

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County

W. Jeffrey Young, Circuit Court Judge

RECEIVED

AUG 10 2016

SC SUPREME COURT

THE STATE,

RESPONDENT,

V.

MICHAEL VERNON BEATY,

APPELLANT,

Appellate Case No. 2015-000718.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General
S.C. Bar No. 68383

P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864)942-8800

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the State present substantial circumstantial evidence to prove that Michael Beaty committed the crime of murder with malice aforethought when the ligature mark only on the front of Ms. Asbill's neck was inconsistent with the State's theory of strangulation by wrapping a USB cord completely around her neck, and the State could not prove Mr. Beaty's DNA was on both ends of the USB cord as would be required by their theory of his holding both ends?

II. Did the trial court judge err by denying Michael Beaty's request to charge involuntary manslaughter when Michael Beaty's statement to law enforcement and expert testimony supported giving the instruction, and prejudice resulted not only from omitting the instruction but also because the Solicitor equated recklessness with malice?

III. Did the trial court judge err by informing the jurors during the court's opening instruction that a jury trial is "a search for the truth in an effort to make sure that justice is done" because that instruction is fundamentally incorrect, shifts the burden of proof, decimates the proper burden of proof and jury inquiry of whether the State had proved Michael Beaty's guilt beyond a reasonable doubt, calls upon the jurors to select between two competing versions of the correct truth, and diminishes defense counsel's credibility?

IV. Did the trial court err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the new theory made by the State in its rebuttal closing argument?

V. Did the trial court err in failing to charge the law of circumstantial evidence as set forth in *State vs. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) instead of the law as stated in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) when the *Edwards* charge properly stated how a jury should review circumstantial evidence?

VI. Did the trial court err in excluding the testimony of Valerie Jones concerning a prior incident when Emily Anna Asbill threatened to jump from an automobile when such testimony was relevant to establish the fact that Ms. Asbill was attempting to jump from the automobile when she was restrained by Michael Beaty resulting in her death?

VII. Did the trial judge err by denying Michael Beaty's request for the court to *voir dire* jurors to determine whether any of the potential jurors had a bias against defense lawyers who represent someone charged with murder, and when the failure to do so prejudiced Mr. Beaty by the prosecution's repeated attacks on the defense during his jury trial?

VII. Should this Court order a new trial based on the cumulative error doctrine?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. The trial court properly found substantial circumstantial evidence reasonably tending to prove Appellant's guilt of murder beyond a reasonable doubt when the evidence, viewed in the light most favorable to the State, showed Appellant was present when the victim died, the autopsy photos clearly defined the edges of the murder weapon, Appellant's DNA was on the suspected murder weapon, Appellant's statements were inconsistent with the evidence presented at trial, and Appellant changed his story after being confronted with that contradictory evidence.

II. The trial court properly charged only murder and sudden emergency when no evidence supported a charge of involuntary manslaughter because Appellant's actions in restraining the victim, if believed, constituted no unlawful act.

III. The trial court's advice to the jury prior to trial that a trial is a search for the truth did not shift the burden of proof, and any conceivable prejudice was cured by the trial court's extensive instructions that the State bore the burden of proving the allegations beyond a reasonable doubt.

IV. The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure is not a due process violation.

V. The trial judge did not err in declining Appellant's request to charge the outdated *Edwards* "reasonable hypothesis" language in the circumstantial evidence charge because the Supreme Court of South Carolina has found that this language is confusing and has directed that it should not be used. Instead, the trial judge properly charged the correct and current circumstantial evidence charge approved of in *State v. Logan*, 405 S.C. 83, 747 S.E2d 444 (2013).

VI. Judge did not abuse his discretion when he refused to admit testimony of an incident from four years prior concerning the victim threatening to jump from an automobile because the statement was unrelated to the defendant and the State did not dispute the victim attempted to jump from the car.

VII. Whether the trial court abused its discretion in refusing to ask jurors whether they were biased against defense attorneys was not preserved for review. However, the court committed no error in refusing to ask the question because the question was not relevant or probative to the issues at hand.

VIII: There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one, and even a perfect trial would have inevitably resulted in Appellant's conviction.

RESPONDENT'S STATEMENT OF THE CASE

A Laurens County grand jury indicted Appellant, Michael Vernon Bailey, in January 2015 for the murder of Emily Anna Asbill (Indictment Number 2013-GS-30-1553) and murder. (Indictments.)

On January 26, 2015, Appellant's case was called to trial before the Honorable W. Jeffrey Young. (R. p. 1.) Charles Grose, Esquire, and Rauch Wise, Esquire, represented Appellant during the trial. (R. p. 1.) Solicitor David Stumbo and Assistant Solicitor Dale Scott represented the State. (R. p. 1.) On January 30, 2015, the jury returned verdicts of guilty as to murder. (R. p. 1; p. 831, lines 15-20.) Judge Young sentenced Appellant to life imprisonment. (R. p. 853.)

Appellant filed a motion for new trial on February 9, 2015. (R. pp. 972-980.) Judge Young denied the motion in an order filed March 27, 2015. (R. pp. 994-1001.) Appellant filed a timely notice of appeal. This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of June 29, 2013, Appellant, his girlfriend Emily Anna Asbill ("EA"), and their friend William Alexander attended a drop-in memorial for a high school friend of the two men. (R. pp. 88-93.) The memorial lasted throughout the day, and those in attendance were drinking and grilling out hotdogs and hamburgers. (R. p. 89.) The host, Kyle Stewart, brought William Alexander to the party around lunchtime because Alexander did not have a ride. (R. p. 90.) Alexander had been drinking by the time Stewart picked him up, and he brought his own alcohol to the party. (R. p. 90.)

Appellant arrived at the party around 6:00 pm with his girlfriend, EA. (R. p. 91-93.) EA did not know the other attendees, but she was quickly made friends, and even rode with the one of the ladies to a convenience store. (R. p. 95.) Appellant and EA decided to leave around 9:00 pm. EA, who had been drinking at the gathering, was intoxicated. (R. p. 96.) Appellant was drinking, as well. (R. p. 113.) Alexander, who was extremely intoxicated, left with the couple because Appellant agreed to give him a ride home. (R. p. 96-97.) Appellant sat in the driver's seat, EA sat in the passenger's seat, and Alexander climbed into the back seat. (R. p. 96.)

Sometime around 11:00 pm, Appellant and Alexander rang the doorbell of Appellant's parents' house. (R. p. 122.) Appellant's step-father Henry Simons answered the door, and Appellant asked for help, telling him his girlfriend was, "hurt or dead." (R. p. 123.) Simons got dressed and went out to the car. (R. p. 123.) EA was sitting in the floorboard of the care with her head leaning back. (R. p. 123.) Simons noticed her right arm was wrapped with something, so he felt for a pulse in her left wrist and neck. (R. p. 122.) Simons tried but was unable to find a pulse, so he called 911. When Simons

asked Appellant what happened, he said, “We had a little bit of a conversation and somewhere along the way she cut herself. I don’t know when or how.” (R. p. 125.) Simmons believed both men were intoxicated. (R. p. 129.)

When Sergeant McClendon, with the Clinton Dept. of Public Safety, arrived on scene at approximately at 11:20 pm, he found EA in the passenger side of Appellant’s car. (R. pp. 135-139.) McClendon testified EA was pale, as if she had been without circulation for some time. (R. p. 139.) McClendon’s instincts told him something was wrong with the situation, and he returned to his vehicle to request a law enforcement officer be dispatched immediately. (R. p. 139.)

Lieutenant Tyrone Goggins of the Clinton Department of Public Safety was the lieutenant on shift. He received a call indicating a female at the home was unconscious under suspicious circumstances. (R. pp. 179-180.) Upon arrival around 11:30 pm, he observed the EMS crew working on someone in the back of the EMS unit. (R. p. 181.) Goggins noticed Appellant walking around the vehicle. Appellant was not wearing a shirt, he had blood on his arms, chest, and stomach area, and he appeared intoxicated. (R. pp. 182-183.) Goggins asked Appellant what happened, and Appellant told him EA was a cutter. (R. p. 183.) Appellant gave Goggins more detail: Appellant, EA, and Alexander had been at a celebration of life for a friend. When Appellant and EA wanted to leave, Alexander asked for a ride home. Appellant intended to take Alexander home, but during the drive he realized he was too intoxicated, so he drove to his parent’s, which was closer. Upon arrival, he noticed EA was leaning over. He nudged her and she fell forward. He went around to the passenger side and noticed blood on her wrist, so he took off his shirt and wrapped her wrist. He then went for help. (R. p. 185.) Appellant told

Coggins, “You can blame me for it.” “I’m the blame for it. I’m the reason this happened and you can blame me for it.” (R. p. 185.)

Goggins asked Appellant specifically, “Are you able to tell me that she cut herself and you didn’t hear anything or see anything while you were driving?” Appellant answered affirmatively. (R. p. 186.) Goggins asked Appellant if he would come to the station to provide more information, and Appellant agreed. (R. p. 188.)

Vickie Hallman, a crime scene investigator with SLED testified she found blood stains on the hubcap and the rear passenger door of the car. (R. p. 384.) At the crime scene at the Simmons house, Hallman also noted a pool of blood on the ground between the front and back passenger side doors. (R. p. 384.) Hallman testified there not very little blood on the interior of the car. (R. p. 385.)

Commander Crystal Roberts was called in by Goggins to assist in the investigation of EA’s death. (R. p. 221.) Roberts reported to the police station and waited with Appellant and Alexander until SLED agents arrived to interview the men. (R. pp. 221-222.) At the police station, Appellant began talking with Roberts about his relationship with EA and about the events of the evening. (R. pp. 228-229.) Appellant again told Roberts he did not notice anything wrong with EA until they arrived at the Calvert Ave. home. (R. p. 229.) SLED agents Harvey Owens and Michael Collins also participated in the interviews with Appellant throughout the night. (R. p. 306.)

