre, and Fred decided to leave the Cockpit Bar and Grill. (Tr. p. 273, l. 14 – p. 274, l. 24; tr. p. 309, l. 8 – p. 310, l. 5). However, as Brandon, Fred, and Andre left the bar and proceeded to their car, Appellant and his friends followed. (Tr. p. 272, l. 11 – p. 273, l. 3; tr. p. 309, l. 16 – p. 310, l. 15; tr. p. 587, l. 11 – p. 588, l. 7). The altercation between the two parties escalated in the parking lot. (Tr. p. 273, l. 14 – p. 274, l. 17; tr. p. 310, ll. 9-16; tr. p. 505, l. 13 – p. 506, l. 2). At this point, Andre, who had driven separate from Brandon and Fred, parted from the group and went directly to his car that was parked a short distance away. (Tr. p. 270, l. 18 – p. 271, l. 5; tr. p. 274, l. 18 – p. 275, l. 2). Brandon and Fred attempted to leave in Fred's nearby car. (Tr. p. 310, l. 16 – p. 311, l. 4). Brandon had the keys to Fred's car and was able to unlock the driver's side door. Fred, however, was unable to open the locked passenger door and was stuck outside. (Tr. p.

[1] Appellant is referred to by the street name "Dink" throughout the trial transcript.

310, l. 8 – p. 311, l. 4). Fred believed that he was about to be assaulted by Appellant and his group. (Tr. p. 311, ll. 10-16). In a moment of fear he adjusted his belt in an attempt to trick the group into thinking he was armed. (Tr. p. 341, l. 15 – p. 342, l. 1). Fred testified that, from where Appellant and his acquaintance were standing, they did not see his attempt. (Tr. p. 341, ll. 19-25). He did not, in fact, have a firearm. (Tr. p. 312, ll. 17-22). However, when Fred turned away from the car toward Appellant and his friend, he discovered that they did have firearms and were brandishing them. (Tr. p. 311, ll. 10-22; p. 341, l. 19 – p. 342, l. 1). Fred immediately raised his hands in a passive manner to indicate that he was unarmed. (Tr. p. 312, 19-22; tr. p. 341, l. 15 – p. 342, l. 1). Appellant and his friend continued to threaten Fred as he stood outside the car. (Tr. p. 311, l. 9 – p. 312, l. 22; p. 341, l. 19 – p. 342, l. 1). Then, despite Fred's passivity, Appellant unleashed a hail of gun fire at the car. (Tr. p. 312, l. 24 – p. 313, l. 6; Tr. p. 506, ll. 4-11). Fred was able to take cover and avoid being shot. (Tr. p. 313, ll. 5-6; tr. p. 314, ll. 13-15). Brandon, however, was hit in the torso by a bullet. Brandon got out of the car and stumbled a short distance into the road where he collapsed. Appellant and his group quickly fled the scene. (Tr. p. 315, l. 22 – p. 316, l. 19; tr. p. 317, ll. 8-16). Fred quickly found his wounded friend and began crying for help. (Tr. p. 317, l. 20 – p. 318, l. 3). Andre, who had heard the gun fire a short distance away, drove his car toward the sound to find his friends. (Tr. p. 274, l. 25 – 275, l. 12). He found Brandon collapsed on the road with Fred by his side. (Tr. p. 275, l. 12 – p. 277, l. 2). Andre and Fred loaded Brandon into Andre's car and sped to Lexington Medical. (Tr. p. 277, ll. 19-21; tr. p. 318, ll. 5-7). However, Appellant's bullet had nicked Brandon's heart and he quickly bled out during the drive. (Tr. p. 279, ll. 12-20; tr. p. 357, ll. 11-19).

