STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN LEE HOGAN, JR.,

APPELLANT,

Appellate Case No. 2012-208526.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

State Cases

Rules

Treatises

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to allow the psychopharmacologist testimony of Dr. William Morton about how appellant's drug use affected his perception of events, since this was relevant to the jury's consideration of voluntary manslaughter—provocations causing a heat of passion and a cooling off period—and it was not offered as a defense to prove diminished capacity?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to admit the testimony of an expert in psychopharmacology concerning how Appellant's drug-induced state affected his perception of events where the expert's testimony was directed to two elements of voluntary manslaughter—provocation causing a heat of passion and cooling off—both of which are subject to a reasonable person standard.

RESPONDENT'S STATEMENT OF THE CASE

A Marlboro County Grand Jury indicted Appellant, John Lee Hogan, Jr., in September 2010 for murder. Indictment (R. pp. 424–425). On February 6, 2012, Appellant's case was called to trial before the Honorable Howard P. King. (R. p. 1). Appellant was represented by Daniel L. Blake during the three-day trial. (R. p. 1). Assistant Solicitors Mary Thomas Johnson-Lee and W. Shipp Daniel, III represented the State. (R. p. 1). On February 8, 2012, the jury returned a verdict of guilty. (R. p. 422, lines 7–18). Judge King sentenced Appellant to life imprisonment for murder. (R. p. 423, lines 21–23).

Thereafter, on February 18, 2012, Appellant served a timely Notice of Appeal, which he filed with the South Carolina Court of Appeals on February 22, 2012 and then subsequently amended on March 27, 2012 to correct a mistake.

RESPONDENT'S STATEMENT OF THE FACTS

At trial Appellant testified that he met Casey McCall and Monesha Brown (Victim) on Saturday, June 5, 2010 when he was in Bennettsville trying to buy crack cocaine. (R. p. 325, line 23–p. 329, line 7). According to Appellant, McCall jumped into the passenger seat of Appellant's truck and asked what Appellant was looking for. (R. p. 328, lines 7–13). A few seconds later, Victim got into the back seat of Appellant's truck. (R. p. 328, line 22–p. 329, line 1). Appellant informed Victim that he did not need any company but then left her alone after McCall vouched for her. (R. p. 329, lines 1–7). Appellant told McCall that he was looking for forty dollars worth of crack. (R. p. 331, lines 8–19). McCall informed Appellant that he could get that amount, and Appellant gave McCall forty dollars. (R. p. 331, lines 15–19). McCall then leaned out of Appellant's truck and got some crack from a man nearby. (R. p. 331, line 21–p. 332, line 2). McCall gave the crack to Appellant, and Appellant drove off with McCall and Victim in his truck. (R. p. 332, lines 2–15).

Appellant immediately started smoking the crack. (R. p. 332, line 9–p. 333, line 17). According to Appellant's testimony at trial, McCall and Victim smoked the crack, too, but soon the forty dollars worth of crack ran out, and Appellant asked McCall to get some more. (R. p. 332, line 16–p. 333, line 23). McCall directed Appellant to Lake Paul Wallace, and while McCall went to get more crack, Appellant and Victim waited in the car. (R. p. 333, line 23–p. 334, line 3). McCall returned with crack, and the three went to an abandoned house to smoke that crack. (R. p. 334, line 2–p. 335, line 22). After they had smoked it all, Appellant asked McCall to get him more crack, but McCall refused and got out of Appellant's truck. (R. p. 336, lines 20–23).

Victim then climbed into the passenger seat and offered to help Appellant find more crack. (R. p. 336, line 24–p. 337, line 6). Eventually, the pair found someone who would sell to

them, and they bought more crack. (R. p. 337, line 6–p. 338, line 8). Appellant informed Victim that he was paranoid and that he wanted to go home, and she asked to join him. (R. p. 338, lines 8–14).

When Appellant and Victim got to his home, they smoked crack together. (R. p. 339, lines 5–16). They then got into the bathtub, intending to have sex, but it was "awkward" according to Appellant. (R. p. 339, line 16–p. 340, line 16). Both Appellant and Victim got out of the tub, and Appellant went to the kitchen to get a beer. (R. p. 340, lines 17–22). When Appellant returned to the bathroom/bedroom,[1] he found Victim looking in his wallet. (R. p. 349, line 23–p. 351, line 10).

