STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2011-186367

THE STATE,

RESPONDENT,

V.

ROBERT MONDRIQUES JONES,

APPELLANT

FINAL BRIEF OF RESPONDENTS

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II. Whether the trial court abused its discretion when it declined to issue a supplemental charge stating "the possession of an unlawful weapon does not . . . bar a self-defense charge"

III. Whether the trial court abused its discretion when it overruled defense counsel's objection that expert witness Brandon Brown's reply testimony was "irrelevant."

INTRODUCTION

On March 25, 2009, Vincent Campbell ("Vincent") was shot and killed by appellant, Robert Jones ("Appellant"). (R. 162-63). Immediately after shooting Vincent, Appellant also shot Vincent's brother, Kevin Campbell ("Kevin"). (R.163). At trial, Appellant claimed he was acting in self-defense and in defense of his girlfriend, Crystal Stone ("Crystal"), when he shot both Vincent and Kevin.[1] (R. 30-34, 396-397). The ensuing investigation culminated in Appellant's trial and conviction on charges of murder, assault and battery with intent to kill ("ABWIK"), possession of a firearm during the commission of a violent crime and possession of a pistol by a person under eighteen years of age. (R. 576).

STATEMENT OF THE CASE

The State agrees with Appellant's statement of the case.

STATEMENT OF THE FACTS

A. The Investigation

On the morning of March 25, 2009, authorities were dispatched to Vardy Street in the City of Greenville after hearing reports of a shooting. (R. 38-39). The call came from a neighboring Bariatric Clinic that was in the process of treating Vincent who, along with his brother Kevin, had stumbled into the clinic after being shot. (R. 40-41, 74, 76, 78-79). A bystander, Jeffrey Smith, observed that Vincent appeared to be shot in the face, while Kevin appeared to be shot in the right arm. (R. 74, 76, 79). Forensic pathologist, Dr. Michael Ward would later opine Vincent died as a result of the gunshot wound, which he explained, entered through the left side of Vincent's face, penetrated through his cheek, inside his mouth and through the back of his throat where it transected his carotid artery. (R. 91, 95).

[1] Crystal and Vincent had three children together, Dayquon, Alexia and Vianna. (R. 142).

When authorities arrived at the clinic, they were alerted that the shooting occurred at the residence across the street, at which point they moved up the driveway of the residence and into its backyard. (R. 41). In the backyard, they observed a white Ford Expedition with the driver's side door opened.[2] (R. 41). There was a blood trail leading from the Expedition, across the street and into the neighboring Bariatric Clinic. (R. 41, 44-45). A search of the vehicle failed to reveal any weapons. (R. 41).

After "clearing" the Expedition, Officer Doyle Burdette, with the Greenville Police Department, spoke with "an older white female," later identified as Sharon Hamby. (R. 41, 101, 116). Hamby, who lived at the residence with Donald Stone ("Donald") and Alexia, Crystal and Vincent's, eldest daughter, informed Burdette that "Rob" had shot Vincent and fled the scene in a silver car heading towards Belton. (R. 41, 101-102). As a result, Burdette advised county authorities, as well as other agencies, to be on the lookout for a silver vehicle heading towards Belton. (R. 47). Burdette then returned to the clinic where he began speaking to its occupants. (R. 41-42).

Detective David Garrison, with Greenville's violent crimes unit, also responded to the scene that morning. (R. 254-55). Garrison explained he arrived approximately fifteen minutes after the initial call was issued. (R. 256). Once he arrived on the scene, Garrison spoke with Burdette, who advised him of the situation at which point he took over the crime scene instructing officers to put up tape and block roadways. (R. 257). Garrison then contacted Greenville Police Department's Dispatch Unit which in turn issued a "statewide teletype" to all South Carolina law enforcement agencies advising them of the situation. (R. 260). Garrison further ordered authorities to search the residence and clinic as well as the surrounding areas for,

[2] Some witnesses identified the white SUV as a Ford Explorer, while others identified the white SUV as a Ford Expedition.

among other things, weapons. (R. 261-62). The search failed to reveal any sort of weapon. (R. 262).

Garrison also spoke with Donald, who authorities had initially encountered when they arrived at Hamby's residence.[3] (R. 260). Donald would later testify that he witnessed the shooting. (R. 122-24). Additionally, authorities took a statement from Roberto Williams, who lived next door to Hamby and reported hearing an argument between a male and female after which he heard gunshots. (R. 53-55, 62-63).

At approximately 1:00 PM, Garrison was advised by Anderson County Sheriff's Office Dispatch that a car matching the description in the teletype had been stopped. (R. 225, 262). Dispatch further informed Garrison the suspects believed to be involved in the shooting, Appellant and Crystal, were in custody. (R. 262). Accordingly, Garrison sent a detective from his office to investigate. (R. 262). The detective returned with Crystal, who gave a statement indicating she had witnessed the incident. (R. 265, 350). Later, Garrison also took statements from Kevin and Appellant. (R. 166-68, 401, 439). Following the investigation, Appellant was charged with murder, ABWIK, possession of a firearm during the commission of violent crime, and possession of a pistol by a person under eighteen years of age. (R. 586-597).

B. The Claim of Self-Defense

During opening statements, defense counsel admitted Appellant shot both Kevin and Vincent, but insisted he was defending himself and Crystal when he did so. (R. 30-34). Accordingly, the main issue at trial was whether Appellant was acting with malice aforethought when he shot both Kevin and Vincent.

