STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Laurens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent/Petitioner

vs.

PRESTON SHANDS, JR.,

Petitioner/Respondent.

Appellate Case No. 2018-001673

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, SC 29649-0516
(864) 942-8800

ATTORNEYS FOR RESPONDENT

RECEIVED
OCT 18 2018
S.C. SUPREME COURT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

ARGUMENTS

I. The trial court did not err in denying Shands' Batson motion because the prosecution stated a gender neutral reason for striking jurors – the criminal records of the three males struck by the prosecution. The female juror with a stale, isolated conviction who was seated on the jury was not similarly situated as the struck male jurors. 7

II. The trial court did not err in denying the motion to quash the indictment because Shands failed to show evidence of any irregularity in the grand jury process in this case 10

III. The trial court did not err in admitting Shands' prior conviction under Rule 609(a)(1), SCRE, because Shands was on parole for that offense when he committed the crimes in the instant case, and because Shands put his character into issue. Shands was not prejudiced because his credibility was not critical since he agreed he committed the offenses, and the evidence was overwhelming 11

IV. Evidence did not support an instruction on involuntary intoxication 17

V. The trial court did not err in denying Shands' motion to strike the prosecutor's argument that was based on evidence in the record 20

VI. The trial court did not err in failing to force the State to open on law and facts and reply only to "new" arguments of defense counsel; and Shands' due process rights were not violated 21

VII. The kidnapping statute is not unconstitutionally vague and not overly broad as applied to Appellant; Appellant held Victim by her hair and trapped her in the garage when she wanted to leave; the evidence is sufficient to survive directed verdict 23

CONCLUSION 25

STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in denying Shands' Batson motion because the prosecution stated a gender neutral reason for striking jurors – the criminal records of the three males struck by the prosecution. The female juror with a stale, isolated conviction who was seated on the jury was not similarly situated as the struck male jurors.

II. The trial court did not err in denying the motion to quash the indictment because Shands failed to show evidence of any irregularity in the grand jury process in this case.

III. The trial court did not err in admitting Shands' prior conviction under Rule 609(a)(1), SCRE, because Shands was on parole for that offense when he committed the crimes in the instant case, and because Shands put his character into issue. Shands was not prejudiced because his credibility was not critical since he agreed he committed the offenses, and the evidence was overwhelming.

IV. Evidence did not support an instruction on involuntary intoxication.

V. The trial court did not err in denying Shands' motion to strike the prosecutor's argument that was based on evidence in the record.

VI. The trial court did not err in failing to force the State to open on law and facts and reply only to "new" arguments of defense counsel; and Shands' due process rights were not violated.

VII. The kidnapping statute is not unconstitutionally vague and not overly broad as applied to Appellant; Appellant held Victim by her hair and trapped her in the garage when she wanted to leave; the evidence is sufficient to survive directed verdict.

RECEIVED
OCT 18 2018
S.C. SUPREME COURT

STATEMENT OF THE CASE

Appellant Shands was indicted by the Laurens County grand Jury for first degree burglary, kidnapping, attempted murder, first degree assault and battery, and possession of a knife during the commission of a violent crime. Shands proceeded to jury trial on May 26-27, 2015 before the Honorable Edward W. Miller. Shands was found guilty of first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a crime. Judge Miller sentenced Shands to life without parole.

On appeal, the Court of Appeals affirmed all convictions except the attempted murder conviction. State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). The State petitioned for a writ of certiorari to review the Court of Appeal's holding reversing the attempted murder conviction. Shands petitioned this Court for review of the seven remaining issues. This return to Shands' petition follows.

STATEMENT OF FACTS

Shands' wife decided to leave their house; Shands would not let her. Shands detained and then violently attacked his wife (Victim), repeatedly stabbing her with a barbecue fork. Shands smashed the windows of a neighbor's house and chased Victim out of the neighbor's house with a knife he took from the neighbor's kitchen.

Shands and Victim were married and lived with their eight year-old son, Jalen, and Victim's sixteen year-old son, Trey. Victim testified she arrived home at 6:30 p.m. on Sunday and settled into watching television when Shands became irate and started cursing. She announced she was leaving with the sons. R. pp. 55-59. Victim tried to open the garage door to leave, but Shands closed the door

each time. R. pp. 66-67. Shands closed the car door on her leg. Shands pulled Victim by the hair to try and get her back in the house. R. p. 59.

Victim remembered Trey telling her to run. Victim and Jalen made it under the garage door. They went across the street to neighbor Bill Koon's house. R. p. 59. Victim remembered trying to keep Shands from stabbing her. R. pp. 59-60. She suffered a number of wounds and scars. She did not know how many times she was stabbed, but she needed about forty to fifty stitches. R. pp. 62-65.

