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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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. Once again, this Court discussed only two of the issues raised in Mr. Beaty’s brief. The two issues discussed in this Court’s opinion leave unaddressed two federal questions, which are:

- 1) Does this Court’s standard for determining harmless constitutional error depart from the mandates of *Chapman v. California*, 286 U.S. 18, 24 (1967)?
- 2) Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution’s best argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

After addressing these two issues, this petition will address several of the issues not discussed in this Court’s opinion.

I. ISSUES ADDRESSED IN THE COURT'S OPINION.

A. Opening Remarks.

This Court issued its first opinion in this case on December 29, 2016. On January 9, 2017, Mr. Beaty petitioned this Court for rehearing. By order dated March 24, 2017, amended on March 28, 2018, this Court granted Mr. Beaty's petition. On April 25, 2018, this Court reissued its opinion. Although making stylistic changes to the section captioned "Trial Judge's Opening Remarks," the substance of the opinion is the same.

In both opinions, this Court agreed that the trial judge, by "use of terms 'search for the truth,' 'true facts,' and 'just verdict,'" ignored this Court's precedent in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties), *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 could 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 the jury believes best serves its perception of justice." Slip Opinion at 3. After admonishing trial courts to avoid using these terms, this Court once again 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. *Compare State v. Coggins*, 210 S.C. 242, 245, 42 S.E.2d 240, 241 (1947) (providing trial judge's choice of words and comments, while not "happy," did not require reversal).

Slip Opinion at 3. This Court once again found Mr. Beaty was prejudiced by the trial judge's unconstitutional comments but still did not explain why that prejudice was not sufficient to warrant a new trial, even after Mr. Beaty's initial petition for rehearing pointed out this error.

This Court once again overlooked the Solicitor exploiting the trial judge's remarks in his closing argument, Rec. on App. 772, ll 4-12, even after Mr. Beaty's petition for rehearing pointed out this error. This Court continues to acknowledge the "State had informed the jury that it would have to pick between two competing theories." Slip Opinion at 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 her 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 of murder 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, once again, 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, 245, 42 S.E.2d 240, 241 (1947) (providing trial judge's choice of words and comments, while not "happy," did not require reversal).

Slip Opinion at 3 (emphasis added). This Court, thus, continues to require Mr. Beaty to not only show prejudice but also to show prejudice sufficient to warrant reversal, even after Mr. Beaty's initial petition for rehearing pointed out this error. As set forth in Mr. Beaty's initial petition for rehearing, 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 continued 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 once again erred by applying a standard of review from a case where no constitutional violation occurred.

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

B. Closing Argument.

1) The Common law.

In the opinion this Court concluded, "This Court cannot simply assume that from July 1, 1985 through the trial in the instant case, the criminal trial courts of this State have uniformly continued to follow repealed Circuit Court Rule 58 to the extent it remains the 'practice as it has heretofore existed in criminal cases in which the defendant introduces evidence.'" Slip Opinion at 7. The present Court has 36 years of combined experience on the circuit court bench. This Court

has approximately 62 years of combined appellate experience reviewing the testimony and arguments of counsel in criminal cases. This Court has ample experience with the criminal courts of our State to know what the standard practice has been since the repeal of Rule 58. That standard practice has been to require the State to open on the law and not the facts, when the defendant presents evidence.

This Court further concluded that “absent a published order, court rule, or a defined common law rule, individual judges have developed their own practices governing closing arguments in cases in which a defendant introduces evidence.” Slip Opinion at 7. This statement is wrong for two reasons. First, there are no facts in the record of this case or cited by the court to support this conclusion. As this Court has acknowledged, erroneously in the opinion of undersigned counsel, the Court cannot assume what the practice is, this Court cannot conclude that individual trial judges have developed their own practices concerning the content and order of closing argument. Second, this Court has ignored that since at least 1795, the trial courts of our state have required the party having the burden to open and close on the case. As this Court held quoting an old Rule 59:

And on all motions or special matters either springing out of a cause or otherwise, the actor or party submitting the same to the court, shall, in like manner, begin and close; and so shall the defendant, where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege.” This rule, with slight modification, has been in existence in this state ever since 1796 (see Miller's Compilation),

State v. Huckie, 22 S.C. 298, 299 (1885).