The agents began interviewing Appellant at approximately 3:30 am. (R. p. 327.) Around 4:00 am, the crime scene technicians interrupted the interview to photograph Appellant and take samples of his clothes and DNA. (R. pp. 311-314, 328.) Appellant confirmed his story about discovering EA was unresponsive upon arrival at Calvert Ave,

claiming when he went to open her car door, her arm fell out and he noticed lots of blood and glass on her arm. (R. p. 330, lines 12-25.)

Before Appellant left the station around 7:30 am the following morning, he gave this written statement to the police:

At 6:00 PM Saturday Emily Anna Asbill and I left Ruby's food store and drove to Kyles Stewart's house to a memorial service for mutual friend. EA drove was supposed to remain sober and be the DD as I planned to drink. Her father had text at her – had texted implying he knew we were in town, at which point I took the batteries out of both phones. Once it Kyles we both drank alcohol in mingled with the group. She left with the other females around 8 to get more beer. A mutual friend, Will was there and by far the most intoxicated. When the time came that we were ready to leave we agreed to take Will home. This was around 10 o'clock, I think. From Kyle's house I drove us to my parents' house. Upon arriving I realized EA was not responding. I rushed around the driver's seat outside to the passenger side and realized she was unconscious. After trying to get her attention and make her regain consciousness I felt she was gone. Will, or someone at my house, called 911, and after EMT arrived I left her side. Since then I have been present with law enforcement. I have and will continue to comply in all ways possible. When I opened the passenger door I noticed blood on her arm and assumed it to be from self-inflicted wounds. I tied it off with my shirt.

(R. p. 238; State's Exhibit 3.)

Later that morning, Appellant returned to the station around 10:30 am to talk to law enforcement again about the death of EA. (R. p. 191.) Appellant's story the next morning was similar to the previous evening's story, except Appellant told Goggins he unbuckled EA's seatbelt when they arrived at Calvert Avenue. (R. p. 192.) However, by this point, the officers were aware of the cause of death. The agents told Appellant EA died from strangulation and asked Appellant how she suffered the injuries to her arms. (R. p. 270) Appellant then changed his story and told the officers for the first time he and EA were arguing on the way home about the attention she gave Alexander during the party. Appellant wrote out the following:

While arguing EA threatened and did open the door to jump out. Threatening to harm herself to punish me for what I argued with her about which was me feeling disrespected that she was focusing more on Will than me. The injuries she had came from her hanging out of the car as I held her clothing to try and pull her back in. I remember her screaming and asking me why I made her do that.

(R. p. 271, lines 5-12; State's Exhibit 4.)

SLED Agent Rick Charles interviewed Appellant later that afternoon. (R. p. 358, lines 1-14.) Appellant wrote out the following statement:

We left Simpsonville around 1:00 or 2:00 to head to Clinton as I had a few odd jobs lined up. First we stopped in Laurens at my grandfather's house and visited with he and his girlfriend. We stayed there until about 3:00 or 4:00, and during that time the other jobs I had lined up got postponed. So we left there and went to my parents' house where we visited and lounged around, and EA showered and changed. We left there at around 6:00. From there we went to C-Mart where I bought beer and gin. On the way there, to Kyle's, I asked EA if she would stay sober so she could drive us home since I planned to drink. We arrived at Kyles Stewart's house for a memorial party/cookout. We met our mutual friend, Will, there. He was already extremely intoxicated. While there, EA took to hanging more with the other females at first while I caught up with old friends. After a while I realized EA was actually drinking, too, so I figured I would end up driving. After 9:00 or so, because Will was so intoxicated, we used that as an excuse to leave saying we would take him home. Around this time I had gotten somewhat uncomfortable with how much attention EA was showing Will, and I believe I said something about it that started an argument. So the three of us set off in the car, at which point I realize how intoxicated I was, which swayed me to go towards my parent's house rather than to Will's parents' which would have taken much longer. During the ride EA and I continued to bicker and argue with both of us saying hurtful things, but I don't recall specifically what was said. I feel as though the intoxication magnified the hurt feelings. After or during the arguments EA trying to jump out of the car, but I grabbed her shirt to try to stop her. When this happened, part of her body- her right arm-made contact with the pavement, although I was not aware of this until later. After that everything started to calm down somewhat, although everyone, not sure about Will, was shaken. Yet a little before or at that point, I believe, that EA made it seem like I had made her want to hurt herself, which is common for us when we argue. But again, things were settling somewhat. Throughout I have – I have little to no recollection of what Will was doing or saying, if anything. Upon arriving at my parents' house I try to get EA's attention but she would respond. I nudged her and felt her

body was limp. I jumped out and rushed around the passenger side and unbuckled her seatbelt, and on my knees, tried to get her to come to. When I opened the door first her arm dropped out and I noticed blood which I believe to be from a self-inflicted cut, which EA has done before. I tied off her arm with my shirt, and that was when I fell to my knees and unbuckled her. I held her head up and her body trying to get her to come to and frantically yelled and pleaded with her to wake up. Around this time I can't recall if I, or Will, or both went to the house to get help and have someone call 911. I stayed holding EA's body until EMT arrived and put her on a stretcher.

(R. pp. 360 - 363; State's Exhibit 5.) Following this statement, Appellant invoked his right to counsel and the interviews terminated. (R. p. 366.)

Vickie Hallman was also part of the team that took photos and samples from Appellant and Alexander. Hallman testified Alexander did not have any blood on his hands or his clothes. (R. pp. 386-387.) Appellant, on the other hand, had dried blood on his hands, shorts, and shoes. (R. p. 389.) Hallman then went to Laurens County Hospital to view and process EA's body before the autopsy was performed. (R. p. 390.) EA had injuries to her right arm, right hand, left hand, and some discolorations and markings on her neck. (R. p. 391.) EA's neck contained markings that were thin in diameter, with clean edges. Hallman further noticed a rectangular-shaped impression on the neck, and noticed petechiae about her eyes. (R. pp. 394-395.) Hallman found no indications of lacerations, or cuts, on the body. (R. p. 392.) Following the examination of the body and after learning the cause of death was asphyxiation by strangulation, Hallman returned to the vehicle the following day to execute a second search warrant in an effort to find any items that may have been used to strangle EA. (R. pp. 397, 399-400.) Approximately twelve items, such as computer cords and phone chargers, were taken into evidence. (R. p. 400.) Among the items collected were two USB cords, which were marked for swabbing at the ends of one and from the middle of the other. (R. p. 401.) Michael

Beatty's DNA was found on the ends of one of the USB cords, and the victim's DNA was found to be the major contributor near the end of the cord with the distinctive, rectangular shaped marking. (R. p. 470-471.)

The State's pathologist, Dr. Ross, testified the cause of death was asphyxiation by strangulation. (R. p. 480.) She also found evidence of abrasions on EA's arm and hand, but no signs of lacerations, or cuts, to the skin, except for a scar that appeared to be months old. (R. 481, 482.) The pathologist identified the ligature marks on EA's neck as being consistent with some object with 90 degree angles (or rectangular in shape) and not found in nature. (R. p. 488.) Dr. Ross testified the victim's tank top was not consistent with the type of markings on EA's throat, and she did not believe the shirt was the instrument used in the victim's strangulation. (R. p. 494.) Dr. Ross also testified EA would have become unconscious within seconds, but it would have taken three to five minutes to cause permanent brain damage or death. (R. p. 489.) Dr. Ross further testified she did not believe EA could have died from positional asphyxiation. (R. p. 518.)

The following is a timeline of the oral and written statements made by the Appellant:

- Oral statement to Goggins at approximately 11:40 pm at the scene: Appellant claims nothing happened on the way home from the memorial party, and he found EA unresponsive at the house on Calvert Ave. Appellant mentions EA is a cutter. (R. p. 184-187.)
- Oral interview with Commander Roberts at station: Appellant claims nothing happened on the way home from the memorial party. He found EA unresponsive at the house on Calvert Ave. Appellant repeatedly discusses EA's history of cutting herself, and expresses confusion about why she would do that to herself. (R. p. 248, 334, State's Exhibit 41.)
- SLED agents interview Appellant in the early hours of the morning: Appellant claims they left the party around 10:00 pm and "nothing dramatic happened." Appellant mentions finding the injuries to EA's arm and shards of glass. Appellant claims they drove directly from the party to Calvert Ave, but offers no explanation for the lapse in time, and gives no description of EA's attempt to jump out of the car. (R. p. 330.)

- Written statement at approximately 7:30 am before Appellant leaves the station. Claims no knowledge of how EA was hurt. Appellant claims he saw nothing on the car ride home. (State's Exhibit 3.)
- Statement with Commander Roberts and Agent Collins at approximately 12:30 pm following Appellant's return to the station. Appellant is informed of EA's injuries and her cause of death. Appellant admitted for the first time he argued with EA on the way home about EA "disrespecting" him, and EA tried to jump out of the car. Acknowledging EA was conscious after the incident, Appellant said EA asked Appellant why he made her do it. (State's Exhibit 4.)
- Later that day, Appellant gave a statement to Agents Kindley and Shelton: Appellant then claimed EA tried to jump out of the car, and Appellant grabbed her clothes to restrain her. Appellant claims after the incident everything seemed to calm down, although everyone was "shaken." EA made it seem like Appellant made her want to hurt herself. (R. p. 351; State's Exhibit 5.)

ARGUMENT

I. The trial court properly found substantial circumstantial evidence reasonably tending to prove Appellant's guilt of murder beyond a reasonable doubt when the evidence, viewed in the light most favorable to the State, showed Appellant was present when the victim died, the autopsy photos clearly defined the edges of the murder weapon, Appellant's DNA was on the suspected murder weapon, Appellant's statements were inconsistent with the evidence presented at trial, and Appellant changed his story after being confronted with that contradictory evidence.