C. Donald's Testimony

[3] Donald later gave a statement. (R. 126, 136-37).

At trial, the State called Donald to testify as to how the events unfolded that morning. In his testimony, Donald explained Appellant, Crystal and Vianna had arrived in Appellant's car that morning followed by Kevin and Vincent who arrived between two and three minutes later. (R. 108). All of the cars were parked in Hamby's backyard which was connected to the street via the driveway. (R. 108). Donald stated he answered the back door at which point Appellant entered trailed by Crystal, who was holding Vianna. (R. 109). Vincent and Kevin followed. (R. 109). Continuing, the group made their way into the kitchen where Crystal and Vincent began arguing about whether Crystal could leave Vianna with Vincent and take Alexia back to Belton with her and Appellant. (R. 112-13). From there Donald testified the situation escalated, though the only parties speaking were Hamby, Crystal and Vincent. (R. 113-14). While the group was in the kitchen, Donald observed Crystal slap Hamby which prompted Hamby to order everyone out of the residence. (R. 115). Donald confirmed this was the only physical contact that occurred in Hamby's residence. (R. 115).

As the group exited the back door, proceeded through the porch and into the backyard, Crystal and Vincent continued to argue and, according to Donald, the argument, while still verbal, escalated once again. (R. 117-18). Appellant, who was not involved in the argument, walked through the backyard, got into his car, which was facing towards the street, and according to Donald, prepared to leave. (R. 119-20). In the meantime, Crystal continued to argue with Vincent as she walked to the passenger side of Appellant's vehicle. (R. 120-21). While he was arguing with Crystal, Vincent was at the driver's side door of the Expedition in the area between his and Appellant's vehicles.[4] (R. 120).

Next, as she was beginning to get into the passenger seat of Appellant's vehicle, Crystal reversed course and joined Appellant on the driver's side of his vehicle. (R. 121). According to

[4] In other words, the front of Vincent's vehicle was headed the opposite direction of Appellant's.

Donald, Crystal was trying to keep Appellant in the vehicle. (R. 121). While Crystal was attempting to do this, Appellant shoved her out of the way and began shooting at Vincent and Kevin. (R. 121). Donald, who testified he was about a foot and a half away, said Vincent never moved in the moments before the shooting transpired. (R. 122). Donald said he never saw anyone else with a gun that day. (R. 123).

D. Kevin's Testimony

The State also called Kevin to testify about the shooting. (R. 141). Kevin, consistent with Donald, explained that the group arrived at approximately the same time, came inside, argued about Vincent and Crystal's children and were then ordered outside by Hamby. (R. 153-56). Like Donald, Kevin explained the argument subsequently escalated, but did not get physical. (R. 153-56).

Next, Kevin testified that as the group was filtering into the backyard towards their respective vehicles, he watched as Crystal put Vianna into Appellant's car. (R. 157). Kevin then said Crystal began to get into the passenger seat when she suddenly got out of the car and stated she was going to get Alexia. (R. 157). She began to argue with Vincent. (R. 158-59). While this was taking place, Kevin testified that Appellant remained on the driver's side of his vehicle with the door partially open. (R. 157-58). According to Kevin, Crystal and Vincent were arguing in front of Appellant in the area between Vincent and Appellant's vehicles when Crystal began attempting to make Appellant sit down. (R. 159-60). Kevin said Appellant then pushed Crystal out of the way and began shooting at he and his brother with a black revolver. (R. 162-63). Continuing, Kevin testified he ran to the passenger side of the Expedition and jumped into the passenger seat when Appellant shot him in the arm. (R. 163). Kevin confirmed that neither he nor his brother were armed that day. (R. 162-63).

E. Crystal's Testimony

Unlike her brother and Kevin, Crystal testified for the defense. (R. 297). She explained that Appellant had taken her to Greenville early that morning so she could report as required by the terms of her home detention. (R. 307-08). Like Kevin and Donald, she testified the group arrived at Hamby's separately, came inside and began arguing about her and Vincent's children. (R. 310-13). Likewise, Crystal confirmed that Hamby told the group to leave and like Donald and Kevin, said they left the residence through the back door, proceeded through the porch and spilled into the backyard. (R. 314). However, unlike Donald and Kevin, Crystal testified both Vincent and Kevin attempted to corner Appellant on the porch. (R. 314). Nevertheless, Crystal agreed that no confrontation took place on the porch. (R. 314-15).

Crystal further explained that once Appellant walked off of the porch he continued to the driver's side of his vehicle and got into the front seat while Kevin and Vincent headed towards the Expedition. (R. 315). At that point, Crystal said she watched as Vincent took his shirt off, threw it on the ground and along with Kevin, approached Appellant. (R. 316-17). Continuing, Crystal stated that as Vincent got closer to Appellant, he opened his car door, reached down and made a threatening move which prompted her to get in between Vincent and Appellant. (R. 317). She testified that while she was in between Vincent and Appellant, she heard shots and watched as Vincent and Kevin ran away.[5] (R. 318). Like Donald and Kevin, Crystal testified she never saw a gun and further, on cross-examination, revealed that while she was afraid Appellant and Vincent may get into a fistfight, she was never afraid for her life or believed Vincent "would ever" kill her. (R. 317, 344, 348-49). Crystal further admitted Appellant never told her he was defending both of their lives that day. (R. 353).