Throughout the investigation, several witnesses were able to identify Appellant as the person who fired into the car, killing Brandon Ratliffe. Fred Moss was able to pick out Appellant

from a photo line-up. (Tr. p. 323, l. 14 – p. 327, l. 5; tr. p. 470, l. 6 – p. 472, l. 9). In addition, Rickena Knighter, who knew Appellant and his friends and was present during the shooting, testified that she witnessed Appellant firing into the car. (Tr. p. 501, l. 22 – p. 502, l. 10; tr. p. 506, ll. 4-11; tr. p. 511, l. 10 – p. 513, l. 9). Ms. Knighter had called to 911 shortly after the shooting. (Tr. p. 508, ll. 7-23). She originally gave them a false name because she was scared and did not want to be further involved. (Tr. p. 508, l. 24 – p. 509, l. 90). However, she eventually met with investigators and provided her true name. (Tr. p. 391, l. 9 – p. 393, l. 21; tr. p. 519, l. 24 – p. 520, l. 16). Law Enforcement also received anonymous phone calls implicating Appellant as the shooter. (Tr. p. 483, ll. 17-19).

At trial Andre Bunch testified that he owned a handgun and that he had provided it to investigators when they arrived to the hospital after Brandon's death. (Tr. p. 271, 11. 2-5; tr. p. 278, 11. 16-21; tr. p. 284, 11. 1 1-22; tr. p. 257, 11. 15-17; tr. p. 258, 11. 2-6; tr. p. 259, 11. 12-14; tr. 370, 11. 14-20). Fred Moss also testified that Brandon owned a handgun which he had placed in Fred's car for safekeeping prior to their night out. (Tr. p. 339, 11. 2-8). A Crime scene investigator performed a Gunshot Residue Test (GSR) on Andre, Fred, and Brandon's body soon after their arrival at the hospital. The results came back negative for all three men. (Tr. p. 365, l. 22 – 368, l. 25; tr. p. 369, 11. 10-23; p. 385, ll. 9-16).

SUMMARY OF THE ARGUMENT

Because the trial court was incorrect in determining that the evidence presented could reduce the killing from murder to manslaughter, the jury charge inferring malice from the use of a weapon did not violate *State v. Belcher*. Furthermore, despite any error, the evidence presented was sufficient to prove that Appellant was guilty of murder. Lastly, the trial judge was correct in excluding two photographs of a .22 caliber gun found on a witness's cellphone because they failed to meet the heightened standard required under *State v. Gregory* for evidence presented for the purpose of proving third party guilty.

ARGUMENT

I. Issue I.

a. How The Issue Arose At Trial

During the Defense's case, Appellant presented testimony from Eric Brown who claimed that he pick up Appellant in his car as the shooting was taking place and that Appellant was unarmed. (Tr. p. 559, l. 2 – p. 562, l. 17). At the close of the Defense's case, Defense Counsel requested that the Court instruct the jury on third party guilt. (Tr. p. 626, l. 14-23). The State disagreed, positing that the defense had not presented sufficient evidence for such an instruction. (Tr. p. 627, l. 6 - p. 628, l. 7). The Court agreed with the State that the defense had failed to produce enough evidence to get beyond a mere suspicion that another party was the shooter. (Tr. p. 628, ll. 8-12). Thereafter, the Court asked the State how it felt about instructing the jury on a lesser included charge. (Tr. p. 628, ll. 14-16). The State agreed to allow a lesser included charge of voluntary manslaughter, however, the Solicitors presented concern that this would conflict with the South Carolina case of *State v. Childers* which held that South Carolina does not recognize sufficient legal provocation from a third party. (Tr. p. 628, ll. 17-23; tr. p. 629, ll. 15-16); *see also State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007). After consideration from both sides, the Court agreed to charge the jury with voluntary manslaughter. (Tr. p. 630, ll. 15-16).

During closing argument, the State presented to the jury that "[m]alice can be expressed. Somebody can verbalize their malicious intent or it can be implied. It can be implied by the use of a deadly weapon. It can also be implied by shooting that deadly weapon into somebody." (Tr. p. 649, ll. 20-24). Defense then requested a sidebar. (Tr. p. 649, l. 25). After the State's closing and away from the jury, the Court indicated to Defense Counsel that it had reread *State v.*

Belcher and understood it to apply only to self-defense. (Tr. p. 662, l. 25 – p. 663, l. 7); *see also State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). In light of its determination, the Court provided the following instructions to the jury regarding murder:

> Malice also may be inferred from conduct showing a total disregard of human life. Inferred malice may also rise when a deed is done by use of a deadly weapon. I defined for you a deadly weapon is any article or instrument which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case. I tell you a gun or a knife or a weapon such as that is an example of a deadly weapon.