The death of Emily Anna Asbill, according to both the State and the defense, was attributable to Michael Beaty. The identity of the killer and the manner of death are not in dispute. What is in dispute is whether EA was intentionally strangled with a USB cord in a gruesome, malicious act or whether Beaty accidentally strangled EA while pulling her back into the car, restraining her to the point of unconsciousness followed by her slow positional asphyxiation in the floorboard. Appellant would have this Court believe the two theories presented at trial were equally plausible. However, a court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Bennett, 781 S.E.2d 352, 354 (S.C. 2016). The numerous inconsistencies in Appellant's theory, combined with the compelling evidence supporting the State's theory, were more than sufficient to reasonably tend to prove the guilt of Appellant. *See State v. Littlejohn*, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955). As there was substantial circumstantial evidence presented by the State to the jury proving Defendant's guilt, the Court properly denied Appellant's motion for directed verdict at the conclusion of the State's case.

Analysis

In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. *Id.* The court must concern itself solely with the existence of evidence from which a jury could reasonably infer guilt. *State v. Bennett*, 781 S.E.2d 352, 354 (S.C. 2016) This objective test is founded upon reasonableness. *Id.* Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. *Id.* Recently, in *State v. Pearson*, our Supreme Court made it clear the State need not present evidence sufficient to exclude every other hypothesis at the directed verdict stage. __ S.E. 2d __, 2016 WL 1130044.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992)

(finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The United States Supreme Court noted the following:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts.**

Jackson, at 319 (second emphasis added).

This Court articulated the following concerning the standard of review:

The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)); *see also State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) (“When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.”). This is consistent with the United States Supreme Court’s observation concerning circumstantial evidence:

Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) cited with approval in *Jackson*, at 317 n.9.

Here, the identity of the perpetrator is not in question. Appellant claimed he accidentally strangled the victim. Thus, the question is whether the State offered substantial circumstantial evidence of Appellant's intentional act sufficient for a rational juror to return a verdict of guilt for murder. *See Jackson; State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) *reversed by State v. Karl Lane*, Op. No. 27464 (S.C. Sup. Ct. filed November 12, 2014) (finding "in viewing the evidence in the light most favorable to the State, which we are constrained to do, the State presented substantial circumstantial evidence of Respondent's guilt").

The State theorized Appellant strangled the victim with a USB cord following a contentious drive home from a nearby memorial service, during which all three occupants of the vehicle had been drinking. On the ride to Beaty's parents' house, Appellant and his girlfriend EA fought about EA's "disrespecting" of Beaty by showing too much attention to the intoxicated William Alexander, the third occupant of the car. Upon arrival at the Calvert Ave. home, Appellant strangled EA in the car with a nearby cord. Realizing EA was dead, Appellant sought help from his step-father, who called 911 for the already deceased victim. (R. pp. 800-802.) Supporting this version of events were the testimony of the first responders, who testified EA had been dead for some time before they arrived, the pathologist, who testified EA died from asphyxiation due to ligature strangulation, the pictures of the markings on EA's neck, which clearly show the outline of the rectangular shaped end of a USB cord, the DNA evidence found on the USB cord in the car, and most significantly, Appellant's own statements, in which he failed to mention any injury

to EA on the ride home and which changed in an attempt to conform to the evidence presented to him during interrogation.

First, the recordings of Beaty's statements to Commander Crystal Roberts are telling. (State's Exhibit's 41.) Appellant claims they were talking on the way home, and only noticed something was wrong when they arrived at house. Beaty mentions seeing the glass and blood around EA when he opened the door. (State's Exhibit 41 at 9:00.) Factually, Appellant's statements do not match the crime scene photos, and the jury could have easily concluded he was lying. (State's Exhibits 3, 4, and 5.)

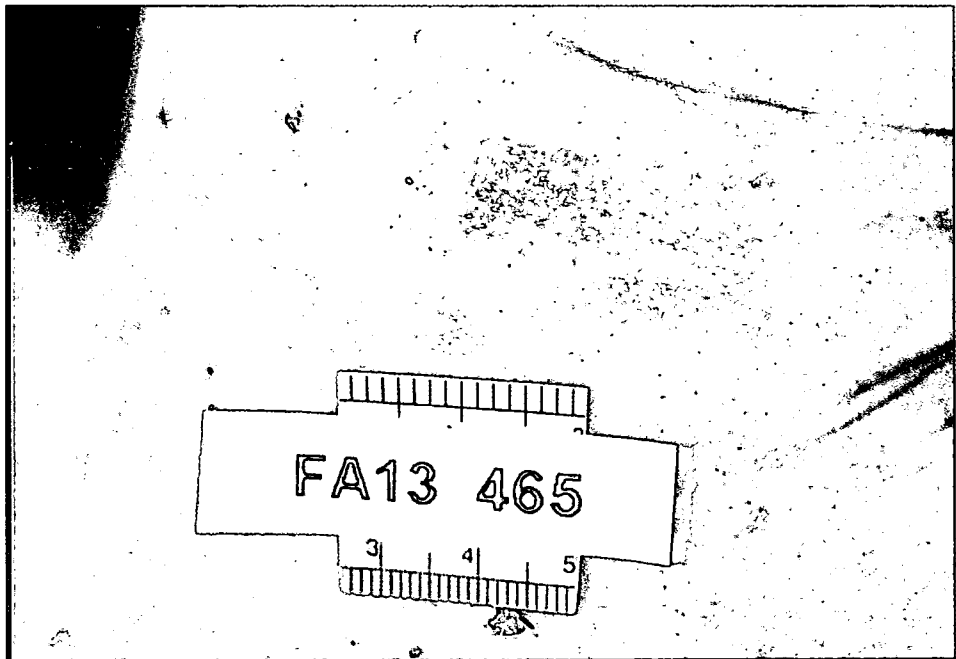
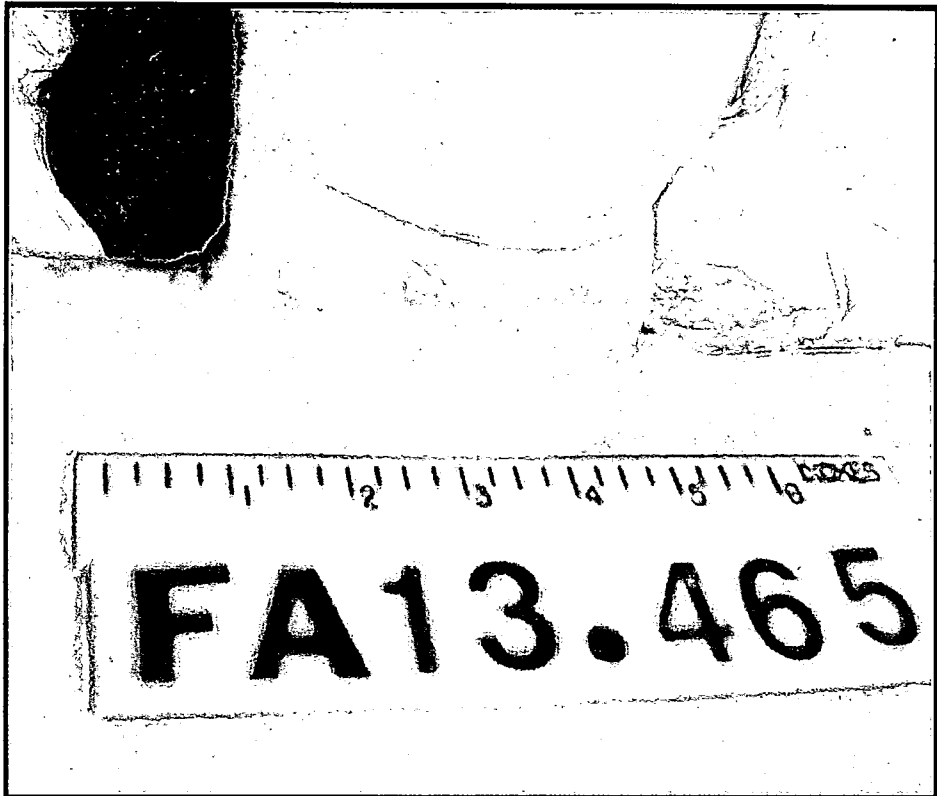
Appellant's demeanor was more telling, however. The jury easily could have deduced, from the manner in which he repeatedly referred to Commander Roberts as "Crystal," Appellant was attempting to manipulate the officer. (State's Exhibit 41 at 6:18, telling Roberts "I like you and appreciate you.") In an effort to convince Roberts of what the couple has "overcome," he makes repeated references to EA's mental health problems, history of cutting herself, and her medication. Appellant also expresses frustration he will have "to go through hell" in his interview with the SLED agents. (State's Exhibit 41 at 17:15) Appellant does not sound like a man distraught over the loss of his girlfriend. Despite his statements that EA was the love of his life, his voice is steady and clear. Appellant even laughs at times. (State's Exhibit 41 at 0:40.) As Roberts characterized it, "[h]e seemed somewhat calm but yet he still portrayed that he was upset." (R. p. 230, lines 9-12.)

Later in his recorded statement about a half hour later¹, Appellant assures Roberts he is talking to her as "an honest, God fearing man." (State's Exhibit 41, pt. 2, at 7:10.) At one point, Appellant complains of being scared to talk to the police because of the

¹ The audio recordings of the interview were in two parts.

ways he has been treated in the past during the numerous instances he has been arrested. When he realizes how he sounds, Appellant stops himself and says, "I'm sorry. I feel right now like I'm not even wrapping my head around the fact the love of my life is dead." (State's Exhibit 41, pt. 2, at 11:00-12:00.) Shortly thereafter, he whispers, "She did that. I don't know why she did that. She's cut herself before. She cheated on me one time, and she cut herself before she ever admitted it to me." (State's Exhibit 41, pt. 2, at 13:13.) Appellant appears determined to convince Roberts EA would have hurt herself if she felt guilty for cheating on him. Given the detail Appellant used to describe previous incidents of EA cutting herself, Appellant's failure to mention her attempt to jump out of the car makes a compelling argument he was deceiving the officers about what happened earlier that night.