[5] On cross-examination Crystal explained that as she was sitting on Appellant in an attempt to hold him back, he "ran out from around me" at which point she *then* heard gunshots. (R. 346).

F. Appellant's Testimony

Finally, Appellant testified regarding the shooting. (R. 376). As with Donald, Kevin and Crystal, Appellant admitted he and Crystal arrived shortly before Kevin and Vincent. (R. 394). Likewise, Appellant agreed that once the group proceeded into the kitchen an argument ensued regarding Crystal and Vincent's children. (R. 395). However, unlike Donald, Kevin and Crystal, Appellant claimed that he and Crystal left at his suggestion rather than Hamby's. (R. 395).

Appellant further testified that as the group was leaving, Kevin and Vincent allegedly stopped him on the porch asking him whether he was "talking shit over the phone" to which he responded he would tell them if he had a problem with them. (R. 395-96). Following the brief verbal confrontation, Appellant stated that Vincent took his shirt off, but Crystal pulled him off of the porch "and we started going to the car and tried to leave[.]" (R. 396). According to Appellant, Vincent, "who was . . . a couple steps behind me going to his car" mentioned "something about getting a pistol, getting a gun, getting a weapon or whatnot." (R. 396). While Vincent was reportedly threatening him, Appellant stated he got to his car and sat down. (R. 396). He further added that at that point in time Crystal, who was previously on the passenger side of the vehicle, had come around and placed herself between Vincent and Appellant. (R. 396). Appellant then said:

> I seen him—he had went to his car he had reached up under his seat and came back out like with a gun, yes, sir. And so then after that that's whenever I had seen him walk over to Crystal. *So like I was—I was scared that he was going to do something to me or to Crystal because he was coming towards my way. So I didn't know, I was just scared.*

(R. 396-97) (emphasis added). Appellant confirmed that he then fired the gun at Vincent.

Next, after describing the interaction between Appellant and Vincent, defense counsel asked what Kevin "was doing when he came out and got in the car and Vincent said something about pistols." (R. 397). Responding to defense counsel's question, Appellant remarked:

> I see him standing like at the back of the Expedition like on the right side or the passenger side towards the back. And so whenever I had started shooting at Vincent or whatnot *out of fear* and like he had—he had ran so I had stopped behind the back of the Expedition. And so I had looked around to see what he was doing. And I had seen him, he was at the front of the Expedition. And I had seen Kevin, he looked like he was opening up the passenger door and reached like he was getting a weapon. So I didn't know what he was doing. I just figured he was getting a weapon because what I had seen Vincent with. So I had shot at him too.

(R. 397.) (emphasis added). Appellant then explained that Hamby handed him Vianna who he placed in the backseat of his vehicle. (R. 401). Thereafter, Appellant admitted he fled; first to his residence in Belton, where he dropped off Vianna; and then to Broadway Lake, where he and Crystal were apprehended. (R. 400-01).

G. Closing Arguments

In closing, defense counsel reiterated his theme from throughout trial arguing Appellant was a young man, in an unfamiliar place, dealing with a larger and older man who he knew to be a violent person and was defending both himself and Crystal when he shot Kevin and Vincent. (R. 525-34). Meanwhile the State essentially argued Appellant's self-defense theme was not credible in light of the fact Appellant's testimony was directly contradicted by other witnesses and was inconsistent with the evidence presented at trial. (R. 534-50).

PRESENTATION OF ISSUES ON APPEAL

A. The Voluntary Manslaughter Issue

Following the close of evidence and the denial of defense counsel's renewed directed verdict motion, the trial court asked both parties whether they had any "requests to charge." (R. 502). In response, defense counsel first requested a charge on self-defense at which point

defense counsel and the State argued over the propriety of a self-defense charge. (R. 502, 503-07). Thereafter, the trial court asked defense counsel, "[a]nything else you want charged[?]" to which defense counsel replied, "[o]kay I guess manslaughter . . . I don't think there's any malice aforethought there." (R. 507-08). Disagreeing with defense counsel's assertion, the trial court questioned defense counsel regarding sudden heat of passion asking, "when did your client say he was so upset[?]" (R. 508-09). Responding to the trial court's question, defense counsel explained sudden heat of passion came about when Appellant testified he was going to get shot. (R. 509). After the trial court opined Appellant's testimony suggested self-defense, defense counsel argued the shooting occurred in a heated environment adding Vincent was a large man who reportedly acted tough. (R. 509). The State then weighed in on the argument regarding sudden heat of passion stating there was no evidence suggesting Appellant was acting in the sudden heat of passion and further noting the evidence failed to show that there was an argument between Appellant and Vincent. (R. 510).

The trial court next questioned defense counsel regarding sufficient legal provocation. (R. 510-11). Responding to the trial court's question, defense counsel explained that after Vincent had taken his shirt off in an effort to fight Appellant, Appellant allegedly observed Vincent pull a handgun on him. (R. 511). Thereafter, the trial court took a short break before concluding he would charge self-defense and voluntary manslaughter. (R. 513). The State objected to the trial court's decision to charge voluntary manslaughter again arguing there was no evidence to support the charge. (R. 520-21). As a result, the trial court asked defense counsel to identify the evidence supporting the voluntary manslaughter charge at which point defense counsel said:

> Voluntary manslaughter, Judge, is in the heat of the moment. In the heat of the moment. A 260 pound man that he knew had had a weapon before, that he was a

> man of violence, that he was defending himself and he had no other way out of it except to shoot him when he saw the gun.