(Tr. p. 673, l. 20 – p. 674, l. 3).

Thereafter the court provided a jury instruction for voluntary manslaughter. (Tr. p. 674, l. 4 – p. 676, l. 2). Defense Counsel then took the opportunity to renew its objection in regards to *Belcher*. (Tr. p. 681, ll. 21-22).

b. Because Appellant was not entitled to the voluntary manslaughter charge, the inferred malice instruction did not violate the holding in *State v. Belcher*.

Standard of Review

"Appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the trial court abused its discretion." *State v. Miller*, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." *State v. Garris*, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011). This Court "must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 577 S.E.2d 460, 463 (Ct. App. 2003). "If as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994)).

Argument

The implied malice instruction did not violate the Court's holding in *State v. Belcher* because there was no evidence presented that would reduce, mitigate, excuse or justify the killing of Brandon Ratliffe. *See State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Brown*, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). "A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). "In determining whether the evidence requires a charge of voluntary manslaughter, the trial court views the facts in a light most favorable to the defendant." *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) (citing *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)). However, "[a]n instruction should not be given unless justified by the evidence." *State v. Moultrie*, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979).

"To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion." *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)). "Sufficient legal provocation must include more than "mere words" or a display of a willingness to fight without an overt, threatening act." *Id.* (quoting *State v. Rogers*, 320 S.C. 520, 525, 466 S.E.2d 360, 362-63 (1996)). "Neither the exercise of a legal right nor a victim's attempts to resist or defend himself from crime constitute sufficient legal provocation." *Id.* (citing *State v. Ivey*, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997); *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)). It was improper to permit Appellant a charge on voluntary manslaughter because

nothing in the evidence shows that the victim, Brandon Ratliffe, provoked Appellant into discharging his firearm.

At trial Defense Counsel did not illicit any evidence, at any time, that the victim, Brandon Ratliffe, provoked Appellant into firing the weapon.[2] The Defense did illicit testimony that Brandon owned a firearm that he had placed in Fred Moss's car the evening of the murder and that only the empty holster was found by law enforcement. Nevertheless, both the direct testimony from Fred Moss and Rickena Knighter failed to make any mention that Brandon did anything to provoke the shooting.

Testimony at trial did indicate that while outside Fred pretended to be armed in an attempt to thwart being violently assaulted by Appellant and his friends. However, while "[a]n overt, threatening act or a physical encounter may constitute sufficient legal provocation" (*State v. Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct.App.2010)), a "[s]ufficient provocation necessary to justify a voluntary manslaughter charge must come from the victim and not be transferred from a third-party to the victim." *State v. Locklair*, 341 S.C. 352, 362-63, 535 S.E.2d 420, 425 (2000).

In *State v. Childers,* the appellant was on trial for the murder of his former girlfriend. At trial he claimed the victim's former brother-in-law shot at him first. He then returned fire, and in doing so, he shot the victim. Appellant also testified he did not visit the victim that night with the intention of shooting anyone, but he fired because he was fired upon. *State v. Childers*, 373 S.C. 367, 370–71, 645 S.E.2d 233, 235 (2007). Appellant claimed that the trial court erred in denying

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[2]*See State v. Key*, 256 S.C. 90, 97, 180 S.E.2d 888, 891 (1971) ("It is academic that failure of the defendants to testify created no inference of guilt against them. They did not have the burden of proving anything. However, undisputed testimony is more conclusive than testimony which is in dispute, and it is less difficult for this court to reason that guilt is conclusively proven when there is no denial, than when an accused person disputes the truthfulness of the State's evidence.")

him a jury charge on voluntary manslaughter. The Supreme Court of South Carolina upheld the trial court's decision. The Court concluded:

> Viewing the evidence in the light most favorable to Childers, this factual scenario is completely void of any evidence supporting a charge of voluntary manslaughter. Childers testified he was provoked by the victim's former brother in-law and he fired his gun in response to being first shot at by the ex-brother-in law. Childers' testimony does not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation by the victim because, contrary to the Court of Appeals' decision, the overt act that produces the sudden heat of passion must be made by the victim.