If the audio recordings of Roberts' interview with Appellant were not persuasive enough, the photographs of the injuries to EA's neck certainly convinced the jury of Appellant's guilt beyond a reasonable doubt. The State's pathologist testified the cause of death was "asphyxiation by strangulation." (R. p. 482.) In other words, EA died because something placed pressure on her neck, cutting off the blood flow to her brain. (R. pp. 484-483.) Critical to the State's case was the identification of the particular object that placed pressure on EA's neck. The ligature mark contained clearly defined, clean edges that crisscrossed on the right side of EA's neck and ended in a rectangular shaped pattern. (R. p. 487, lines 8-18.) As Dr. Ross pointed out, "[n]othing in nature has 90 degree angles." (R. p. 487, lines 16-17.) The members of the jury looked at these photos and were able to draw their own conclusions:



(State's Exhibits 28, 30, 32-34) Dr. Ross confirmed the USB cord, State's Exhibit 46, was consistent with the injuries on EA's neck. Moreover, DNA found on State's Exhibit 46 was also consistent with the State's theory of the case. The victim's DNA was found in the center of the cord, and Appellant's DNA was identified as a mixture with EA's DNA at the ends of the cord.

In contrast, Appellant attempted to argue, through cross examination, EA's death could have been caused when Appellant grabbed the back of EA's shirt to pull her inside the vehicle after she attempted to jump from the car. The following exchange occurred during Appellant's cross of Dr. Ross:

Q: You get positional asphyxiation if you're unconscious and you're simply sitting down and tipped your head down, don't you?

A: No.

Q: You don't?

A: No.

Q: You get positional asphyxiation if you lean over a seat?

A: No. It would have to be such that you –

Q: Excuse me?

A: No. I don't know what you mean, sitting on the seat.

Q: If somebody is lean over this way in the seat would they get – – could they get positional asphyxiation?

A: No.

Q: Why not?

A: It's not enough pressure on the neck.

Q: Not enough pressure on the neck?

A: Correct.

Q And if they were sitting in the front seat of the floorboard of the front seat with her head down, that would be a cramped awkward position?

A: If their head was cramped some way. If they were upside or if she was trapped tightly underneath the dashboard, maybe.

(R. pp. 511-512.)

Dr. Ross specifically rebutted the defense's theory of the case. When asked whether EA's blood alcohol content of .23 had any effect on her death from asphyxiation, Dr. Ross testified it would not. (R. p. 491.) Dr. Ross also testified she did not believe the

tank top EA was wearing could create the ligature markings on EA's neck. Further, the absence of the ligature mark on the back of EA's neck indicated either the ligature was pulled from behind, or EA's hairline prevented the ligature from leaving a mark. (R. pp. 494, 507.)

At the close of the State's case, the jury could consider: 1) Appellant's inconsistent statements to law enforcement, including the audio recordings in which the completely lucid Appellant neglects to tell police about the car jumping incident but manages to discuss EA's mental health extensively; 2) the photos of the ligature around EA's neck with the clearly defined rectangular pattern; 3) the DNA evidence on the USB cord; and 5) the testimony of Dr. Ross, who opined EA died from ligature strangulation consistent with the use of State's Exhibit 41, the USB cord found in the car. The jury could also consider the other troubling evidence presented in this case, such as the photos of the injury to her arms, but the lack of blood inside the car. Had Appellant pulled EA back into the car and into a state of unconsciousness, how had she not bled all over the interior of the car? The State's case against Appellant made a compelling argument Michael Beaty brutally strangled EA with the USB cord found in the car.

The trial court did not abuse its discretion in concluding the evidence allowed a reasonable juror to find the defendant guilty beyond a reasonable doubt. Accordingly, Appellant is not entitled to relief on this ground.

II. The trial court properly charged only murder and sudden emergency when no evidence supported a charge of involuntary manslaughter because Appellant's actions in restraining the victim, if believed, constituted no unlawful act.

The evidence presented at Appellant's trial did not support an involuntary manslaughter charge. There was simply no evidence by which the jury could have found Defendant guilty of the crime of involuntary manslaughter. The State contended Appellant brutally murdered Emily Anna Asbill by strangling her with a USB cord. Appellant only offered evidence he accidentally restrained the victim to the point of unconsciousness in an effort to pull her back into a moving car. Appellant claimed once inside the car, the victim slid down into an awkward position, which resulted in her death from positional asphyxiation. Under Appellant's theory of the case, there was no unlawful act. Thus, the trial court correctly charged the law of murder and emergency situation and denied Appellant's request to charge involuntary manslaughter.

Standard of Review

A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Burriss*, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999). An appellate court will not reverse the trial judge's decision absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Id.* The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 390, 529 S.E.2d at 539. The law to be charged must be determined from the evidence presented at trial.

State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2008). The trial court instructed the jury on the elements of murder and defined malice aforethought. (T. pp.

832-834.) The court continued by giving the following instruction on emergency situation:

Ladies and gentlemen, where a Defendant is suddenly placed in an emergency situation through no fault of his own, is compelled to act instantly to avoid any injury to another person, he is not negligent if he makes such wastes that a person of ordinary judgment might make if placed in the same emergency situation and he is not required to make the best choice, but only one that is reasonable under the circumstances.

(R. p. 814, space lines 8 – 15.)

Analysis

Appellant asserts in his brief that he was entitled to a jury charge on involuntary manslaughter based on the evidence presented at trial.

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.

Pittman, 373 S.C. at 571, 647 S.E.2d at 167. See also *State v. Knoten*, 347 S.C. 296, 306, 555 S.E.2d 391,396 (2001) (finding there was evidence to support a voluntary manslaughter charge where the defendant's second statement to police supported the charge though the defendant recanted his second statement and testified it was a fabrication). Appellant asserts, viewing the evidence in the light most favorable to him, he was entitled to an involuntary manslaughter charge because he could have been found guilty under the second description of involuntary manslaughter—that “the evidence of his being ‘highly intoxicated’ and his statement about pulling Ms. Asbill ‘back in the car resulting in her death’ would allow the jurors ‘to find that there was gross negligence in the way he handled it.’” (Appellant’s IBOR, p. 23.)

In support of his theory, he offered testimony from retained experts. One expert in biomechanics attempted to recreate the crime scene with surrogate materials and models. First, the expert dripped porcine blood from a moving car in an effort to estimate the speed at which EA must have been traveling when her blood spattered on the rear passenger door and wheel well. (R. p. 563.) Next, the expert attempted to recreate pulling a passenger back into a nonmoving car. The expert claimed he used a similar tank top to the one EZ was wearing, then he attached a clamp to the back of the surrogate's tank top and told her to "relax" to simulate falling from the car. (R. pp. 563-567.) The surrogate for EA was approximately her same height and weight. (R. p. 561.) Appellant's expert theorized the tank top could produce the ligature marks on EA's neck, depending on the position of the top as it bunched around her neck. (R. p. 575-576) For obvious safety reasons, the expert did not simulate the force exerted to pull the 5'8", 160 pound surrogate into a moving car, nor did the expert attempt to recreate the actual ligature marks on the surrogate's neck. (R. p. 583; 608.)

The only testimony regarding the length of time EA was suspended from the car came in the form of questioning by the State. When specifically asked by the solicitor if the expert tested the strength of the shirt by restraining the surrogate from falling for two minutes, he indicated he did not. (R. p. 614, lines 11-19.) The following exchange occurred when the solicitor pressed the point:

Q: So you're here to testify that in your professional opinion it's a possibility that Mr. Beaty's driving 30 miles down the road – 30 miles an hour down the road while maintaining constant pressure, say, give or take 23 pounds of pressure on somebody who's hanging out of the door for at least 120 seconds?

A: No, I'm not saying that, sir.

Q: Well, we know 120 seconds is the minimum amount of time it takes somebody to die if constant pressure is applied to their neck, and we estimated his speed to be 30 miles an hour. What am I missing?

A: Well, I didn't measure – one thing I didn't – I didn't look at the duration at which how long that – the ligature would have been held on the neck. All I look at is the possibility of the – I looked at the ligature mark itself –

Q: The geometry.

A: – and the abrasions, but I did not look at the duration, like how long somebody would have held that mark to cause the ligature mark seen in the autopsy photographs. That would be a question for pathologist.

Q: Okay. But you did some research. You look at some well respected medical journals and you came up with 120 seconds. And you've already testified that's kind of on the low end. And that's a critical time. Two minutes. Because thereafter respirations don't just pick up on your own. Go back to the slide of the 120 seconds.

A: Sure. No, I'm familiar with that slide. So could you restate the question again, sir, please?

Q: Your testimony is that it's more likely – or it's likely, or even possible, the Mr. Beaty is maintaining this woman shirt in such a fashion that she's choking on her shirt, 23 pounds of pressure, while he's driving 30 miles an hour down the road for at least 2 minutes?

A: No, sir. That's not what I'm saying.

Q What are you saying?

A: I'm just saying that it's likely that the shirt is what caused the ligature mark. I'm not saying that it was held there for 15 seconds or 2 minutes. I don't know what occurred afterwards. But for some reason he held on – he held on the neck with the shirt, the ligature mark was there, she ends up in some strange position to create a respiratory issue. I don't know that. So I did not try to estimate. And I'm not saying that he was – Ms. Asbill was held for 2 minutes by that shirt.

(R. p. 624, line 13- p. 626, line 7.) The defense's expert refused to offer testimony Appellant restrained EA for two minutes, instead limiting his testimony to the defense's theory of the case.

The defense's pathologist claimed EA's breathing was compromised because of the awkward position she assumed in the passenger side floorboard of the car, particularly when she was intoxicated. Dr. Arden also noted the pattern of ligature mark around EA's neck, noting the lack of mark along the back of her neck. Appellant claimed

the absence of the ligature mark on the back of EA's neck supported their theory the USB cord was not used to strangle her. (R. pp. 682-684.) On numerous occasions, Appellant used the theory of Occam's razor to explain how EA died that night. The simplest explanation for the murder, according to the defense, is EA attempted to jump out of the car, her intoxicated boyfriend attempted to save her by pulling her back into the car, inadvertently choking her to the point of unconsciousness, only to have her actually die from positional asphyxiation when she slid down into the floorboard after she passed out. (R. p. 683, line 12 – p. 684, line 6.)