On cross-examination, counsel asked Victim, "but the way Preston was acting that night, he was more agitated than usual right?" R. p. 70, lines 20-21. Victim answered, "I guess a little because he did stuff all the time." R. p. 70, line 22. Victim admitted Shands never physically harmed her before. R. pp. 70-71. However, on cross-examination, she testified in the months leading to the assault, he was "[c]ontrolling, we walked on pins and needles every day, we just didn't know what to expect." R. p. 71, lines 13-16. Victim did not smell alcohol on Shands. R. p. 69, lines 18-23.

Trey testified he was home earlier in the day with Shands. He saw Shands drink a beer, but he did not know how much Shands drank. R. p. 73. Trey denied seeing Shands drinking from a clear glass containing cola. R. p. 80. When Victim arrived home, Victim and Shands started arguing. Victim told Trey and his brother they were leaving. Trey testified Shands shut the garage door to keep Victim from leaving. Shands also kicked the car door into her leg. R. pp. 73-75.

Trey managed to run over to Koon's house and asked Koon to call 911. He saw Victim run under the garage door. However, Shands tackled Victim in front of Koon's house and started stabbing her. Trey tried to stop him. Shands left and returned with a hammer and broke Koon's windows. Shands entered Koon's house and grabbed a knife. He chased Victim out of the house, but law

enforcement arrived. R. pp. 75-77. Trey thought Victim was going to die. R. p. 78.

Jalen confirmed Shands and Victim argued. Jalen further confirmed Shands kicked the car door into Victim's leg while she was trying to leave. Jalen testified Shands held Victim by her hair and was trying to stab Victim's throat with a fork, but the fork was bent up. R. pp. 82-83.

Clarence "Bill" Koon, the neighbor, testified Trey banged on his door, and told him Shands was stabbing Victim. Victim and the children ran to his house, soon followed by Shands. Shands and Victim struggled on the front-room floor. R. p. 87. Koon described the melee:

> [H]e looked to me he was trying to cut her throat with some kind of object wrapped around his hand, I couldn't tell at the time what it was . . . And it was wrapped around his hand like a pair of steel nooks. And he was trying to use the bottom end of it, the broke end part and he was trying to go across her throat with it.

R. p. 88, lines 1-8. Victim was completely covered with blood. R. p. 88, lines 12-13.

Koon went to the bathroom shower to tell his wife and call 911. Koon saw the two boys struggle with Shands to keep him from stabbing Victim. R. pp. 88-89. Shands left and returned with a hammer and smashed the front windows. Koon locked the back door and told Shands to "cool off" but Shands broke through the sliding glass door and entered the house. R. pp. 89-90. Shands grabbed a knife from the kitchen and headed out the front door as a law enforcement officer drew his weapon out front. Shands dropped his knife under the officer's command. R. p. 90. Koon explained, "that man was trying to kill that woman." R. p. 94, lines 19-22.

Counsel asked Koon if the events were out of character for Shands. Koon replied he did not know if it was out of character or not. R. p. 97. On redirect, the prosecutor asked, "How would Mr. Shands react if someone tried to speak to Ms. Shands?" Koon answered, **"He could get sometimes a**

little jealous at times. I mean he would say something to her and get her attention." R. p. 97, lines 10-14 (emphasis added).

Martha Koon, Koon's wife, testified she was in the shower when she heard the screams. She did not see the weapon, but saw Shands holding something and went for Victim's throat. Blood was everywhere. R. pp. 99-100. Shands entered the house after smashing the sliding glass door with a hammer. He took a knife from the kitchen and started towards Victim until the police arrived. R. p. 100. Martha agreed Shands was always friendly and polite, except for that day of course. R. p. 103.

Sergeant Michael Gainey responded to the 911 call. R. p. 105. He saw Victim and a teenager running out of the house. Then Shands came out of the house with Jalen. His left hand was on Jalen's shoulder, his right hand held the knife. Sergeant Gaines pointed his revolver at Shands and told him to let Jalen go. Shands complied. Sergeant Gainey further demanded Shands drop his knife. Shands did. Shands also complied with Sergeant Gainey's request to get to the ground. Sergeant Gainey did not smell any alcohol on Shands. R. pp. 107-112. Sergeant Gainey verified Shands suffered superficial injuries – he was treated for some lacerations on his hand. R. p. 118; p. 123.

Paramedic Andrew Heiney treated Victim. Her clothing was ripped. She briskly bled from a laceration to her head. R. pp. 129-30. There were multiple stab wounds on her arms. R. p. 131. Heiney opined the wounds were life threatening. R. p. 132. EMS decided, due to the severity of the injuries, to transport Victim by helicopter rather than ambulance to the hospital. R. pp. 133-34.