(R. 522). Hearing defense counsel's argument, the trial court changed its mind finding there was no evidence to support a charge on voluntary manslaughter. (R. 522-23). Defense counsel renewed his objection concerning the voluntary manslaughter charge after the trial court charged the jury. (R. 566).

B. The Supplemental Self-Defense Charge

After closing arguments concluded and the trial court had charged the jury, defense counsel, for the first time, requested that the trial court issue a supplemental charge. (R. 566). In particular, defense counsel asked the trial court to charge that "the use of an unlawful—the possession of an unlawful weapon does not preclude him from self-defense—does not bar a self-defense charge[.]" Continuing, defense counsel said, "[t]hat's State v. Slater. I think it's very relevant to this case." (R. 566).

Responding to defense counsel's belated request, the trial court noted it had previously asked both parties about additional charges prior to its charging the jury. (R. 567). After acknowledging that he understood this, defense counsel continued to argue in support of the supplemental self-defense charge citing State v. Mickle, for the "proposition of a person acting lawfully even though he's unlawfully in possession of a weapon[.]" (R. 567). Addressing defense counsel's supplemental request to charge, the trial court distinguished the present case from Slater explaining "Slater involved a case where the Court did not charge self-defense. We charged self-defense." (R. 568). The trial court further highlighted that defense counsel was reading from Criminal Offenses in South Carolina but explained "the cases say—they actually stand for different propositions than you're asserting here and I'm not going to charge it." (R. 568).

C. Defense Counsel's Objection to Brandon Brown's Expert Testimony

In its' cross-examination of Appellant, the State inquired about various evidence which was taken from his residence in Belton. (R. 427). Specifically, the State, without objection from defense counsel, asked about a variety of red bandanas or "flags" which were found under his bed along with a box of bullets. (R. 426). Additionally, the State, again without objection from defense counsel, further questioned Appellant about a series of photographs which, according to Appellant, depicted gang-related graffiti. (R. 427-32). In particular, Appellant testified about a photograph of the graffiti, State's Exhibit 61, which showed the words: "Life" "Blood" "Dog" "Gangstas" "Nine" and "Trey[.]" (R. 429-30). Explaining the significance of the relationship between these words, Appellant testified the words should be interpreted to say "Nine Trey Gangstas" which he identified as a Blood gang. (R. 430). Appellant was next asked how he knew Nine Trey Gangstas was a Blood gang to which Appellant responded "I have friends that are a part of it." (R. 431). In particular, Appellant indicated Denardo Graham, who he had previously said was responsible for writing the graffiti in the photograph, was a member of the Bloods. (R. 431).

The State then showed Appellant State's Exhibit 58, a photograph of graffiti on the side of a storage shed located at his residence in Belton. (R. 432). After reviewing this photograph, Appellant testified the graffiti, which said "BTB" was made by his cousin, Dominique Cherry. (R. 432). Appellant, still without any objection, testified that "BTB" meant "B Town Boys" or "Belton Boys" which Appellant claimed was a rap group consisting of himself, Cherry and his friend Chris Williford. (R. 433). Appellant then explained he had a BTB tattoo, along with a tattoo which said "NTG[.]" (R. 434-35). Appellant confirmed that NTG stood for "Nine Trey Gangstas." (R. 435). He further admitted that while he was previously a Blood, starting from

when he was "about 14 or 15[,]" membership in a gang is for life. (R. 435). The State then began to ask Appellant how one is admitted into a gang at which point defense counsel, for the first time, objected on relevancy grounds. (R. 436). Thereafter, the State asked Appellant whether he had ever told Crystal's friend, Jennifer Abbot, that he was a Blood and that if Vincent ever hit Crystal again, he would shoot him or get someone else to shoot him. (R. 438). Appellant denied making such a statement. (R. 439).

When the defense rested, the State proffered the testimony of Brandon Brown, as an expert in "street gang lingo . . . gang affiliation, both regionally, statewide and nationally" as well as an expert in written materials associated with "The Blood gang." (R. 463). Continuing, the State informed the trial court it intended to introduce Brown's testimony to rebut Appellant's previous testimony that he was a member of the Bloods, but that he subsequently got out of the gang, which the State argued, went to Appellant's credibility. (R. 472, 474-75). At that time, defense counsel did not question Brown's qualification as an expert, but did object to the proffered testimony on the basis that it was "not responsive to reply." (R. 474). The trial court then recessed for lunch. (R. 475-76).

Upon returning from lunch, defense counsel objected stating:

> Just I object Judge, that it's totally irrelevant. It has nothing to do with this case. All the stuff I heard there is all speculative stuff, has nothing to do with my client, the facts of this case or anything. All it does is muddy the water. And quite honestly Judge, highly prejudicial to let something like that in. Why we want to junk up the case that there's no—it's obviously no gangs been mentioned in this case. Not from the get-go. Not until just a few minutes ago. I mean nobody said anything about gangs.

(R. 476).