Appellant's argument he was entitled to an involuntary manslaughter charge hinges on a perceived ambiguity on which reckless behavior the manslaughter charge intends. Assuming EA's death was the result of positional asphyxiation following Appellant's efforts to pull her into the car, which was the defense's sole theory of the case, nothing about his actions in saving her was reckless. Appellant argues, vaguely, the jury could have found "there was gross negligence in the way he handled it" but he does not argue what exactly about pulling the victim back into the car was negligent. Appellant's intoxication did not interfere with his prevention of EA's jumping from the car, as his efforts presumably prevented her from falling onto the road. Instead, if defense's theory of the case is to be believed, to justify an involuntary manslaughter charge, Appellant must have shown reckless disregard for EA's safety when he failed to prevent her death from positional asphyxiation. Considering the State's pathologist testified she did not believe someone could die from positional asphyxiation by sitting cross-legged in the floorboard of a car, it is not likely Appellant would have known EA was at risk -- intoxicated or not. Thus, as the trial court correctly pointed out, this was

either murder or a sudden emergency. Appellant even acknowledged to the court emergency was the defense's theory of the case, stating:

MR WISE: Sudden emergency. Sudden emergency. You had the accident language in it. And that's the defense. So we need the criteria that there's a defense that's alternate to malice, and the prejudice comes from directing them in how to infer malice and emphasis that in it. ...

(R. p. 818, line 25 – p. 819, line 4.)

The other problem with defense's theory of EA's death is the statements from Appellant, himself. SLED Agent Kindley testified Appellant gave him a new version of events at approximately 12:30 pm, after Appellant learned of EA's cause of death from the pathologist. Kindley testified Appellant told him EA screamed at him after he pulled her back into the car. Thus, the evidence put forth showed EA was alive and conscious when she was pulled back into the car. The defense's expert pathologist testified it was possible EA died from positional asphyxiation, but the expert did not take into account EA's consciousness in his theory of her death. Thus, even viewing the evidence in the light most favorable to the defense, the only explanation consistent with the evidence presented at trial was EA died from positional asphyxiation sometime after she was pulled into the car and spoke to Appellant. Under this theory of EA's death, Appellant would have no culpability for voluntary or involuntary manslaughter. The trial judge properly untangled the knot of testimony and expert opinion testimony concerning EA's death to conclude there was no evidence of involuntary manslaughter. Simply charging a compromise verdict, for the sake of ambiguity, was not an appropriate remedy.

Further, Defendant's motion takes a statement made by the State in closing arguments completely out of context, and distorts it for the purpose of supporting an involuntary manslaughter charge. The State presented the image of Mr. Beaty

continuing to drive with his left hand while restraining Ms. Asbill by her shirt with his right hand simply for the purpose of illustrating to the jury the inconsistency and implausibility of Defendant's theory. The State never argued that Defendant acted with any level of criminal intent in restraining Ms. Asbill. The State drew particular attention to Defendant's admission in his 4-page handwritten statement (State's Exhibit #5) to the following: 1) things had calmed down, and 2) EA blamed Appellant for making her do this to herself. By Appellant's own voluntary statement given the day after this incident, EA was alert and conscious after he pulled her back in to the vehicle, thus undercutting his theory at trial.

In contrast, the State's theory of the case was clear and consistent: Appellant killed EA with malice aforethought by strangling her with a USB cable (State's Exhibit #46) found inside the vehicle by crime scene investigators. The State's theory was corroborated by DNA evidence on the USB cord, distinct ligature markings on EA's throat, which were remarkably consistent with such a cord being crossed-over in a noose-like manner, and the testimony of the pathologist (Dr. Ross) who conducted the autopsy.

Respondent submits that the trial court did not err in refusing to instruct the jury as to involuntary manslaughter because there was not *any evidence* to support that jury charge. *State v. Niles*, 400 S.C. 527, 533, 735 S.E.2d 240, 243 (Ct. App. 2012), cert. granted Feb. 6, 2014 ("If any evidence supports a jury charge, the circuit court should grant the request." (citing *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004))). In this case there was not any evidence Appellant was in reckless disregard for EA's safety when he pulled her into the car. Nor, pursuant to the defense's theory of the

case combined with Appellant's statements to police, was Appellant culpable for her death if her drunken state and her position in the floorboard were the actual causes of her death.

Moreover, the inference that Appellant would have the jury make— Appellant pulled her into the car where she slowly died and he failed to prevent it because he was intoxicated—is not a reasonable inference that can be drawn from the evidence. As this Court has recognized,

Although an indictment for a higher offense will sustain a conviction for a lesser included offense, a request to charge a lesser included offense is proper only when the evidence could support a reasonable inference that the defendant committed the lesser rather than the greater offense. *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991). A mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge. *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976).

State v. Morris, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991). The inference Appellant suggests cannot be drawn directly from the evidence in this case. In fact, that inference is inconsistent with Appellant's own statements. Rather, it requires taking two pieces of testimony—namely, that EA was fully conscious after she was pulled in the car and she later died of positional asphyxiation—and constructing a completely unlikely scenario in which EA died from her positioning in the car wholly unrelated to Appellant's restraint of her previously. In this scenario, Appellant would not be culpable of involuntary manslaughter, either.

The logic gymnastics required to get to the inference drawn by Appellant demonstrate the inference is simply not one that can be reasonably drawn from the evidence. Moreover, absolutely no evidence in the record supports the theory Appellant

acted with reckless disregard for EA's safety when he caused her death. In conclusion, the jury was first presented substantial circumstantial evidence Appellant murdered EA with a USB cord. The jury was presented an alternate theory by Appellant he acted heroically in defense of EA's life which resulted in her accidental and unpredictable asphyxiation. Accordingly, the trial court did not err in refusing to charge involuntary manslaughter.

Harmless Error Analysis

Even if this Court finds the trial court should have charged involuntary manslaughter, the erroneous denial of a requested manslaughter jury instruction is subject to a harmless error analysis. *State v. Battle*, 408 S.C. 109, 121, 757 S.E.2d 737, 743 (Ct. App. 2014). "When considering whether an error with respect to a jury instruction [is] harmless, [an appellate court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

Even if the trial court erred in refusing to charge involuntary manslaughter, such error was harmless. Whether an error with respect to a jury instruction was harmless is a very fact-intensive inquiry. *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435. And a court's "inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.'" *Id.* (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

Respondent submits that the lack of an involuntary manslaughter charge did not contribute to the verdict. The facts of this case, as outlined in this brief's Statement of Facts section, overwhelmingly support a theory propounded by the State, that Appellant

deliberately strangled the victim with the nearby USB cord. Despite the expert opinions offered by the defense about what *could have* happened, *the only direct evidence of what did happen* refutes this testimony. Appellant was present in the car and gave his versions of the events of the night to various law enforcement officers. Appellant's statements were also highly incriminating for what they did not say: Appellant did not say EA was hanging from the car for several minutes while he continued to drive while still holding on to her shirt. Appellant told the officers EA screamed at him after she jumped from the car. Thus, regardless of the weight the jury gave to Appellant's explanation of EA's injuries, Appellant did not explain how EA later died. As such, it is clear that the erroneous lack of an involuntary manslaughter instruction did not contribute to the verdict. Accordingly, the trial court's error is harmless beyond a reasonable doubt.

III. The trial court's advice to the jury prior to trial that a trial is a search for the truth did not shift the burden of proof, and any conceivable prejudice was cured by the trial court's extensive instructions that the State bore the burden of proving the allegations beyond a reasonable doubt.

Appellant complains the trial court's comments to the jury that a trial is a search for the truth were an improper shifting of the State's burden of proof. The full context of this comment is as follows:

Most people never have an opportunity to attend and participate in an actual trial as you are today and may think from watching TV, movies, or reading in books that trials are always full of high drama and riveting circumstances. While all these things might be true at times, I just want to keep reminding you this trial is not for entertainment. This is a real trial, which is a fundamental part of our democracy, and it is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is often slow, deliberate, repetitive. The exact opposite of what you've seen on TV and movies or read in books.

Now, ladies and gentlemen, this courtroom is a place of honor that is dedicated to the protection and the preservation of our citizens through what has been called, and I truly believe in my heart to be, the greatest justice system ever created by mankind. The attorneys who are appearing before you are advocates -- strong advocates for the parties that they represent. But first and foremost, ladies and gentlemen, they are officers of this court who are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors in your search for the truth. Ladies and gentlemen, you should expect them to be professional, competent and ethical in the representation of their clients' interests. But remember, ladies and gentlemen, you also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical as well. And again, thank you for accepting this very important responsibility of jury duty.

Ladies and gentlemen, what I'm going to tell you now is just intended to serve as an introduction to the trial of this case. **These remarks are not a charge on the law of this case. I will charge you the law that is applicable to this and this case only at the end of the trial.** This is merely an explanation so you may better understand what may be happening.

(R. p. 57, line 11 – p. 58, line 23.) (Emphasis added.)

The jury was sworn and the trial court advised the sworn jurors the indictments are simply charges and not evidence. (R. p. 59.) The trial court then advised the jury that the State bore the burden of “proving all the elements of the charge beyond a reasonable doubt.” (R. p. 59, lines 9-11.) Four days later, the parties rested, made their closing summations and the trial court provided more specific instructions to the jurors before they began the deliberations that led to the verdicts.

Analysis

The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood the jury applied the charge in a way that violated the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 71 (1991). Ultimately, “[a] trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.” *State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321,

323 (2007); *see State v. Ezell*, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”).