Julie Medlin, also with the Laurens County EMS, confirmed Shands was alert and oriented at the time he was transported for medical treatment and explained, "that means he knew who he was, he knew where he was, he knew the events leading up to why we were called and just everything that was

going on around him, like what day and time it is." R. p. 186, lines 9-12. Shands did not appear disoriented or intoxicated. R. p. 186, lines 13-16. Shands was covered with small glass shards. R. p. 186, lines 17-19. Shands' injuries were "a laceration to the right hand, fifth digit; . . . a laceration to the outside of his left calf and an abrasion to the back of the left shoulder." R. p. 186, lines 20-24.

Shands claimed he was intoxicated during his attack. Shands spilled his beer so he found "this stuff I had bought at work" that was homemade moonshine R. p. 191, line 21 - 192, line 13. Shands never drank moonshine before. It was so strong that when he tasted it straight, he spit it out of the cup. Shands mixed the moonshine with ice and two liters of coke. It still tasted strong. R. pp. 192-93.

Shands claimed he usually just goes to sleep when he drinks. R. p. 193, lines 14-24. Shands claimed the moonshine did not affect him this way though, instead it "took me clean out of my round." R. p. 194, lines 11-13. Shands speculated the moonshine "wasn't just alcohol" but "was something more strong and powerful in there, that they put in there other than alcohol. Because normally alcohol just makes me drunk and fall out and go to sleep." R. p. 194, lines 13-22. Therefore, Shands concluded, the moonshine must have contained some drug. R. p. 194, lines 19-25.

On cross-examination, Shands admitted he never tried the moonshine before. He explained he was told the moonshine was "the cremator of all whiskey" and until tasting it "you can never say you drunk anything." He admitted he drank it without knowing how he would react to it. R. p. 201, lines 2-22. Shands admitted he knew it was stronger than normal alcohol. R. p. 202.

Shands admitted he was responsible for what happened to Victim. He claimed he did not remember anything from the incident. R. pp. 195-96. Shands admitted that although the marriage was good at first, he became jealous and controlling when he started drinking. R. p. 199, line 22 – p. 200,

line 2. Shands did not deny his violent acts, he claimed, "I know I did it but I don't understand it, I don't understand what happened that night." R. p. 204, lines 9-10.

ARGUMENT

I. The trial court did not err in denying Shands' Batson motion because the prosecution stated a gender neutral reason for striking jurors – the criminal records of the three males struck by the prosecution. The female juror with a stale, isolated conviction who was seated on the jury was not similarly situated as the struck male jurors.

Shands claims the trial court erred by not granting his Batson motion challenging the prosecution's decision to strike three male jurors. However, the prosecution gave gender neutral reasons for striking three males: two were previously convicted of criminal domestic violence and the third had four prior lottery violation charges. A female juror with a stale, isolated conviction for check fraud was seated, but she was not similarly situated as the three male jurors.

The Supreme Court held in Batson v. Kentucky, 476 U.S. 79 (1986) that the equal protection clause prohibits a prosecutor from striking jurors solely on account of their race. The rule was further extended to prohibit gender discrimination in jury selection. J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994). A three-step procedure should be followed when an opponent raises a claim that a jury strike was exercised in violation of the Equal Protection Clause. First, the moving party must make a prima facie showing the challenge was based on race or gender. Provided an adequate showing was made, the trial court must require the challenged party to provide a race or gender neutral explanation for the challenge. Last, the trial court must determine if the moving party has proven purposeful discrimination. State v. Giles, 407 S.C.14, 18, 754 S.E.2d 261, 263 (2014).

For the second step of the procedure, the explanation must be a "a clear and reasonably specific explanation of [the] legitimate reasons for exercising the [jury strike]." Miller-El v. Dretke, 545 U.S.

231, 239 (2005). However, the explanation need not be persuasive or even plausible. Giles, 407 S.C. at 21, 754 S.E.2d at 265.

At the third step, the moving party must show the facially race or gender neutral reason was actually mere pretext to engage in purposeful discrimination. State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006). The Court of Appeals explained, "The opponent of the strike . . . must demonstrate the pretextual nature for the stated reason for the strike. . . . This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. (internal citation and quotation marks omitted). The burden of persuasion during a Batson motion remains at all times on the moving party. State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

In the instant case, the State struck two white males, a black male and a female. The defense struck seven females and three males. The jury was composed of nine women and three men. R. pp. 16-22. After Shands raised a Batson motion, the State offered its reasons for striking the three males, noting both Juror 125 and Juror 156 had CDV convictions. The prosecutor noted the present case involved acts of domestic violence. R. p. 23.

The prosecutor also explained why the State did not object to other jurors with contact with law enforcement. Juror 5, a female, was charged with "false info" but showed no disposition from 2004. Juror 54, a female, had a fraudulent check conviction from 2003, but the prosecutor noted that was from eleven to twelve years ago. Juror 53, **a male**, had a pending simple possession charge, but was not convicted yet. Juror 170, a female, had a nolle prossed unlawful neglect charge and a dismissed simple possession charge. R. p. 23.