The fact that the State has the obligation to open fully on the facts and then reply to new matter has been part of the common law since the founding of our country. Nicole Velascoal, 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) As the author stated:

The rationale behind the common law rule is that the party with the burden of proof should be entitled to the opening and closing arguments to the jury. This structure for the order of closing arguments is grounded in the premise that justice is best served if the defendant knows the actual arguments that the prosecution will make in support of a conviction before the defendant is faced with the decision whether to reply, and if so, what to reply.”

Id. at 128-129.

Thus, the law in our State, in the absence of a rule promulgated by this Court, is that the State be required to open fully on the facts and respond only to new matter raised by the defendant. We have never had a hodgepodge of closing arguments determined by the peculiarities of each individual judge, until now. This Court should recall the opinion, instruct the judges they are to follow the long established common law and reverse the conviction of Michael Beaty.

2) Due Process.

Regardless of whether this Court analyzes this case based upon a violation of the common law rule or the Due Process clause of the State and Federal Constitutions, the argument in this case was prejudicial to Michael Beaty. The reason is simple. As discussed at the two oral arguments in this case, Mr. Beaty simply asked for the opportunity to respond to the best argument of the State. This request was denied. No understanding of the meaning of a fair trial can mean that one side is deprived of the opportunity to respond to the best argument of the other side. As noted by this Court, the Powerpoint presentation, which represents the best argument of the State, was used in the reply argument. The opinion in this case sanctions the state using its Powerpoint presentation, and thus its best argument, in reply.

This Court found that the final reply argument of the State did not prejudice Mr. Beaty when the State introduced for the first time the theory was Mr. Beaty strangled Ms. Asbil because

she was screaming in front of his parent's house. No testimony at trial would have prepared Mr. Beaty's counsel for that argument. As noted Mr. Beaty's brief, the evidence to refute that argument was available, but the jury never hear it. Even this Court noted in the opinion that "the ligature marks on Victim's neck but not on the back of the neck." Slip Opinion at 1. This fact seriously questions the theory of the state as to how Ms. Asbill lost her life. This fact proves the theory of the biomechanical engineer was more probable. But notwithstanding these facts, this Court concluded that Mr. Beaty was not prejudiced by not being able to respond to the best argument of the state. The facts recognized by this Court establish this is a questionable case where the least error could have been prejudicial to the defendant.

As to closing arguments, the United States Supreme Court has said:

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Herring v. New York, 422 U.S. 853, 862 (1975)

Counsel for Mr. Beaty did not have the last clear chance to respond to the best argument of the State. In depriving Mr. Beaty of this opportunity, the lower court denied Mr. Beaty Due Process of law as guaranteed by Article I, Sec. 3 of the Constitution of the State of South Carolina and by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

3) Alternate Way to Address this Issue.

This Court recognized trial judges have the "authority to ensure that a defendant's Due Process rights are not violated during a criminal trial," including that "trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to

restrict the State’s reply argument to matters raised by the defense in closing.” Slip Opinion at 10. Yet, this Court reasoned, “We remain mindful of the need for clearly articulated rules governing the content and order of closing arguments in cases in which a defendant introduces evidence. The uncertainty resulting from the absence of such rules is unfortunate.” Slip Opinion at 10. Because this Court is the head of our state’s “unified judicial system,” S.C. Const. art. V, § 1, it is strange that this Court would recognize the trial judges have more authority than this Court to protect the Due Process rights of an accused.

This Court, in fact, exercised the very rulemaking authority it claims to lack by issuing its memorandum dated April 26, 2018, a copy of which is attached.¹ This memorandum strongly urges trial judges to require the State to open in full on the facts and the law and to restrict the State’s reply argument to matters raised by the defense in closing. It is difficult to imagine trial courts ignoring such a strong admonition from this Court. This Court, therefore, has conferred on future defendants the very rights Mr. Beaty sought from his trial judge and this Court.

The solution is simple. This Court should hold Due Process requires an accused to have a full and fair opportunity to respond to the prosecution’s best argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing. Certainly, this Court has that inherent authority pursuant to S.C. Const. art. V, § 1. This Court, in fact, exercised similar inherent authority in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

¹ “A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.” *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

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 brief.