The irony of Appellant’s argument is that the central function of the trial process in both criminal and civil cases is to discover the truth. *See Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (stating “the central function of [a] trial . . . is to discover the truth”); *see also State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) (“A trial is a search for the truth[.]”); *see, e.g., Carella v. California*, 491 U.S. 263, 265 (1989) (explaining that burden-relieving jury instructions “subvert the presumption of innocence accorded to accused persons and also **invade the truth-finding task assigned solely to juries** in criminal cases” (emphasis added)).

As part of the truth-seeking process, the State carries the burden to prove a criminal defendant’s guilt for every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Burr v. Florida*, 474 U.S. 879, 880 (1985) (“[T]he **beacon of the truth-seeking process** in criminal cases is not absolute certainty, but the ‘reasonable doubt’ standard[.]” (emphasis added)).

The Supreme Court has cautioned trial judges to avoid using language that instructs the jury to “seek the truth” due to the risk that such language could potentially shift the burden of proof to the defendant in an unconstitutional manner. *State v. Aleksey*, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000). Additionally, the Supreme Court has advised trial judges not to instruct jurors that their verdicts “would represent truth and justice for the parties” due to the risk that such language could distract the jury from its core functions. *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012) (Toal,

C.J., concurring for the majority). However, our Supreme Court specifically declined to hold any mention of “the truth” in jury charges is unconstitutional. *See Aleksey*, 343 S.C. at 28, n. 2, 538 S.E.2d at 252 (“Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of ‘the truth’ in jury charges is unconstitutional.”); *see also State v. Hoffman*, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included “in seeking the truth” language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant).

In the instant case, the “seeking the truth” comment came prior to the jury being sworn and not during a discussion of the State’s obligation to prove Appellant’s guilt beyond a reasonable doubt. The comments were made during an effort by the trial court to impart to jurors the gravity of their responsibility in advance of the trial that had not yet begun. The comment in this context was not improper.

The jury was sworn on Monday, the trial began, the parties presented their cases and rested, the parties made their closing arguments **and then**, the trial court instructed the jury extensively on reasonable doubt and the state’s burden before the jury deliberated and returned a verdict on Friday.

Indeed, as shown below, the trial court did an exemplary job of communicating the State’s burden of proving the charges beyond a reasonable doubt, so the early isolated comment was not prejudicial to Appellant. *See State v. Raffaldt*, 318 S.C. 110, 115-116, 456 S.E.2d 390, 393 (1995) (finding a jury charge instructing the jury to “seek some reasonable explanation other than the guilt of the accused” was erroneously burden-

shifting but determining any error with that instruction was harmless because the charge as a whole properly explained the State had the burden of establishing Raffaldt's guilt beyond a reasonable doubt); *see also State v. Needs*, 333 S.C. 134, 154, 508 S.E.2d 857, 867 (1998) ("In *Manning*, the Court pointed to the 'in search of the truth' language contained in the reasonable doubt charge as contributing to its defective nature. However, appellate courts since have seemed to allow the use of the phrase – at least when it is not combined with other offending terms outlined in *Manning*." (citations omitted)).

In the instant case, the instructions at the close of evidence, four days after the jury was sworn, diminished to negligible any conceivable prejudice from the pretrial comment on the search for the truth. The trial court instructed the jury as follows on the State's burden:

Now, the defendants have pled not guilty to the charges in the indictment, and that plea puts the burden on the State to prove the Defendants guilty. And a person charged with committing a crime in South Carolina is never required to prove himself innocent. I charge you that this is an important rule of law that the Defendant in a criminal trial, no matter the seriousness of the charge, how serious it may be, will always be presumed to be innocent of the crime for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt. And the presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is like a robe of righteousness placed about the shoulders of the Defendant, which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It is not just a legal phrase, but it is a substantial right to which every Defendant is entitled unless you, the jury, are satisfied by the evidence of the defendant's guilt beyond a reasonable doubt.

Now, ladies and gentlemen, the State has the burden of proving the Defendant guilty beyond a reasonable doubt. And some of you may have

served as jurors in civil cases where you were told that it is only necessary to prove a fact more likely true than not true such as by the greater weight or the preponderance of the evidence. In criminal cases, however, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. And proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . .

(R. p. 807, line 12 – p. 808, line 21.).

The trial court further instructed the jury if there was only a reasonable possibility the Defendant was guilty, they must give him the benefit of the doubt and find him not guilty. (R. p. 809, lines 1-6.) The trial judge advised the jury it is the exclusive judge of facts. (R. p. 806, lines 11-23.) When informing the jury it could not draw any conclusions from Appellant's decision to not testify, the trial court also reminded the jury again the State had the burden of proof and the defendant did not have to prove his innocence. (R. p. 810, lines 7-17.)

In discussing the specific offenses, the trial court informed the jury the State had to prove the defendant killed another with malice aforethought. (R. p. 812, lines 13-16.) The trial court further advised the jury "malice is a state of mind and the State has the burden to prove to you that the element of malice existed..." (R. p. 814, lines 4-6.) The court further advised the jury of defendant's culpability when, in an emergency situation, he must act instantly to avoid injury to another. (R. p. 814, lines 8-15.)

Put in context, the trial court's comments prior to the jury being sworn merely imparted the gravity of the jurors' responsibility to ensure justice is done and citizens' rights are protected. The comments did not create any real danger that four days later the jurors would not follow the trial courts' extensive pre-deliberation instructions on the State's burden of proving the charges beyond a reasonable doubt. *See State v. Smith*, 315

S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (“Jury 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.”). Accordingly, the trial court did not err, and Appellant was not prejudiced by the perceived error.

IV. The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure is not a due process violation.

Appellant claims the trial judge should have required the State to open on the law and the facts and be allowed to only offer a reply argument after Beaty’s closing argument. Appellant claims in his statement of issues the current, established practice violates the due process clause of the South Carolina Constitution and the Fourteenth Amendment of the federal constitution.² However, due process is not implicated, and the procedure is reasonable and does not require alteration.

Historically, the right to the final closing argument has followed the party with the burden of proof. *Stein Closing Arguments § 1:6: Right to open and close; order of argument* (2011-2012 ed.) (“Generally, the right to make opening and closing follows the person having the burden of proof.”); Nicole Velasco, *Taking the “Sandwich” Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?*, 29 *Nova L.Rev.* 99, 112 (2004) (“At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.”).

² At trial, defense counsel argued that counsel agreed in chambers the State would open in full on the law and the facts, the defense would argue, and then the State be restricted to merely replying to the defense’s argument. Defense counsel argued that by following the established practice, the State had the opportunity to “sandbag” the defense, and defense counsel was unable to know before he argued what the State’s theory of the facts would be. (R. pp. 737; 815-816.)

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

Unlike the vast majority of jurisdictions, current South Carolina practice sets the order of closing arguments in criminal cases according to the evidence received at trial. *See State v. Brisbane*, 2 Bay 451 (S.C. 1802) (As a matter of practice, when a criminal defendant calls no witnesses, he has “the **privilege** of concluding to the jury.”) (emphasis added); *see also State v. Gellis*, 155 S.E. 849, 855 (1930) (“It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments.”); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379, 384 (1972) (same); *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122, 125 (Ct. App. 1995) (same).

In this case, Appellant chose to present two defense witnesses. Therefore, under longstanding state procedure, Appellant was not entitled to have last closing argument to the jury nor was he entitled to require the solicitor to open on both the facts and the law. Appellant asserts the trial judge’s adherence to the longstanding practice in South Carolina violated due process, although there is little explanation for this claim, beyond a vague allegation of the opportunity for sandbagging.

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

In all criminal proceedings, the prosecution takes the offensive at the outset, building through its witnesses a “case” for defendant’s guilt. In most instances, defense counsel is limited to the defensive tactic of cross-examination to show the weakness of the State’s evidence, and to create a reasonable doubt in the minds of the jury. Occasionally the defense will be in a position to take the offensive itself by calling witnesses to build its own case for innocence. In those instances where such an offensive tactic is possible, the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution’s presentation. But what of those situations where the circumstances do not give the defendant the option of presenting his own case? In our judgment it was precisely to counterbalance the weight of the State’s offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury. As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses.

Preston v. State, 260 So.2d 501, 504 (Fla. 1972).³

Totally denying a criminal defendant the opportunity for closing argument constitutes a denial of the defendant’s basic right to make his defense. *Herring v. New York*, 422 U.S. 853, 858-859 (1975). While the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is not evidence. *See, e.g., Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649, 653 (2006), quoting *S.C. Dept. of Transp. v. Thompson*, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct. App. 2003) (“[a]rguments made by counsel are not evidence”); *Sosebee v. Leeke*, 293 S.C.

³ In 2007, Florida changed its rules to eliminate a defendant’s right to make a final closing argument. See In re Amendments to the Florida Rules of Criminal Procedure—Final Arguments, 957 So.2d 1164 (Fla. 2007). Florida’s new rule provides, in pertinent part, as follows: “In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury.” Id. at 1167.

531, 362 S.E.2d 22, 24 (1987) (“the solicitor’s closing argument is not evidence”). There is no constitutional **right** to a certain order or scope of argument.

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

Significantly, Appellant did not lose his right to make a closing argument; rather, he merely chose to forfeit the opportunity to present his argument last. *See Herring*, 422 U.S. at 857-64 (a *total denial* of the opportunity to present a closing argument to the trier of fact is a denial of the basic right of the accused to make his defense).

The order of closing arguments is a matter of state procedural preference which does not offend equal protection or any other constitutional right. *Sheffer*. The trial judge and the parties below had the right to rely on well-established precedent and longstanding practice – a practice that never deprives any defendant of the opportunity to present a closing argument. That practice was followed in Appellant’s case. In fact, the solicitor indicated he preferred to offer one argument in closing, but Appellant requested he bifurcate the charge:

MR. STUMBO: And, Judge, just for the record, and we believe the law in the State right now is the State has – should have the option, and does

under the law now, to bifurcate or to give one argument. We honestly would prefer to give one argument, but if the Defense demands that we opening closed, I don't have any problem with it.

THE COURT: You can do it either way.

MR. STUMBO: We can do it either way.