Shands' challenge to this explanation is essentially all convictions are equal, so the State should have struck juror 54. R. p. 24. The State noted, though, a significant distinction between "someone who accidentally overdrew their bank account and someone who struck a household member, threatened to strike a household member. They are not similarly situated." R. p. 25, lines 3-7. The trial court denied the motion. However, Shands argued **after** the ruling that the lottery charges and a fraudulent check conviction were similarly situated. R. p. 25, line 21 – p. 26 line 3.

A juror's criminal conviction is considered a neutral reason to strike. State v. Casey, 325 S.C. 447, 453, 481 S.E.2d 169, 172 n.2 (Ct. App. 1997). Shands argues the State's reasons for striking the jurors were pretextual because the State did not strike the female with an eleven year-old check conviction. "However, the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for inconsistency." Id. at 454, 181 S.E.2d at 173.

The defendant bears the burden of proving the State's neutral reasons for striking the juror is pretext. State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). "Therefore, those findings are given great deference and will not be set aside unless clearly erroneous." Evins, 373 S.C. at 415-16, 645 S.E.2d at 909-10 (quoting State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006)).

In the instant case, the prosecutor's explanation was reasonable. Due to the aggravated domestic violence in this case, striking the two jurors convicted of domestic violence was a foregone conclusion. Further, the remaining male juror, with four incidents of violating a lottery law, was not

similarly situated with a juror with one lone, stale conviction for check fraud. That male juror, after multiple clashes with the justice system, was understandably not as suitable as a juror whose isolated conviction occurred over a decade ago. Accordingly, evidence supports the trial court's ruling as Shands failed to show the reasons provided were mere pretext.

II. The trial court did not err in denying the motion to quash the indictment because Shands failed to show evidence of any irregularity in the grand jury process in this case.

Shands argues the trial court should have quashed the indictments based on conjecture that the witness before the grand jury was not the same officer listed on the indictment. Shands made no effort to prove this assertion to the trial court. Shands sought a proffer from the prosecution on the grand jury process in Laurens County. Deputy Solicitor Mowry explained a prosecutor assigned the case drafts and signs the indictment. When the grand jury is in session, a representative from each law enforcement agency presents the indictments for that agency. R. p. 27, line 24 – p. 28, line 11. Mowry advised the trial court he did not know the identity of any witnesses who testified before the grand jury and the Solicitor's Office does not keep track of who takes the cases before the grand jury . R. p. 28, lines 14-23. The Solicitor noted the prosecutors did not appear before the grand jury, and Shands' counsel agreed he was not making that allegation. R. pp. 30-31.

Shands suggested he may need to call some witnesses depending on the prosecution's proffer, however, Shands never did call any witnesses to determine which officers testified before the grand jury. "Proceedings of the grand jury are presumed to be regular unless there is clear evidence to the contrary." State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." Id. at 502, 409 S.E.2d at 424.

No evidence was presented that the witnesses on the indictment did not appear before the grand jury to present the indictments. No evidence was offered an officer without knowledge of the case presented evidence to the grand jury. Shands declined to present any evidence to determine the existence of any irregularity suggested by Shands now on appeal.

III. The trial court did not err in admitting Shands' prior conviction under Rule 609(a)(1), SCRE, because Shands was on parole for that offense when he committed the crimes in the instant case, and because Shands put his character into issue. Shands was not prejudiced because his credibility was not critical since he agreed he committed the offenses, and the evidence was overwhelming.

Shands claims the trial court erred in allowing the State to impeach Shands with his 1976 murder conviction. However, Shands was on parole for the conviction at the time he assaulted Victim, and the conviction was probative under Rule 609, SCRE. The prosecution limited the danger of unfair prejudice by asking him if he had a prior conviction for a violent offense. Further, Shands put his character into evidence by eliciting testimony from family and neighbors that he never acted that way before the assault. Therefore, the State was allowed to rebut this character evidence with his conviction under Rule 404(a), SCRE, because Shands opened the door to this testimony. Accordingly, the trial court did not err. Further, any error was harmless in light of the overwhelming evidence of guilt.

The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year's

imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Prior convictions similar to the one for which the defendant is being tried are not automatically inadmissible; instead, "[t]rial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence." Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

Shands' prior conviction was within time limits of Rule 609 because Shands was on parole and under the State's supervision at the time of the assault.

Rule 609 provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE.

Shands was convicted of murder in 1976 in Florida and sentenced to life imprisonment. He was paroled in 2003, and still serving parole at the time of the offense. R. p. 135, lines 23-25. Shands argues he was not in custody while on parole. In State v. Scott, 326 S.C. 448, 484 S.E.2d 110 (Ct. App.