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

Sections II(B) of Mr. Beaty's initial petition for rehearing argued, "This Court erred in failing to consider the facts supporting the request for a charge on involuntary manslaughter." In his initial petition for rehearing, at p. 1, Mr. Beaty pointed out, "[T]his Court did not discuss the facts of the case." Although the opinion reissued on April 25, 2018 discussed the facts, this Court did not explain why those facts did not warrant the trial judge instructing the jurors about involuntary manslaughter. In continuing to hold that Michael Beaty did not establish sufficient facts to create a jury issue as to involuntary manslaughter, this Court either continues to overlook the facts established by Mr. Beaty or has adopted a new rule as to lesser included offenses.

1) Involuntary Manslaughter as a Lesser Included Offense.

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, 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).

2) Mr. Beaty’s Statements to Law Enforcement.

In recognizing the statements Mr. Beaty made to law enforcement, this Court stated:

At trial, the State introduced several of Appellant's statements to law enforcement into evidence. These statements varied materially. Appellant initially suggested Victim died of a self-inflicted cutting injury. Following law enforcement's receipt of the autopsy results, Appellant voluntarily returned to the police station and repeated his earlier version of events. However, in this statement, Appellant stated he had to undo Victim's seatbelt when he realized she was unconscious after arriving at his parents' home. When Appellant was informed of the autopsy results, which showed Victim had been strangled and had “road rash,” Appellant gave a written statement explaining he and Victim had argued during the car ride, Victim had opened the car door to jump out, and he had grabbed her shirt to pull her back into the car.

Slip Opinion at 1. This Court, however, did not explain how Mr. Beaty’s statement that Ms. Asbill “opened the car door to jump out, and he had grabbed her shirt to pull her back into the car” does not establish facts supporting an involuntary manslaughter instruction. The tone of this Court’s discussion about Mr. Beaty’s statements suggests the Court might have discounted Mr. Beaty’s statement about Ms. Asbill’s attempt to jump out of the moving vehicle because that statement “varied materially” from his other statements. If the Court did so, then this Court overlooked its longstanding rule that evidence supporting a lesser included can come from any source in the record, even if from an accused’s statements that “varied materially.”

In *State v. Knoten*, the prosecution “introduced all three of [Knoten’s] written statements at trial.” 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Knoten’s second statement established facts supporting a voluntary manslaughter instruction. On appeal, the State “contend[ed] that because Appellant recanted the confession at trial, he was not entitled to a charge on voluntary manslaughter.” *Id.* 347 S.C. at 305, 555 S.E.2d at 396. This Court held, “Were a jury to believe the facts as represented in [Knoten’s] second statement, . . . [then] [i]t follows that a charge on voluntary manslaughter was required.” *Id.* 347 S.C. at 306, 555 S.E.2d at 396. Not reversing Mr. Beaty’s convictions based on the trial judge’s failure to charge involuntary manslaughter is inconsistent with *Knoten*.

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.

3) Expert Testimony.

Mr. Beaty’s statement that Ms. Asbill “opened the car door to jump out, and he had grabbed her shirt to pull her back into the car” is supported by expert testimony. In the opinion reissued on April 25, 2018, after reviewing the prosecution’s evidence and theory of the case, this Court observed:

A forensic pathologist also testified for Appellant and stated the USB cord did not cause the injuries to Victim's neck and opined positional asphyxiation played a role in Victim's death. A mechanical engineer testified for Appellant and stated the ligature marks on Victim's neck could have been caused by someone holding her up by her tank top as she hung out of the car and that both Victim's abrasions and her blood found on the outside of the car were consistent with this scenario.

Slip Opinion at 2. This Court, however, did not explain why this expert testimony did not warrant an instruction on involuntary manslaughter.

Against the standards set forth in Subsection II(A)(1) above, this Court has now said, without legal discussion, that the act of a drunken driver rendering an intoxicated passenger unconscious by pulling her clothing from behind 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, and this Court found "the ligature marks on [her] neck were visible on the front and sides of her neck but not on the back of her neck." Slip Opinion at 1. The State's pathologist 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.

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 any 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 the only choice they had—other than setting him free—murder. 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 States Constitution and Article I, Section 3 of the South Carolina Constitution.

4) Did this Court Adopt a New Rule for Lesser Included Offenses?

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).

5) *State v. Scott*, 414 S.C. 482, 779 S.E.2d 529 (2015).

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”).

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.

Sections II(B) of Mr. Beaty’s initial petition for rehearing argued, “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.” Mr. Beaty incorporates by reference Section II(B) of his initial petition for rehearing as if set forth here verbatim. For the same reasons set forth in Section II(B) of the initial petition for rehearing, this Court should reverse Mr. Beaty’s convictions and enter an order directing a verdict of acquittal.