(R. p. 737, line 20 - p. 738, line 2.) The solicitor complied with Appellant's request. Appellant should not be allowed to argue, vaguely, his Due Process rights were violated because the solicitor complied. Accordingly, there was no error.

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

Appellant's case is distinguishable from *Mouzon*. First, according to well-settled state procedural practice, Appellant lost the opportunity to present the last argument when he introduced evidence in the form of two expert witnesses. Second, the focus in Appellant's case remained on one event – the death of EA at the hands of Michael Beaty.

The State's theory was clearly that death resulted Appellant's strangulation of EA with the USB cord. The defense was certainly aware of the facts in evidence the State would argue in support of its theory of the case. Third, and perhaps most significantly, defense counsel's proffer of "rebuttal" arguments was simply a recitation of their own theory of the case. The defense objected to the solicitor's reference to the location of the strangulation on Calvert Ave, the victim's screaming, and Appellant's climbing on top of the victim to strangle her. Far from "sandbagging" the defense, the State maintained in its case in chief that at some point Appellant must have overpowered EA when he wrapped the USB cord around her neck when the State demonstrated how EA was strangled. The only offered evidence of location, other than in the car on the way home from the memorial was the driveway of the Calvert Avenue home. Numerous first responders testified they arrived at the crime scene to find the deceased victim. Thus, the location of the actual murder entered into evidence with the State's first witness. Finally, Appellant's own evidence supported the argument EA was screaming at him on the ride to Appellant's parents' house. Indeed, Appellant failed to show the trial court how he might have been "sandbagged" as he claims. Despite his arguments, Appellant's point of contention is with South Carolina's rule itself, not the application of the rule in this case. The solicitor was under no obligation to open fully on the facts and law and close only on reply, and Solicitor Stumbo made no promise he would. Appellant, however, was fully aware of the State's theory of the case and could have presented his "rebuttal" arguments in his own closing.

In sum, Appellant failed to demonstrate prejudice even assuming the trial judge erred. *See State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of

practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him.”); *see also Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (finding errors in closing argument "do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.").

V. The trial judge did not err in declining Appellant’s request to charge the outdated *Edwards* “reasonable hypothesis” language in the circumstantial evidence charge because the Supreme Court of South Carolina has found that this language is confusing and has directed that it should not be used. Instead, the trial judge properly charged the correct and current circumstantial evidence charge approved of in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).

The trial judge did not err when he charged the circumstantial evidence charge in accordance with *State v. Logan*, because the charge was a current and correct statement of the law in South Carolina.

Charge Conference

At the close of all evidence, the trial judge held a charge conference. Judge Young advised he would not charge the jury on the defense’s request to charge *State v. Edwards*⁴ and would instead charge in accordance with *State v. Logan*⁵, stating:

THE COURT: And I think you all wanted to go back to *Edwards*.

MR. WISE: That’s correct.

THE COURT: Which is not the current law, but maybe one day it will be. You never know.

(R. p. 733, lines 20-24.) Pursuant to *State v. Edwards*, Appellant asked the trial court for the following charge as part of an appropriate circumstantial evidence instruction:

⁴ 298 S.C. 272, 379 S.E. 2d 888 (1989).

⁵ 405 S.C. 83, 747 S.E.2d 444 (2013).

Every circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and ... all of the circumstances so proven [must] be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming then to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

(IBOA, p. 43; *Edwards*, at 275, 379 S.E.2d at 889).

The parties then made closing arguments, and the trial judge then charged the jury on the law. Regarding direct and circumstantial evidence the trial court charged:

Now, ladies and gentlemen, there are two types of evidence which are generally presented during a trial; there's direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence and the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. However, to the extent that the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. And if the circumstances merely portray the defendant's behavior as suspicious, the proof has failed. In the State has the burden of proving the defendant beyond a reasonable doubt in this burden rests with the state regardless of whether the State relies on direct evidence, circumstantial evidence or some combination of the two.

(R. p. 809, lines 7-25.)

Analysis

The trial judge's refusal to give the requested charge was not error. In reviewing jury charges for error, an appellate court considers the trial judge's jury charge as a whole and in light of the evidence and issues presented at trial. "A jury charge is correct if when read as a whole, the charge adequately covers the law." *State v. Drayton*, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct. App. 2015). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Brandt*, 393 S.C. 526, 549,

713 S.E.2d 591, 603 (2011)). Further, a trial judge generally “is required to charge only the current and correct law of South Carolina.” *State v. Jenkins*, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014).

In *State v. Cherry*, 361 S.C. 588, 601-602, 606 S.E.2d 475, 482 (2004), the Supreme Court held that the traditional circumstantial evidence charge served to confuse juries by leading them to erroneously believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence. As a result, the Court held “that the recommended language in *Grippon*⁶ is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction.” The Court in *Cherry* also expressly eliminated the confusing “reasonable hypothesis” language found in the *Edwards* instruction, which Appellant requested. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 (“[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not”). Indeed, the Supreme Court directed that the charge no longer be used. *Id.* Consistent with *Holland v. United States*, 348 U.S. 121 (1954), the Court in *Cherry* found that the “reasonable hypothesis” instruction merely served to confuse juries. *Cherry*, 361 S.C. at 601-602, 606 S.E.2d at 482. *See also Grippon*, at 85, 489 S.E.2d at 465 (Toal, J., concurring) (“Relying on *Holland*..., the federal courts and a majority of state courts have abandoned the ‘reasonable hypothesis’ language in favor of an approach that does not differentiate between direct and circumstantial evidence, but simply provides that a defendant’s guilt must be proven beyond a reasonable doubt”); *State v. Manning*, 305 S.C. 413, 417, 409 S.E.2d 372, 374 (1991) (“In deviating from the

⁶ 327 S.C. 79, 489 S.E.2d 462 (1997).

Edwards charge, the charge given in this case turns the State's burden of proof on its head by requiring the jury find a 'reasonable explanation' of the evidence inconsistent with appellant's guilt before it can find him not guilty").

While the Court in *Logan* did state that trial courts may not exclusively rely on [the *Grippon*] charge over a defendant's objection," *Logan*, at 100, 747 S.E.2d at 453, the Court reaffirmed both the correctness of the *Grippon* charge and the impropriety of the "reasonable hypothesis" language in rejecting the claim that *Cherry* had been implicitly overruled. *Id.* at 94, 747 S.E.2d at 449 ("the trial court did not err in providing a circumstantial evidence charge consistent with *Grippon*"). This language remains disapproved. *Id.* at 98, 747 S.E.2d at 451-52 ("requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant"). *See also Jenkins*, 408 S.C. at 572-73, 759 S.E.2d at 766.

Appellant asked the trial judge to instruct jurors on the "reasonable hypothesis" language of *Edwards*. Therefore, the requested charge was properly rejected because it did not and still does not accurately state the applicable law.

Nor is there merit to Appellant's claim the alternative explanation of the defense compelled the court to give the *Edwards* charge. Appellant cites *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002), for the proposition the trial court should have instructed the jury the State must disprove the defense's alternative version of events beyond a reasonable doubt. (IBOA at p. 45.) In *Burkhart*, however, the instruction in question was the charge on self-defense. The court found the trial court erred when it refused to charge the jury the State bore the burden of disproving self-defense beyond a reasonable doubt.

Id. at 260, 565 S.E.2d at 302. The charge on circumstantial evidence was not at issue. In accordance with *Burkhart*, Appellant could have requested the trial judge add language to the sudden emergency charge, indicating the State had the burden of disproving the emergency beyond a reasonable doubt. However, Appellant failed to request this charge of the trial court, and thus this issue is not preserved for review.

Finally, Respondent notes that the Court in *Logan* recognized that “erroneous jury instructions are subject to a harmless error analysis,” and it found that any error in the failure to give the requested circumstantial evidence instruction was harmless because “[t]he trial court’s jury instruction, as a whole, properly conveyed the applicable law” in light of the instruction on “reasonable doubt burden of proof.” *Logan*, 405 S.C. at 94, 747 S.E.2d at 449. In both *Jenkins* and *Drayton*, this Court likewise concluded that the failure to give an instruction such as that requested by Appellant “was harmless beyond a reasonable doubt because the trial court’s instruction, as a whole, properly conveyed the applicable law,” in light of the trial judge’s correct “reasonable doubt” charge. *Jenkins*, 408 S.C. at 573-74, 759 S.E.2d at 766; see also *Drayton*, 411 S.C. 533, 769 S.E.2d 254, (certiorari granted in part, judgment vacated in part on other grounds by *State v. Drayton*, 415 S.C. 43, 780 S.E.2d 902 (2015)).

Here, the trial judge gave the same reasonable doubt instruction as the trial court in *Logan*. (R. p. 809.) The charge in question is taken almost verbatim from that endorsed by the Federal Judicial Center, see *Federal Judicial Center, Pattern Criminal Jury Instructions* 17-18 (1987) (Instruction 21); and it has been approved by the Court’s decision in *State v. Darby*, 324 S.C. 114, 115-16, 477 S.E.2d 710, 710-11 (1996), and in Justice Ginsburg’s concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 26-27(1994)

(Ginsburg, J., concurring in part and in judgment) (“This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly”). As a result, any error was harmless beyond a reasonable doubt.

VI. Judge did not abuse his discretion when he refused to admit testimony of an incident from four years prior concerning the victim threatening to jump from an automobile because the statement was unrelated to the defendant and the State did not dispute the victim attempted to jump from the car.

How the Issue was Raised at Trial

Following the close of the defense’s case, Judge Young excused the jury to take up some matters with trial counsel before the charge conference the following morning.

Appellant asked to place the following on the record:

THE COURT: you may be seated. I understand you want to put something on the record.

MR. STUMBO: I would just object to this been done. I don’t know why we need to do this on the record other than Mr. Wise summarizing what the testimony would be. I don’t see what the purpose is other than – based on what I understand the testimony, to embarrass his family.