1997), the defendant was tried before the rules of evidence were adopted. He was tried in 1995, and the State sought to impeach a defense witness, Brock, with Brock's 1977 robbery conviction. Brock received a nine year sentence and was released on parole in 1980. The parole terminated in 1986. The court relied on Jones v. Cunningham, 371 U.S. 236, 243 (1963), and held Brock was in custody while on parole, and therefore, was in custody until 1986, only nine years prior to the trial. Scott, at 451-52, 484 S.E.2d at 112. In State v. Ellis, 397 S.C. 576, 726 S.E.2d 5 (2012), in addressing a sentence calculation, the Supreme Court found a probationary sentence did not start until the conclusion of parole for another offense, noting a "defendant's release from a sentence does not mean his mere release from physical custody." Id. at 583-84, 726 S.E.2d at 8-9. In the instant case, Shands was still in custody by virtue of being under parole supervision, therefore, the ten-year limit was not implicated.

Generalized impact on credibility

Admittedly, murder is not a crime of dishonesty. However, the offense, requiring malice, does impact credibility. This generalized impact on credibility is contemplated by Rule 609(a)(1), SCRE. Merely because an offense is not a crime of "dishonesty or false statement" under Rule 609(a)(2), does not mean the offense lacks probative value for truthfulness. Otherwise Rule 609(a)(1) would not exist. In the instant case, the offense carried an impact on credibility that supports the trial court's ruling.

In State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012), the Supreme Court's analysis centered on the higher standard in Rule 609(b) pertaining to admission of remote convictions rather than the standard in Rule 609(a)(1) pertaining to convictions within ten years. Black, 400 S.C. at 18, 732 S.E.2d at 885. The extensive discussion regarding the impeachment value of prior convictions must be taken in the context of the statutory presumption against the admission of remote convictions unless the trial

court finds the probative value "substantially outweighs" its prejudicial effect. Indeed, in Black the Supreme Court noted even though a conviction for a crime of violence is not particularly probative of the specific trait of truthfulness, its impeachment value is merely "limited." Id. at 23, 732 S.E.2d at 887. The Court did not hold the impeachment value was nonexistent.

This is because if the crime is "not probative of truthfulness," its probative value would **never** outweigh its prejudicial effect. Such a ruling would eviscerate the Rule and only allow impeachment with crimes of dishonesty or false statement. As a result, the judicial limitations on the exception contained in Rule 609(a)(2) would swallow the rule contained in Rule 609(a)(1) in its entirety. This was clearly not the result contemplated by this Court in State v. Bryant, 369 SC. 511, 633 S.E.2d 152 (2006); after finding Bryant's prior firearms convictions "do not involve dishonesty," the Court nevertheless stated "their probative value should have been weighed against their prejudicial effect." Bryant at 517, 633 S.E.2d at 156. A balancing test pursuant to Rule 609(a)(1), SCRE, is always proper, even where the prior conviction and the current charge are identical.

In the instant case, the probative value of the prior conviction and its impact on credibility was heightened by Shands' cross-examination of several witnesses about his character. For instance, Shands asked Victim, "This is the first time he has ever done something like this, isn't it?" R. p. 70, lines 7-8. Shands also asked Victim, "But he never did anything like this before?" R. p. 70, line 23. Likewise, Shands asked Trey, "And other than this one incident [Shands] has never done anything like this that you have seen, has he?" R. p. 80, lines 6-7. Shands followed this question by asking, "But he, he could fuss and get irritable but he has never had stabbed anybody like this, has he?" R. p. 80, lines 9-10.

Shands asked Jalen on cross-examination if it was the first time he saw his dad do something like that with a fork, whether it was out of the ordinary, and if he ever saw Shands in that kind of state of mind before. R. p. 85, lines 16-25. Shands asked Koon if it "was entirely out of character for [Shands]," if he was always a good neighbor, and whether he witnessed anything like that before. R. p. 96, line 25 – p. 97, line 5. Shands also elicited testimony from Martha Koon that Shands was a good neighbor for several years until that night. R. p. 102, line 15 – p. 103, line 3.

In the instant case, Shands' defense was an imperfect defense of intoxication and to this end he presented evidence he was acting out of character the day of the assault. Therefore, the impeachment value of his past murder conviction, described as "a violent felony," was enhanced beyond the usual probative worth of violent crimes because Shands' defense was premised on the idea that but for his gross intoxication, this would not have happened because it was out of character. Moving on to the remainder of the Colf factors, the murder conviction may have occurred years ago, but as discussed above, Shands' sentence had not ended as he was still on parole and monitored by Laurens County. The danger of unfair prejudice was limited by the fact the jury was not told the conviction was murder, a similar offense to attempted murder, but instead was told the conviction was a violent felony.