B. Cumulative Error Doctrine.

Section II(C) of Mr. Beaty’s initial petition for rehearing explained why this Court erred by not applying the cumulative error doctrine. Mr. Beaty incorporates by reference Section II(C)

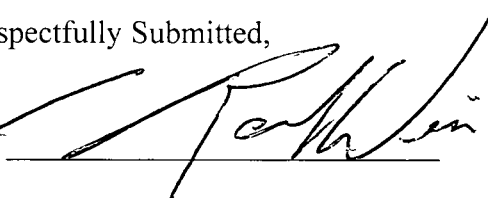
of his initial petition for rehearing as if set forth here verbatim. For the same reasons set forth in Section II(B) of the initial petition for rehearing, this Court should reverse Mr. Beaty's convictions and order a new trial.

III. CONCLUSION.

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

Respectfully Submitted,

By

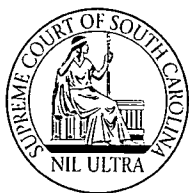


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MEMORANDUM

TO: Circuit Court Judges & Summary Court Judges

FROM: Susan Widener, Staff Attorney

RE: State v. Michael Beatty

DATE: April 26, 2018

On April 25, 2018, the South Carolina Supreme Court issued a decision in the case of State v. Beatty following the grant of rehearing following its decision in State v. Beatty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1 at 13), and reargument. The Court addressed two issues, one concerning certain language used in preliminary remarks to the jury and the second the order of closing arguments in a criminal case.

In addressing the first issue, the Court held:

We instruct trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State's burden of proof in a criminal case. Such language includes, but is not limited to, any language suggesting to the jury that its task is to "search for the truth" or to find "true facts," or that the jury should render a "just verdict."

On the second question, after reviewing the history of closing argument jurisprudence, the Court stated:

Our current closing argument rules consist of the following patchwork: Pursuant to the common law rule pronounced in *Brisbane*¹ and as clarified in *Garlington*, in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument. Pursuant to the common law rule set forth in *Huckie*, if two or more defendants are jointly tried, if any one

¹ Full citations to the cases cited in this paragraph are: *State v. Brisbane*, 2 S.C. L. (2 Bay) 451 (1802); *State v. Garlington*, 90 S.C. 138, 72 S.E. 564 (1911); *State v. Huckie*, 22 S.C. 298 (1885); and *State v. Gellis*, 158 S.C. 471, 155 S.E 849 (1930).

defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in *Gellis*, in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.

....

Currently, there is no rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence, except for the "constitutional rule" that a defendant's right to due process cannot be violated at any stage of a trial. Consequently, trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial. We remain mindful of the need for clearly articulated rules governing the content and order of closing arguments in cases in which a defendant introduces evidence. The uncertainty resulting from the absence of such rules is unfortunate. We hope the day will soon come when such rules are firmly in place.

The case may be read in full at:

<http://www.sccourts.org/opinions/HTMLFiles/SC/27795.pdf>

PLEASE BE AWARE THAT IN THE ABSENCE OF A COURT ORDER TO THE CONTRARY, DECISIONS OF THE COURT ARE NOT FINAL UNTIL THE TIME FOR REHEARING HAS EXPIRED, OR UNTIL THE PETITION FOR REHEARING IS ACTED UPON, WHICHEVER OCCURS LATER.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

The State, Respondent,

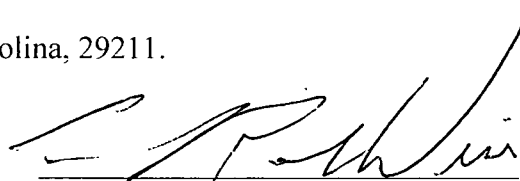
vs.

Michael Vernon Beaty, Jr. Appellant.

CERTIFICATE OF SERVICE

I hereby Certify that I am the attorney for the Appellant in the above entitled case and that I have served a copy of the Petition for Rehearing, by placing a copy on the United States Mail, postage prepaid, on May 10, 2018, addressed as follows:

Susannah Rawl Cole, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina, 29211.



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Attorney for Appellant

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MAY 11 2018

S.C. SUPREME COURT

May 10, 2018
Greenwood, South Carolina