Id. at 373–74, 645 S.E.2d at 236 (citing to *State v. Locklair*, 341 S.C. 352, 363, 535 S.E.2d 420, 425 (2000) (the defendant was not entitled to a voluntary manslaughter charge because the "overt act was made by a third party, not the deceased, and South Carolina has not recognize sufficient legal provocation from a third party that can be transferred to the victim."); *State v. Tucker*, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) ("The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation.").

In *State v. Wharton*, the Court again addressed the issue of transferred intent in regards to voluntary manslaughter. The Court expressly found that the record was devoid of legal provocation, but nonetheless concluded ". . . *Childers* was not a majority opinion, and the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina."

However, *Wharton* is irreconcilable with *State v. Locklair* and *State v. Tucker*. In both, all five Justices concurred in the opinion.[3] In *Locklair*, Appellant argued that the jury could find

[3] *State v. Locklair*, 341 S.C. 352, 363, 535 S.E.2d 420, 425 (2000) (Per Curium by Chief Justice Toal with Justices Moore, Waller, Burnett and Pleicones concurring); *State v. Tucker*, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) (Per Curium by Justice Waller with Justices Toal, Moore Burnett, and Beatty concurring).

voluntary manslaughter because the victim's mother threw a cigarette case at Locklair prior to the shooting. *Locklair*, at 362, 535 S.E.2d at 425. There the Court, quoting from *State v. Tucker*, concluded that "[p]rovocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." *Id.* (quoting *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)). Despite *Wharton*, the weight of Supreme Court precedence would hold that, even if Appellant was reacting to Fred's gestures when he fired, this could not constitute sufficient provocation to justify a charge of voluntary manslaughter.

Nevertheless, despite third party provocation, the evidence presented at trial fails to show the element necessary for voluntary manslaughter. In *State v. Starnes* the Supreme Court held:

> We have consistently held that both heat of passion and sufficient legal provocation must be present at the time of the killing. [*State v. Wharton*, 381 S.C. 209, 215, 672 S.E.2d 786, 788 (2009)]. A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion. *See id.* (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. *See State v. Pittman*, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

State v. Starnes, 388 S.C. 590, 596–97, 698 S.E.2d 604, 608 (2010)

Fred Moss testified that he had his hands raised in a non-threatening manner in the moment preceding the shooting. *See* tr. p. 312, 19-22; tr. p. 341, l. 15 – p. 342, l. 1. In addition, Rickena Knighter testified that Appellant took a moment to tell her to take cover prior to opening fire. *See* tr. p. 506, ll. 4-8. "[E]ven when a person's passion is sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have

cooled, the killing would be murder and not manslaughter. Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved." *Hernandez, at 660, 690 S.E.2d at 585* (internal citations omitted).

Even if Fred's actions are considered, the evidence would indicate that sufficient provocation did not exist. Alternatively, the fact that Appellant had the wherewithal to warn others to take cover shows that he was no longer in the heat of passion. Given the totality of the evidence presented at trial, the voluntary manslaughter charge given was incorrect, making the malice portion of the charge proper under the circumstances.[4]

c. Harmless Error—Notwithstanding Any Error From The Malice Instruction, The Only Conclusion Established From The Evidence Presented At Trial Was That Appellant Was Guilty Of Murder.

Standard of Review

"Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. The Court should uphold a conviction if it determines, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). "Whether or not the [implied malice charge] was harmless is a fact-intensive inquiry" as to whether the charge contributed to the guilty verdict rendered. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Where there is no indication that the jury based its verdict on an improper malice portion of the charge, any error in that instruction is harmless. *See State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013).

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[4] " '[T]his court[ ] may affirm a trial [court's] decision on any ground appearing in the record and, hence, may affirm the trial [court's] correct result even though [it] may have erred on some other ground.' *Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987). The reasoning adopted by the trial court is not binding upon this court if the record discloses a correct result. *Id.*; see also Rule 220(c), SCACR" *Fay v. Grand Strand Reg'l Med. Ctr., LLC*, 412 S.C. 185, 195, 771 S.E.2d 639, 645 (Ct. App. 2015).