As to the final two elements of the Colf factors, Shands made the argument to the trial court for the State's benefit. He conceded his testimony was important and the credibility issue was essential to his defense. Shands remonstrated it would "devastate his credibility." R. p. 138. That purpose enhances, rather than decreases, the legitimate probative value of the challenged evidence because the purpose of admitting the evidence is to attack Shands' credibility and the danger of unfair prejudice would stem from the possibility of the jury considering the conviction for propensity purposes, which is

minimized here due to the offense being referred to merely as a violent offense.

Shands put his character into evidence and opened the door to his prior conviction.

Additionally, Shands put his character in issue – repeatedly – as discussed above. Shands' counsel elicited testimony from Victim and her sons that Shands was acting out of the ordinary. Shands' counsel even asked Koon if Shands had acted out of character. These questions put Shands' character for peacefulness into play, and the prosecution was allowed, pursuant to Rule 404(a), SCRE, to counter Shands' assertions of good character. Under Rule 404(a):

> 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: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; . . .

"When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991).

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citing United States v. Nobles, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." United States v. Robinson, 485 U.S. 25, 33 (1988). Shands put his character into evidence early and often to establish he was acting out of character. The State was allowed to counter with evidence rebutting the character

trait he chose to put into evidence. Accordingly, it was not error for the trial court to allow Shands to be impeached with his prior conviction.

Any error is harmless since Shands never formulated a legitimate defense.

Further, any error is harmless. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Shands' only defense was a sham involuntary intoxication defense where only his own testimony showed intoxication and no evidence supported involuntary intoxication. Further, Shands clearly could control his actions once he was confronted with an armed officer instead of helpless victims. Shands admitted to the assaults, and his assertion he was acting out of character was also rebutted by testimony, including his own, he had become controlling and jealous.

IV. Evidence did not support an instruction on involuntary intoxication.

Shands argues the trial court erred in failing to instruct the jury on involuntary intoxication. He further makes an offhand claim the instruction on voluntary intoxication was a charge on the facts. Shands voluntarily drank moonshine, and no evidence supporting a claim of involuntary intoxication was presented to the jury. Further, the instruction on voluntary intoxication was an instruction on the law, not the facts. Shands admitted the moonshine was strong and he never tried it before.

This Court held voluntary intoxication is not a defense to a crime unless it produced permanent insanity. State v. Vaughn, 268 S.C. 119, 125, 232 S.E.2d 328, 330 (1977). This Court has explained:

> Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition. To grant immunity for crimes committed while the perpetrator is in such a voluntary state would not only mean that many offenders would go

> unpunished but would also transgress the principle of personal accountability which is the bedrock of all law. The effect of drunkenness on the mind and on men's actions is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences.

Id. at 125-26, 232 S.E.2d at 330-31 (citation, ellipses, and internal quotation marks omitted).

Shands' musing of spiked moonshine was insufficient to produce evidence of involuntary intoxication. California's Court of Appeals found a jury instruction on involuntary intoxication was not warranted based on the claim the defendant was unaware the marijuana cigarette he smoked was laced with PCP finding a reasonable person does not have the right to assume a marijuana cigarette provided by others is not laced with PCP. People v. Velez, 175 Cal.App. 3d 785, 796 (Cal. Ct. App. 1985). The Court of Appeals observed, "Similarly, in the instant case, Shands knowingly consumed an illegal, unregulated liquor and had no right to assume the moonshine would cause a predictable intoxicating effect." State v. Shands, 424 S.C. 106, 126, 817 S.E.2d 524, 534 (Ct. App. 2018).

In State v. Barr, 102 S.W.2d 629 (Mo. 1937), the defendant drank whiskey. He claimed he then took a drink from another person's bottle, it tasted bitter, and he began to feel funny. He claimed he blacked out, and when he regained consciousness, he was in bed at home and "had never felt that way before or since, though he had been drunk many times." Id. at 634. The Missouri Supreme Court found a claim the bottle of whiskey tasted funny was too vague to justify finding it was drugged and further rejected the assertion that the subsequent hangover established that the liquor was doctored. Id.

In People v. White, 264 N.E.2d 228 (Ill. App. Ct. 1970), the defendant testified he went to the washroom at a bar, leaving a half-full glass of beer at his seat, and returned to find his seat taken. He

moved elsewhere and finished his beer. He later claimed he blacked out as he left the bar. When he came to, he was home and arrested for murder on his way to work. Id. at 229-30. The Illinois court rejected a claim the jury should have been charged on involuntary intoxication, finding, "The only evidence which was presented was the request for a blood test, which defendant stated he made, or the testimony of defendant that he left a glass of beer for about five minutes at the bar. We do not believe that this constituted sufficient evidence that defendant was drugged." Id. at 231. As the Kentucky Court of Appeals observed, "Clearly, where one drinks of his own free will, the mere fact that he misjudges his own capacity, or the intoxicating effect of the particular beverage, will not render his intoxication involuntary." Tackett v. Commonwealth, 266 S.W. 26, 27 (Ky. Ct. App. 1924).