The trial court then noted Appellant's client testified as to his gang membership on cross-examination. (R. 476). After this statement, defense counsel reiterated that Brown's testimony

had "nothing to do with the facts of this case." (R. 477). The trial court then ruled "I'm going to allow it in, its in reply, it's rebuttal. It goes to credibility or believability of your witness." (R. 477). Defense counsel then clarified his objection telling the trial court his argument was that because he did not seek redirect examination regarding the issues raised by the State in cross-examination, the State could have presented Brown's testimony in its case in chief. (R. 477-78). Replying to defense counsel's concern, the trial court clarified it would allow the testimony only for impeachment purposes. (R. 478). Following the trial court's ruling, the State called Jennifer Abbott to testify about Appellant's previous statements concerning his gang membership as well as his prior threats against Vincent. (R. 479-90).

The State then called Brown who was subsequently qualified as an expert in gang affiliation, activity and the introduction into gangs as well as how one exits the gang over defense counsel's relevancy objection. (R. 497). Consistent with his qualification, Brown testified about gang affiliation with respect to the Bloods, their presence in upstate South Carolina, ways that one may be initiated into the Bloods and how and when one may exit the Bloods. (R. 497-500). Brown then testified, that based upon his opinion as an expert in the field, not only would it be unusual for someone to say they are involved but are no longer a member of the gang, but further opined "you're never going to become a gang member and then quit being a gang member but still live the gang lifestyle." (R. 501).

In its closing, defense counsel addressed Brown's testimony stating:

> They put some guy on the stand, I didn't even ask him a question, about Bloods. There is nothing in the record that my client was under investigation for being involved with The Bloods. So what? These young kids they talk about music. These kids do all kinds of crazy things today. They got tattoos that represent everything in the world. That does not mean that they're a violent person. That they shot somebody for the heck of it. He sure didn't go over there intending to do that.

(R. 530).

Similarly, the State, in its closing, also addressed the testimony related to Appellant's purported gang membership stating:

> Ladies and gentlemen, I didn't bring this gang expert to insinuate or put anything out there that this was a gang related shooting. I did that to show you that this man has not been honest with you. He told you that he wasn't in a gang anymore. That's not how gangs work. You don't come and go as you please. He's still got the flags that they use. He had these five underneath his mattress, right next to the bullets. He also had one in the car. Again, I'm not saying this is gang related. Because there's absolutely no evidence, no testimony in the record that Vincent or Kevin is a gang member.

(R. 539).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

ARGUMENTS

I. The trial court correctly declined to charge voluntary manslaughter as there was no evidence Appellant was acting in the sudden heat of passion when he shot and killed the victim since, by his own admission, he shot the victim because he was in fear for both he and Crystal's life

Appellant maintains the trial court erred in refusing to charge the lesser-included offense of voluntary manslaughter. Specifically, Appellant notes there was evidence of sufficient legal provocation since there was testimony Vincent approached him in a threatening manner while armed with a gun. Br. of App. at 9. Appellant further contends he was acting in the sudden heat of passion when he shot at Vincent because: (a) Vincent and Crystal were in an argument over their children; (b) Vincent had previously hit Crystal and, (c) Vincent, some time prior to the

shooting, threatened to "beat Appellant's ass" over the telephone and when he did, mentioned guns. Br. of App. at 10.

In response, the State agrees that Appellant established sufficient legal provocation based upon his testimony that Vincent, in the time leading up to the altercation, displayed a willingness to fight, mentioned guns and then emerged from his vehicle with a weapon. However, the State submits the trial court was correct in declining to charge voluntary manslaughter since the evidence at trial failed to establish Appellant shot Vincent in the sudden heat of passion.

First, Appellant's assertion that he was acting in the sudden heat of passion because Vincent and Crystal were in an argument is without merit since South Carolina law requires that heat of passion be caused by the facts giving rise to sufficient legal provocation. See State v. Starnes 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2011) ("[T[here must be evidence that the heat of passion was caused by sufficient legal provocation."). Thus because *Vincent's words and actions related to Appellant* were the facts giving rise to sufficient legal provocation, *Vincent and Crystal's disagreement* cannot serve as evidence of sudden heat of passion. Likewise, Appellant's second and third arguments in support of sudden heat of passion fail for essentially the same reason—it cannot be said that Vincent, by previously hitting Crystal and threatening Appellant, created "an uncontrollable impulse to violence" in Appellant on the day of the shooting. See State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) ("To mitigate murder to manslaughter, the sudden heat of passion must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence."). Indeed, as sufficient legal provocation in this case was caused by *Vincent's actions immediately before the shooting* (i.e attempting to fight, mentioning and then grabbing a gun) the

fact that Vincent had hit Crystal months ago is simply irrelevant to sudden heat of passion. As detailed above, this is also the case with respect to Vincent's previous threats to Appellant. Thus, the State submits the remaining question is simply whether there is any evidence Appellant was acting in the sudden heat of passion when he shot Vincent.

It is the evidence presented at trial that determines the law with which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). 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). However, a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

As to lesser-included offenses, the law requires that a jury must be charged on a lesser-included offense if, "there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Conversely, a trial court may eliminate instructing the jury on a lesser-included offense where there is no evidence tending to reduce the crime from the greater offense to the lesser. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant." Pittman, 373 S.C. at 572-73, 647 S.E.2d at 168.