Argument

In *Belcher* the Court held that "[i]n many murder prosecutions . . . there will be overwhelming evidence of malice apart from the use of a deadly weapon." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). In *State v. Stanko*, the South Carolina Supreme Court dealt with the exact issue as to whether a malice instruction, found to be impermissibly burden shifting, could nonetheless be found harmless. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). There the Supreme Court acknowledged that the trial court erred in giving a malice instruction when evidence was presented that could mitigate, excuse, or justify the homicide. *Id.* at 263-64, 741 S.E.2d at 714. However, the Court reaffirmed "[e]rrors, including erroneous jury instructions, are subject to a harmless error analysis." *Id.* at 264, 741 S.E.2d at 714 (citing *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. It held "[j]ury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* (citing *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). After an evaluation of all of the evidence presented on malice and an evaluation of the jury charge, the *Stanko* Court found that the jury did not rest its verdict on a presumption of malice from the use of a deadly weapon. *Id.* at 265, 741 S.E.2d at 714-15.

This is exactly what occurred in Appellant's case. The State presented numerous examples of malice for the jury to base its determination. For example, after the aggressive encounter with Appellant and his friends inside the Cockpit Bar and Grill, Brandon, Andre, and Fred sought to avoid violence by leaving. However, despite leaving the bar and proceeding to their cars, Appellant and his friends continued to stalk the group of friends into the parking lot. Moreover, the evidence shows that Appellant and his friend brandished their firearms, threatening Brandon and Fred. (Tr. p. 311, ll. 17-22; tr. p. 312, ll. 17-22). Fred also testified that he raised his hands in

a nonthreatening manner after seeing Appellant with the firearm. Despite this, Appellant discharged a hail of gunfire at the two friends. (Tr. p. 312, l. 23 – 313, l. 6).

Moreover, in the judge's malice instruction, Judge Griffith made sure to use the word *may* instead of *must*: "Inferred malice *may* also rise when a deed is done by use of a deadly weapon." Tr. p. 673, ll. 21-22 (emphasis added). He also instructed the jury:

> Now as the sole fact finders . . . you must consider the evidence. . . You should weigh all of the evidence whether direct or circumstantial that's been presented to you using your good judgement and common sense and after weighing all of the evidence, if you are not convinced of the guilt of the defendant, Mr. Brooks, beyond a reasonable doubt, then you must find him not guilty.

(Tr. p. 669, l. 15 – p. 670, l. 24).

A reasonable juror would have considered the totality of Judge Griffith's jury instruction and would not have felt constrained to a finding of murder based solely off the malice portion. *See Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987) ("rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant"). The jury reached its conclusion because the evidence adduced demonstrated, notwithstanding any error from the malice instruction, that Appellant *was* guilty of murder.

IV. Issue II.

a. How The Issue Arose At Trial

Defense Counsel sought to introduce two images of a .22 cal. handgun collected off a cellphone by investigators shortly after the murder. (Tr. p. 540, l. 13-19). The cellphone belonged to Josie Paxton who was a patron at the Cockpit Bar and Grill on the night of the

murder. (Tr. p. 613, ll. 6-14). Paxton was the former girlfriend of Antonio Williams. (Tr. p. 399, l. 11 – p. 400, l. 4; tr. p. 545, l. 17 – p. 546, l. 1). The alleged relevance to the two images was a connected text message that Williams had sent to Paxton in which he stated "my home dog just shot my other home dog." (Tr. p. 547, ll. 15-23). Despite testifying that she did not see the shooting take place, Paxton informed law enforcement, based off the text message, that Williams may have information regarding the shooting. (Tr. p. 399, l. 11 – p. 400, l. 4; tr. p. 617, ll. 9-24; tr. p. 619, ll. 22 – p. 620, l. 12). Law enforcement eventually met with Williams and quickly dismissed him as a suspect. (Tr. p. 400, ll. 5-21). Defense Counsel sought to introduce the photo for the purpose of proving third party guilt. (Tr. p. 538, l. 25 – p. 540, l. 1; tr. p. 546, ll. 2-3).[5] The Court denied Defense Counsel's request to present the pictures. In reaching this conclusion the Court stated:

> Absolutely not. That's just a picture on someone's cell phone of a gun that -- I don't know, you've got a picture and suspicion and five steps away from an actual -- I mean, I don't understand how that's not confusing to the jury, a picture on a cell phone of a gun and we don't have a gun here. There's a .22 caliber. There's testimony the gun that was fired was a .22 caliber because the shell casings were there and there's a .22 recovered from the victim. Aside from that that's about all we got.