In the instant case, Shands admitted he never drank moonshine before and merely surmised it was drugged because alcohol normally causes him to fall asleep.[1] This and the vague evidence he acted out of character is too speculative to support a jury instruction on involuntary intoxication. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (instructions are determined from evidence at trial). No evidence supports the requested instruction.

Shands also claims the instruction on voluntary intoxication was a charge on the facts. However, it is a statement of law. See Vaughn. The trial court merely declared the law – voluntary intoxication is not a defense to any crime. Williams v. Southeastern Life Ins. Co., 197 S.C. 171, 171, 14 S.E.2d 895, 897 (1941) ("In our opinion, the proposition of law requested did not infringe upon the facts. It was nothing more than a statement of a legal conclusion which would result if the jury found

---

[1] Shands' own testimony demonstrated the moonshine was not an ordinary drink, but the "cremator of all whiskey." R. p. 201. Shands' testimony merely shows he miscalculated the intoxicating effect of the moonshine. Further, none of the witnesses even noticed his attested intoxication.

certain facts alleged in the complaint to exist."). "Numerous cases uphold the proposition that a charge stating the legal conclusions which would result from the establishment of certain facts is not necessarily subject to objection as a charge on the facts, or as assuming the truth of the facts as stated." Id.

Further, Shands was not prejudiced by the lack of an involuntary intoxication charge. Shands' sons did not see him drink moonshine and none of the witnesses noticed his purported intoxication. Shands was sufficiently aware to drop his knife and drop to the ground at the officer's commands. Shands' testimony proves at most voluntary intoxication and he agreed he committed the offenses. The appellant must be prejudiced in order to reverse an appellant's verdict on the basis of an erroneous jury charge. State v. Lee-Grigg, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007).

V. The trial court did not err in denying Shands' motion to strike the prosecutor's argument that was based on evidence in the record.

Shands argues he should get a new trial because the trial court "sustained" his objection during closing argument but refused his request to strike the prosecutor's comments. The closing argument was proper and based on evidence in the record. Further, Shands was not prejudiced by the comments.

"A trial judge is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002). A solicitor's closing argument is permissible where it stays within the record and reasonable inferences to it. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002).

Shands complained about the prosecutor's following statement, "This isn't about he was drinking something that day, this is a jealous, controlling husband who was not going to let his property leave that house." R. p. 232, lines 6-9. Counsel objected to "the characterization" and claimed the

assertion was outside the record. The trial court replied, "Let's keep it to the facts." R. p. 232, lines 10-12. The prosecutor's argument is supported by the record, particularly from cross-examination of Shands. The prosecutor asked Shands, "And you got pretty jealous and kind of controlling, right?" Shands answered, "**Yeah**, I started drinking." R. p. 199, line 25 – p. 200, line 2 (emphasis added). So the argument was proper because Shands agreed with the prosecutor that he was jealous and controlling.

Further, the trial court's warning to "keep it to the facts" was likely not sustaining the objection considering the trial court's decision to forgo striking any part of the argument. State v. Bamberg, 270 S.C. 77, 82, 240 S.E.2d 639, 640-41 (1977) (finding whether or not an argument is improper is a matter left to the trial judge's discretion).

Additionally, Shands was not prejudiced by the comment. "Improper comments 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." Humphries, 351 S.C. at 373, 570 S.E.2d at 166. Shands agreed he committed the vicious assaults. Shands was not prejudiced by the characterization of his actions

VI. The trial court did not err in failing to force the State to open on law and facts and reply only to "new" arguments of defense counsel; and Shands' due process rights were not violated.

Shands claims the trial court should have created a new rule of procedure and forced the State to open on the law and facts, and be allowed only a reply argument to defense counsel's closing argument. 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).

This Court recognized it was limited in its ability to alter procedure in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). Instead, this Court and the trial court are tasked with assuring, no matter the order of argument, that a defendant's due process rights are not violated. The trial court, without the benefit of Beaty, declined to alter the common practice of allowing the prosecution to close on the facts when a defendant chooses to present a defense. However, the record fails to indicate Shands' due process rights were violated. Beaty.

"Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

Shands claimed surprise in a number of areas or claimed he would have countered on various points made by the prosecution, but in all instances, the prosecutor's arguments were straight forward and easy to predict. Shands' most absurd claim is counsel was unable to respond to the prosecutor's arguments about kidnapping. R. p. 255. The prosecutor made her theory of the evidence supporting kidnapping clear when responding to Shands' directed verdict motion:

> Your Honor, as far as the evidence, Ms. Shands testified, actually several people have testified that she was grabbed by the hair as she was attempting to leave, pulled back into the doorway of the house. There is testimony that she lifted the garage door and closed it and sort of ended up in kind of a halfway state where she would not have been able to get her car out and leave. That is confining her for purposes of the statute. . . .