In State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) this Court explained, "[v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." 338 S.C. at 101, 525 S.E.2d at 513. Thus, "[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing[.]" Id. Additionally, "[p]rovocation necessary to support a voluntary manslaughter charge must come

from some act of or related to the victim in order to constitute sufficient legal provocation." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). As discussed above, the sudden heat of passion "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Byrd, 323 S.C. at 322, 474 S.E.2d at 432.

Further, as noted in Appellant's brief, "it is well settled that self-defense and voluntary manslaughter are not mutually exclusive and both issues should be submitted to the jury *if supported by the evidence*." State v. Wiggins, 330 S.C. 538, 549 n.18, 500 S.E.2d 489, 495 n.18 (1998) (emphasis added). Accordingly, in cases where both self-defense and voluntary manslaughter jury instructions may be involved, courts must review the facts to see if a charge on both is warranted. State v. Gilliam, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988).

Here, because the facts show Appellant either murdered Vincent or shot him while acting in self-defense or defense of others, Appellant is not entitled to an instruction on the lesser-included offense of voluntary manslaughter. Specifically, in support of the murder theory of the case, the State presented multiple witnesses who said Appellant simply shot Vincent without warning. Meanwhile, Appellant's testimony, if believed, only showed he was acting in self-defense or defense of others. As detailed above, Appellant testified as to his intent at the time of the shooting stating:

> I seen him—he had went to his car he had reached up under his seat and came back out like with a gun, yes, sir. And so then after that that's whenever I had seen him walk over to Crystal. *So like I was—I was scared that he was going to do something to me or to Crystal because he was coming towards my way. So I didn't know, I was just scared.*

(R. 396-97) (emphasis added). Defense counsel then asked, "[s]o you shot first?" to which Appellant responded, "yes, sir." (R. 397).

The State submits this evidence, even when viewed in the light most favorable to the accused, points to one conclusion, that Appellant's testimony, if believed, supported the trial court's ruling to deny Appellant's request to charge voluntary manslaughter as Appellant's testimony clearly showed a lack of criminal intent. This is best illustrated by Appellant's testimony that he fired the weapon because after seeing Appellant armed with a gun, "he was scared that [Vincent] was going to do something to me or to Crystal[.]" (R. 396-97). Quite simply, because Appellant's testimony regarding his *mens rea* does not establish the criminal intent required for a charge on voluntary manslaughter, instead only establishing intent consistent with self-defense or defense of others, the trial court was correct in denying Appellant's request to charge voluntary manslaughter.[6] See State v. Childers, 373 S.C. 367, 375-76, 645 S.E.2d 233, 237-38 (2007) (Toal concurring) ("Voluntary manslaughter, by definition, requires a criminal intent to do harm to another."). Furthermore, while voluntary manslaughter and self-defense are not mutually exclusive, the opposite is also true as voluntary manslaughter is not a lesser-included offense of self-defense. E.g. Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609. Perhaps most notably, the legal analysis for an instruction on each doctrine requires proof of different elements with remarkably different *mens rea* which, if proved, result in completely different outcomes for the accused.[7] Keeping this in mind, the State submits that if this Court were to find Appellant's fear for himself and Crystal's welfare constituted evidence of sudden

[6] The State further notes that because Appellant is arguing he was entitled to a charge on voluntary manslaughter, voluntary manslaughter is not a lesser-included offense of ABWIK, and Appellant actually testified as to his intent in shooting Vincent, any evidence related to Appellant's intent when he shot at Kevin is simply irrelevant to determining whether Appellant was acting in the sudden heat of passion when he shot Vincent.

[7] Furthermore, while other jurisdictions have essentially combined self-defense and voluntary manslaughter to allow a jury to find, under a theory of "imperfect self-defense" that a failure to prove each of the elements of self-defense could still yield a verdict of voluntary manslaughter, this is not the law in South Carolina. See State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) (declining to adopt the theory of imperfect self-defense).

heat of passion it would not only be at odds with established precedent[8], but "would impermissibly blend the elements of voluntary manslaughter and self-defense" which in turn, "would render voluntary manslaughter a lesser-included offense of self-defense[.]" Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609. Accordingly, the State asks this Court to affirm the ruling of the trial court on this issue.

II. The trial court, after charging the elements of self-defense, correctly declined to issue a supplemental charge stating "the possession of an unlawful weapon does not . . . bar a self-defense charge" as the request to charge was untimely and was not warranted by the evidence

Appellant next contends the trial court erred when, after charging the jury on the elements of self-defense, it declined to issue a supplemental charge stating "the use of an unlawful—the possession of an unlawful weapon does not preclude him from self-defense—does not bar a self-defense charge." Continuing, Appellant agrees that the trial court correctly charged self-defense, but further contends the State's argument in closing essentially mandated the additional charge.[9] In response, the State notes defense counsel's request to charge was untimely and was not warranted by the evidence.

A. The Request to Charge was Untimely

[8] See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 ("[T]he mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge.").

[9] The State notes this argument was never presented to the trial court. Instead, defense counsel merely argued the *evidence* rather than the State's *argument* presented a question of whether Appellant was lawfully in possession of the gun. Accordingly, the argument is not preserved. See State v. Sheppard, 391 S.C. 415, -- , 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal). Furthermore, because defense counsel failed to object to the State's closing argument, and in any event, never requested the instruction now at issue as a means of curing what opposing counsel now appears to argue, was an improper argument, the State submits this issue is waived on appeal. See State v. Walker, 366 S.C. 643, 660, 623 S.E.2d 122, 130-31 (Ct. App. 2005) (holding defense counsel's failure to object to an allegedly improper closing argument rendered the issue unavailable for appellate review); State v. Carlson, 363 S.C. 586, 606, 611 S.E.2d 283 (Ct. App. 2005) ("Failure to object to comments made during argument precludes appellate review of the issue.") (quoting State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 251 (Ct. App. 2000)).