(Tr. p. 546, l. 14-23).

b. The Trial Judge Was Correct In Excluding The Photographs Of The .22 Cal. Firearms Because They Failed To Meet The Heightened Standard Required Of Evidence Offered To Show The Crime Was Committed By Another Party.

[5] In light of the Defense's attempts to incriminate Antonio Williams, the State presented several witnesses who testified that Williams could not be mistaken for Appellant in light of the fact that Williams was much larger than Appellant and had a distinctive tattoo of an "L" on his forehead. (Tr. p. 400, ll. 15-19; tr. p. 621, l. 4-12).

Standard of Review

"The admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." *State v. Garris*, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

Argument

Appellant asserts that the trial court erred in denying the admission of the photographs. However, "the right to present a defense is not unlimited, 'but must bow to accommodate other legitimate interests in the criminal trial process.' The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *State v. Lyles*, 379 S.C. 328, 342–43, 665 S.E.2d 201, 209 (Ct. App. 2008) (internal citations omitted).

In *State v. Gregory* the South Carolina Supreme Court held that a defendant seeking to present evidence of third party guilt must meet a heightened standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; ***evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.***

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (emphasis added); *see also Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct 1727 (2006) (approving of the *Gregory*

standard while abrogating more expansive standard in *State v. Gay*, 343 S.C.543, 541 S.E.2d 541(2001)).

The Court furthered:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535 (citing 20 Am. Jur. 254).

Appellant's bases for admitting the photos were a vague text message stating that "my home dog just shot my other home dog," and scant testimony from the sender's ex-girlfriend. Ms. Paxton did not testify that Williams may have committed the murder, only that she told police that Antonio Williams may have information about the shooting. *See* Tr. p. 614, ll. 6-11. She further admits that her belief was based solely on the vague message. *See* Tr. p. 619, ll. 19-24. Also important is the fact that Paxton failed to indicate whether Williams was even at the bar that evening. *See* Tr. p. 613, l. 1 – p. 623, l. 14. In fact, nowhere in the record does it indicate that Antonio Williams was at the Cockpit on the night of the murder. Lastly, on cross-examination Paxton described Williams as tall with a distinctive tattoo of an "L" on his forehead. *See* Tr. p. 621, ll. 4-12. The shooter, on the other hand, was described as short and no tattoo was mentioned. *See* Tr. p. 130, ll. 16-19; tr. p. 308, ll. 8-9; tr. p. 400, ll. 11-14. Fred Moss also interacted directly with the shooter while inside the bar and it would seem likely that he would have mentioned such a distinctive tattoo during his testimony had he seen it. *See* Tr. p. 307, l. 18 – p. 309, l. 3. Prior to excluding the text message photos, Judge Griffith carefully reviewed them

outside the presence of the jury and permitted the Defense the opportunity to present their basis for admission. In the end, he denied their admission. His decision to exclude these photos was consistent with the evidence presented at trial and with *Gregory's* heightened requirements.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 9, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County

The Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

Respondent,

v.

GREGORY LAMONT BROOKS,

Appellant.

Appellate Case No. 2016-002301

PROOF OF SERVICE

I, Samuel Bailey, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 9th day of April, 2018.

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April 9, 2018

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

Re: State of South Carolina v. Gregory L. Brooks
Appellate Case No. 2016-002301

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-referenced matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Samuel Bailey
Assistant Attorney General

SB/dmd
Enclosures
cc: Susan B. Hackett, Esquire (w/two copies of encls.)
The Honorable S. R. Hubbard, III, Solicitor, Eleventh Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)