R. p. 171, lines 12-19. Accordingly, Shands was disingenuous with the jury when he claimed during closing argument he did not know what evidence the State was going to rely on to prove kidnapping. R. p. 224. Shands' decision to not present an argument on kidnapping, but feign ignorance, was a

strategic decision to sacrifice a discussion of the evidence for the sake of creating a superficially beneficial record for this Court. Shands' sophistic play does not hide that he was well aware of the evidence supporting kidnapping and could easily anticipate the prosecution's arguments on the subject. In sum, Shands' explanation of prejudice is underwhelming 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."). Further, even assuming error, any error was harmless beyond a reasonable doubt. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (noting error is harmless when it could not reasonably have affected the result of the trial). Shands advised the jury he did not deny the acts alleged but claimed intoxication. Of course, no evidence of involuntary intoxication was presented. Evidence was simply overwhelming regardless of the order of closing arguments.

VII. The kidnapping statute is not unconstitutionally vague and not overly broad as applied to Appellant; Appellant held Victim by her hair and trapped her in the garage when she wanted to leave; the evidence is sufficient to survive directed verdict.

Shands claims the trial court erred in denying the motion for directed verdict, and further, the the kidnapping statute is unconstitutional. Evidence readily meets the standard to survive Shands' directed verdict motion: Shands pulled Victim's hair, held her down while stabbing her, and kept her from leaving in her car by keeping her from opening the garage door. Further, the statute is constitutional and is not overbroad as applied to Shands.

When considering a motion for directed verdict, the trial court views 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). The task of

the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016).

Shands further presents a conclusory argument that if the evidence were construed to constitute a kidnapping, the statute would then be vague and overbroad as applied to Shands. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). This Court already found the statute is not vague. State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980) (finding section 16-3-910 is not unconstitutionally vague and finding the defendant lacked standing to challenge the statute as overbroad). In so finding, this Court explained, "The terms of this statute are clear and unambiguous. It proscribes the forceful seizure, confinement or carrying away of another against his will without authority of law." Id. at 166, 268 S.E.2d at 277 (internal citation omitted). The Supreme Court further found Smith lacked standing to claim the statute was overbroad because Smith's "conduct fell squarely within the statute's terms,". Id.

Under S.C. Code §16-3-910: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of [kidnapping]."

Shands seized Victim by pulling her by the hair and later seized her by tackling her and holding her down to stab her. Shands confined Victim when he kept her from leaving by closing the garage door. Shands pulled her by the hair to force her back into the house, in other words, by abducting her. Evidence supports the verdict and Shands' conduct falls within the statue's terms. Bennett, Smith.

CONCLUSION

For the above reasons, this Court should deny Shands' petition for writ of certiorari. Should this Court see fit to grant the petition, the State respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, SC 29649-0516
(864) 942-8800

BY:
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 18, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Laurens County
The Honorable Edward W. Miller, Circuit Court Judge

THE STATE, Respondent-Petitioner,

v.

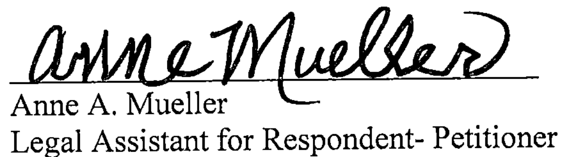
PRESTON SHANDS, JR., Petitioner-Respondent.

Appellate Case No: 2018-001673

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to the Petition for Writ of Certiorari on Petitioner by depositing copies in the United States Mail, postage prepaid, addressed to his attorney of record, E. Charles Grose, Jr. Esquire, Grose Law Firm, 404 Main Street, Greenwood, South Caroluina 29646.

I further certify that all parties required by Rule to be served have been served.
This 18th day of October, 2018.



Anne A. Mueller
Legal Assistant for Respondent- Petitioner

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Laurens County
The Honorable Edward W. Miller, Circuit Court Judge

THE STATE, Respondent-Petitioner,

v.

PRESTON SHANDS, JR., Petitioner-Respondent.

Appellate Case No: 2018-001673

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to the Petition for Writ of Certiorari on Petitioner by depositing copies in the United States Mail, postage prepaid, addressed to his attorney of record, E. Charles Grose, Jr. Esquire, Grose Law Firm, 404 Main Street, Greenwood, South Caroluina 29646.

I further certify that all parties required by Rule to be served have been served.
This 18th day of October, 2018.

Anne A. Mueller
Legal Assistant for Respondent- Petitioner

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

RECEIVED
OCT 18
S.C. SUPREME COURT