First, it is clear Appellant's request to charge was untimely. Rule 20(a) of the South Carolina Rules of Criminal Procedure provide, "[a]ll requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon." Furthermore, a failure to make a timely request for a jury instruction constitutes a waiver of the issue on appeal. State v. Sprouse, 325 S.C. 275, 286, 478 S.E.2d 871, 877 (Ct. App. 1996). Here, the trial court actually noted Appellant's request to charge was untimely stating "I asked about any additional charges you might want before I gave the charge to the jury." (R. 567). As a result, State submits Appellant's failure to timely request a jury charge results in the issue being waived on appeal. See Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 134, 470 S.E.2d 373, 378 (1996) ("To preserve an issue for appeal, a contemporaneous objection is necessary and specific grounds must be clearly stated."); State v. White, 311 S.C. 289, 296, 428 S.E.2d 740, 744 (Ct. App. 1993) (holding defense counsel's failure to contemporaneously and specifically object to victim impact testimony rendered the issue unavailable for appellate review); State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (concluding defense counsel's failure to contemporaneously object to testimony concerning the defendant's prior bad acts did not preserve the issue for appellate review).

B. The Supplemental Charge was not Warranted

Even assuming Appellant's request to charge was not waived, the State further submits the supplemental self-defense charge was not warranted by the evidence because the jury was never asked to determine whether Appellant, for purposes of self-defense, was in lawful possession of the gun. Indeed, once the trial court has decided that a defendant is entitled to a

self-defense charge, the lawfulness of the defendant's possession of a weapon *is immaterial* in determining whether the defendant was acting in self-defense.[10]

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

Additionally, "[i]n charging self-defense, the trial court must consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." State v. Harris, 382 S.C. 107, 114, 674 S.E.2d 532, 536 (Ct. App. 2009) (citing State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000)). Failure to give a requested jury instruction is not prejudicial error where the instructions given afford the proper test for determining issues. Harris, 382 S.C. at 114, 674 S.E.2d at 536 (citing Patterson, supra). If the charge as a whole is reasonably free from

[10] To establish self-defense in South Carolina the following elements must be present:

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999).

error, isolated portions that might be misleading do not constitute reversible error. Id. A trial court's jury charge that is substantially correct and covers the law does not require reversal. Id.

Here, Appellant fails to point to *any evidence* which suggests there was an issue as to whether Appellant was in lawful possession of the gun for purposes of determining self-defense. Instead, Appellant points only to the State's argument and a portion of the jury charge as creating such an issue. In response to this argument, the State submits that if the *evidence* (as opposed to argument, the jury charge, or the indictment) fails to demonstrate that the charge should be given, the additional charge from Slater—that one can be lawfully armed in self-defense despite being in unlawful possession of a weapon—should not be charged.[11] See Patterson, 367 S.C. at 232, 625 S.E.2d at 245 ("To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."); Coleman v. Lurey, 199 S.C. 442, 446, 20 S.E.2d 65, 66 (1942) (holding Article V, Section 21 of the South Carolina Constitution requires that the judge state the controlling principles of law applicable to the case in light of the evidence adduced at trial). However, because the facts of this case demonstrate *there were no facts in evidence* which suggested the jury should evaluate whether Appellant, for purposes of self-defense, was unlawfully in possession of the gun, the trial court correctly declined to issue the supplemental charge.[12]

III. The trial court did not abuse its considerable discretion in overruling defense counsel's objection that expert witness Brandon Brown's reply testimony was irrelevant since the State presented Brown's testimony to rebut Appellant's assertion during cross-examination that he was no longer in a gang

[11] Furthermore, the State submits that if either the State's argument, the jury's charge, or both created an issue with the jury as to whether it needed to determine whether Appellant was in lawful possession of the gun for purposes of determining self-defense, the issue should have been presented to the trial court by way of a timely objection on the appropriate grounds (i.e. an improper argument or burden-shifting objection).

[12] Finally, the State submits that if in fact the trial court erred in failing to give the supplemental self-defense instruction, any error was harmless since the jury received a complete self-defense charge. See Harris, 382 S.C. at 114, 674 S.E.2d at 536 (holding that a failure to give a requested jury instruction is not prejudicial error where the instructions given afford the proper test for determining issues).

Appellant argues the trial court erred in overruling defense counsel's objection that expert witness Brandon Brown's reply testimony was irrelevant pursuant to Rule 403, SCRE. Specifically, Appellant contends the shooting was not gang-related, the evidence of Appellant's gang membership was highly prejudicial and showed improper propensity evidence. In response, the State notes that when reviewing Brown's testimony against other evidence which was already in the record, the trial court correctly determined the probative value of Brown's testimony impeaching Appellant was not substantially outweighed by the danger of unfair prejudice, especially when viewed against the entirety of the record. See State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009) ("The determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.").