MR. WISE: No. The testimony – testimony relates to the defense we have about her jumping out of the car.

THE COURT: I have denied it coming in.

MR. WISE: Correct.

THE COURT: They want proffer it for appeal purposes, I’m sure.

MR. WISE: And I don’t mind getting an affidavit written and just putting it in the record, if you want me to.

MR. STUMBO: I don’t have a problem doing that, Judge. If they want to get an affidavit. I would prefer that.

THE COURT: All right.

(R. p. 731, lines 5-23.)

Unfortunately, the record is unclear on the specific ruling of Judge Young on the admissibility of the testimony.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25–26, 609 S.E.2d 506, 509 (2005) (internal citations omitted).

In general, all relevant evidence is admissible. Rule 402, SCRE. However, there are some exceptions to that rule. For instance, according to S.C. R. Evid. 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .” Additionally, S.C. R. Evid. 404 provides the following constraints on the admission of character evidence:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

...

Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

...

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Along those same lines, South Carolina case law provides as follows:

In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonable to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused.

State v. Day, 341 S.C. 410, 419–20, 535 S.E.2d 431, 436 (2000) (internal citations omitted).

Day, of course, sets out an exception to the general prohibition on character evidence and evidence of prior bad acts. There are other ways in which such evidence may be properly admitted despite Rule 404. For example, “[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (2003).

Appellant argues EA’s statement to her teacher four years prior when she was fifteen years old was a threat against the defendant. (IBOA at p. 49.) The Statement reads, in pertinent part:

1. I was the honors English teacher of Emily Anna Asbill when she was 15 years of age.

2. One day she was staying after school to work on her project involving "To Kill a Mocking Bird." She started discussing her problems at home concerning her parents who objected to a boy she was dating. She said she had been feeling depressed. She said to me "Mrs. Jones I have been cutting myself." We discussed her feelings. She then informed me that she had threatened to jump out of her mother's car.

3. I reported the incident to Dr. Alexander who informed me that he would contact her parents. I heard nothing further from her or the school concerning this incident.

(Affidavit of Valerie Jones.)

Clearly the statement was not a threat directed against the defendant. The victim was still a child when she made the statement. Moreover, the statement was not a threat against anyone other than the victim, herself. Finally, Appellant argues the statement should be admissible because it makes "more or less probable either the defense or the theory of the prosecution." (IBOA at p. 49.) The State did not dispute the defense's theory EA attempted to jump out of the car during a heated argument. The State did dispute Appellant's claim he accidentally strangled EA when he pulled her back into the car. At trial the solicitor argued the fighting in the car, including the injuries sustained when she was dragged on the ground, contributed to the escalating tensions between Appellant and EA, and Appellant strangled her after they arrived at Calvert Ave.

Appellant's efforts to introduce a statement from the victim's childhood would, as the solicitor argued, only serve to embarrass the family. The statement was so far remote in time as to make it completely irrelevant to the adult actions of the victim or her relationship with this defendant. Moreover, it failed to serve as a rebuttal argument against the State's theory of the case, when the State did not dispute whether EA attempted to jump from the vehicle or not. Appellant's only benefit in submitting this

statement was to achieve an appealable issue on which he could also hinge his cumulative error argument. *See* Section VIII, *hereafter*.

The trial court properly exercised his discretion in ruling the statement EA made to her teacher as a fifteen year old child was inadmissible in the trial of her murderer over four years later.

VII. Whether the trial court abused its discretion in refusing to ask jurors whether they were biased against defense attorneys was not preserved for review. However, the court committed no error in refusing to ask the question because the question was not relevant or probative to the issues at hand.

As a preliminary matter, this issue was not preserved for appellate review. During discussions prior to bringing in the jury, the State and Appellant agreed to discuss the “extensive voir dire questions” from the defense. (R. p. 9, lines 23-25.) Following a recess, the State called the case against Appellant and the judge immediately questioned the potential jurors individually on their knowledge of the case from the media. (R. pp. 12-27.) The judge went on to inquire whether anyone was related to Appellant or any other potential witnesses. (R. pp. 27-32.) The court asked the jury if anyone was related to the attorneys or their staff, or if anyone had formed an opinion about any matter related to the case. (R. pp. 32-33.) The court asked numerous other questions concerning possible biases for and against Appellant. (R. pp. 34-43.) At the end of voir dire, the court asked if the defense had further questions. Counsel for Appellant said, “Just what we mentioned up there. And number 20 also, Your Honor.” (R. p. 43, lines 16-17.) The court held two side bars before the jury was seated, but the discussions were not placed on the record. (R. pp. 43-44.) Appellant made no objection to the voir dire, other than what he “mentioned up there.” (R. p. 43.)

A “general objection that does not specify the particular ground on which the objection is based is insufficient to preserve a question for review.” *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). A general objection that does not specify the particular ground for objection does not preserve the issue for review. *State v. New*, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). Moreover, Appellant’s objection to the voir dire questions in his motion for a new trial did not sufficiently preserve the argument. “Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review.” *State v. Sheppard*, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). Because Appellant did not make a particularized and contemporaneous objection to the court’s failure to ask the question about defense attorneys in voir dire, the argument is not preserved for review.

As to the merits of Appellant’s claim, a juror must be unbiased, impartial, and able to carry out the law as it is explained to him. *State v. Green*, 301 S.C. 347, 344, 392 S.E.2d 157, 161 (1990). A potential juror must be excused if his opinions would prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions. *Id. at 354, 392 S.E.2d at 160*. *State v. Davis*, 309 S.C. 326, 335-36, 422 S.E.2d 133, 139-40 (1992) overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

The manner in which voir dire is pursued and the scope of any additional voir dire are matters of trial court discretion. *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982). In *Mu’Min v. Virginia*, 500 U.S. 415 (1991), the United States Supreme Court held a defendant is entitled to specific questions only if the failure to ask them would render his

trial "fundamentally unfair." *See also State v. Tucker*, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999).

There was no error in the Court's refusal to ask potential jurors, "Who among you just don't like lawyers, particularly lawyers who represent persons accused of a crime in cases like this?" In his ruling denying Appellant's motion for a new trial, the trial court stated:

I do not find this question to be directly relevant or probative to the issue at hand, and the discovery of any potential bias of jurors towards Defendant or his counsel was sufficiently vetted by other questions asked of the jury pool during voir dire.

(Order Denying Motion for New Trial at 7.)

Moreover, during the course of this trial, the State made no remarks insulting or expressing animosity toward counsel for Appellant. In saying Appellant's counsel wanted jurors to "check their common sense at the door," the State was simply attacking the reasonableness and plausibility of Appellant's theory of the case. The State made no personal attacks whatsoever against either Mr. Grose or Mr. Wise. As for the identification of Appellant, Mr. Beaty sat between his attorneys, and the jury could clearly see this. The cross-examination and comments the State made during its closing dealt with the potential bias of witnesses who were collecting fees for their testing, review, and testimony, as is permissible under SCRE 608(c).

Appellant did not adequately preserve the voir dire issue for review and the trial court did not abuse its discretion in finding the question irrelevant and non-probative of the facts of the case. Accordingly, Appellant is not entitled to relief on this ground.

VIII: There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one, and even a perfect trial would have inevitably resulted in Appellant's conviction.

Appellant argues this Court should grant a new trial on the basis of the cumulative error doctrine. This ground was neither raised at trial nor in the motion for new trial and is therefore not preserved for review. The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)

Nonetheless, the cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. *Id*; see also *State v. McEachern*, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Further, our courts have addressed the issue of an unpreserved cumulative error doctrine, concluding the doctrine is not recognized when Appellant asks the court to consider any unpreserved issues for review. *See State v. Beekman*, 405 S.C. 225, 238, 746 S.E.2d 483, 490 (Ct. App. 2013) (“our appellate courts do not apply the plain error rule”); *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting appellant clearly sought for the appellate court to apply the plain error rule and stating as follows: “This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. “) As in *Beekman* and *Sheppard*, Appellant asks this court to apply the plain error doctrine by combing the record for issues and arguing for the first time on appeal the cumulative effect of these matters deprived him of a fair trial.

Further, despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance. The State presented substantial circumstantial evidence of Appellant’s guilt to survive a directed verdict motion. The trial court properly declined Appellant’s request for an involuntary manslaughter charge because absolutely no evidence supported it, and the charge as a whole accurately instructed the jury on the State’s burden of proof beyond a reasonable doubt, particularly with respect to circumstantial evidence. The State was under no obligation (and never agreed) to present its entire closing argument on the facts before Appellant’s close, and thus the State cannot be accused of “sandbagging” the defense. Moreover, the State submits Appellant’s introduction of irrelevant and upsetting testimony from an old teacher of the victim were a strategic effort to accumulate

appellate issues. Finally, the court exercised sound discretion in refusing to inquire whether any member of the jury “just don’t like lawyers, particularly lawyers who represent persons accused of a crime in cases like this.”

Appellant’s attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine the fact that Appellant did receive a fair trial. This case does not warrant reversal on cumulative error. “As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted). In the case at hand, Appellant received a fair trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
SUSANNAH R. COLE

SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

ATTORNEY FOR RESPONDENT

August 10, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County

W. Jeffrey Young, Circuit Court Judge

RECEIVED

AUG 10 2016

80 SUPREME COURT

THE STATE,

RESPONDENT,

V.

MICHAEL VERNON BEATY,

APPELLANT,

Appellate Case No. 2015-000718.

CERTIFICATE OF COMPLIANCE

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

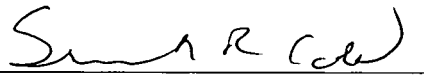
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
SUSANNAH R. COLE
SC Bar No. 68383

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PROOF OF SERVICE

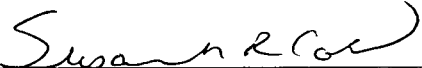
I, Susannah Cole, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

E. Charles Grose, Jr., Esquire
404 Main Street
Greenwood, SC 29646

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

This 10th day of August, 2016.



Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383