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

"Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." State v. Wiles, 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009) (citing Rules 401, SCRE and Rule 402, SCRE). Despite this, otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice[.]" Rule 403, SCRE. Pursuant to Rule 403, SCRE, "the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice." State v. Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 496 (Ct. App. 2011). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." Wiles, 383 S.C.at 158, 679 S.E.2d at 176. "The determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case." Holder, 382 S.C. at 293, 676 S.E.2d at 698.

Here, because the State, prior to defense counsel's relevancy objection, had already elicited a variety of evidence regarding Appellant's familiarity and involvement in the gang lifestyle, including the fact that he had previously been in a gang, the probative value of the impeachment evidence was not substantially outweighed by the risk of unfair prejudice. Stated more bluntly, since the record already established Appellant was, or had been in a gang, the probative value of the State's attempt to show he was untruthful about his gang membership did not result in any additional unfair prejudice.

For example, in its' cross-examination of Appellant, the State, without objection, inquired about various gang-related evidence, which was taken from his residence in Belton. (R. 427). Specifically, the State, without objection from defense counsel, asked about a variety of red bandanas or "flags" which were found under his bed along with a box of bullets. (R. 426). Additionally, the State, again without objection from defense counsel, further questioned Appellant about a series of photographs which, according to Appellant, depicted gang-related graffiti. (R. 427-32). In particular, Appellant testified about a photograph of the graffiti, State's Exhibit 61, which showed the words: "Life" "Blood" "Dog" "Gangstas" "Nine" and "Trey[.]"

(R. 429-30). Explaining the significance of the relationship between these words, Appellant, again without objection, testified the words should be interpreted to say "Nine Trey Gangstas" which he identified as a Blood gang. (R. 430). Appellant was next asked how he knew Nine Trey Gangstas was a Blood gang to which Appellant responded "I have friends that are a part of it." (R. 431). In particular, Appellant indicated Denardo Graham, who he had previously said was responsible for writing the graffiti in the photograph, was a member of the Bloods. (R. 431).

The State then showed Appellant State's Exhibit 58, a photograph of graffiti on the side of a storage shed located at his residence in Belton. (R. 432). After reviewing this photograph, Appellant testified the graffiti, which said "BTB" was made by his cousin, Dominique Cherry. (R. 432). Appellant, still without any objection, testified that "BTB" meant "B Town Boys" or "Belton Boys" which Appellant claimed was a rap group consisting of himself, Cherry and his friend Chris Williford. (R. 433). Appellant then explained he had a BTB tattoo, along with a tattoo which said "NTG[.]" (R. 434-35). Appellant confirmed that NTG stood for "Nine Trey Gangstas." (R. 435). He further stated he was a Blood, starting from "about 14 or 15[,]" but then got out approximately a year before the present incident took place. (R. 435). Nevertheless, Appellant admitted *membership in a gang is for life*. (R. 435). The State then began to ask Appellant how one is admitted into a gang at which point defense counsel, for the first time, objected on relevancy grounds. (R. 436). Thereafter, the State asked Appellant whether he had ever told Crystal's friend, Jennifer Abbot, that he was a Blood and that if Vincent ever hit Crystal again, he would shoot him or get someone else to shoot him. (R. 438). Appellant denied making such a statement. (R. 439).

Keeping this in mind, when the State called Brown to rebut Appellant's testimony that he was no longer in a gang, the jury had already heard the following information:

- Appellant had gang-related materials and graffiti in and around his home (R. 427-32);
- Appellant had tattoos indicating he was a Blood (R. 435);
- Appellant had admitted his friends were Bloods (R. 431);
- Appellant had confirmed he used to be a Blood (R. 435);
- Appellant had admitted that gangs were for life (R. 435).

Understanding this, State submits the additional evidence gleaned from Brown which rebutted Appellant's testimony that he left the Bloods at approximately age 16, was not substantially outweighed by the risk of any unfair prejudice. To the contrary, the additional information demonstrating Appellant was not a credible witness, when taken in conjunction with the fact the jury already knew about Appellant's gang activities, failed to show the trial court abused its discretion in admitting Brown's reply testimony. Furthermore, when reviewing this calculus in conjunction with the State's *de facto* limiting instruction from closing arguments, that the evidence was used to show Appellant was not a credible witness, the State submits there is no risk the jury's verdict was based upon an improper basis. Accordingly, the State asks this Court to affirm Appellant's convictions and sentences.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the judgment and sentence imposed by the trial court.

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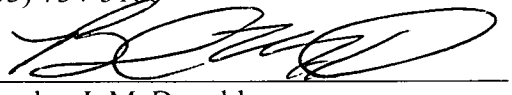

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February 27, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2011-186367

THE STATE,

RESPONDENT,

V.

ROBERT MONDRIQUES JONES,

APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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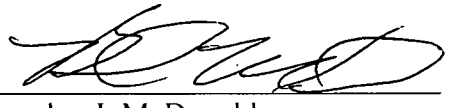

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PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the Final Brief of Respondent on appellant by depositing a copy of same in the United States mail, first class, postage prepaid, addressed to his attorney of record as follows :

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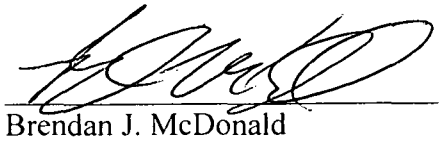
I further certify that all parties required by Rule to be served have been served.

This 27th day of February, 2013.



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