According to Appellant, he slapped Victim twice, and she threw the wallet at Appellant and then ran into the kitchen. (R. p. 351, line 11–p. 353, line 18). Appellant followed Victim into the kitchen. (R. p. 354, line 25–p. 355, line 1). By the time he got there, Victim had grabbed a knife. (R. p. 355, lines 1–3). Appellant testified that Victim said, "['O]h, hell, no mother fucker. You want to slap me, you want to slap me,['] and she swung the knife[,] and she stabbed [Appellant] in [his] side." (R. p. 355, lines 6–8). Appellant then grabbed Victim and squeezed her hand until she dropped the knife. (R. p. 355, lines 13–19). Appellant picked up the knife and swung it at Victim and hit her in the neck. (R. p. 356, lines 2–19). According to Appellant, "[i]t went in pretty deep into her neck, . . . and I pulled it out, and as soon as I pulled it out, the blood just started pouring out of her neck. . . ." (R. p. 356, lines 19–22). Appellant then dropped the knife, but when Victim reached for it, Appellant slammed her into a wall. (R. p. 356, line 23–p. 357, line 4). According to Appellant, everything happened "lightning fast." (R. p. 355, lines 20–25).

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[1] Appellant lived in a trailer home where the bathtub was only separated from the bedroom by a half-partition. (R. p. 350, lines 5–23).

Victim and Appellant wrestled around the kitchen for about a minute and a half. (R. p. 357, line 11–p. 358, line 7). Both got tired. (R. p. 358, lines 5–11). Appellant grabbed a roll of duct tape from the top of his refrigerator and duct taped Victim's hands behind her back. (R. p. 358, lines 11–21). Appellant then led Victim into the bedroom and sat her in the bathtub. (R. p. 358, line 25–p. 359, line 22). Appellant smoked some crack. (R. p. 359, line 20–p. 360, line 11). He then walked back into the kitchen and grabbed another knife. (R. p. 361, lines 10–15). He got in the bathtub and slit Victim's throat. (R. p. 361, lines 10–17). Appellant testified,

> [S]he wasn't moving or resisting or she didn't say anything at all, and I just—that's when I, that's when I sliced her. That's when I sliced her throat, and there was no struggle in the bathtub. There was no stab, stab, stab or beat, beat, beat. It was just me slicing her throat.

(R. p. 361, lines 17–20).

Afterwards, Appellant took a shower, smoked some more crack, and then began cleaning up. (R. p. 361, line 21–p. 362, line 13). He put Victim's body in a barrel and left the barrel on the side of the road. (R. p. 362, lines 7–24). It was dawn on Sunday morning by then. (R. p. 362, line 25–p. 363, line 9).

Victim's mother, Queen Brown, reported Victim missing after she went by Victim's house to bring Victim some dinner, and Victim was not there. (R. p. 107, lines 14–24). Approximately six weeks after Victim disappeared, law enforcement identified Appellant as the last person to be seen with Victim. (R. p. 113, line 2–p. 116, line 12). On July 23, 2010, Appellant confessed to law enforcement that he had killed Victim, and he took them to her body. (R. p. 124, line 12–p. 128, line 18; 147, line 14–p. 154, line 24).

ARGUMENT

The trial court did not err by refusing to admit the testimony of an expert in psychopharmacology concerning how Appellant's drug-induced state affected his perception of events where the expert's testimony was directed to two elements of voluntary manslaughter—provocation causing a heat of passion and cooling off—both of which are subject to a reasonable person standard.

Introduction

The psychopharmacology testimony that Appellant sought to introduce at trial was not relevant to the jury's consideration of voluntary manslaughter. Such testimony would have only served to confuse the jury. As such, the trial court properly found the evidence inadmissible.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

How the Issue Was Raised at Trial

At a pre-trial hearing on December 9, 2011, defense counsel presented the testimony of Dr. William Alexander Morton, Jr. (R. p. 1; 3). The State stipulated to Dr. Morton's qualifications in the field of addictions and pharmacology, but counsel for the State informed the court that they had "an objection to the relevance of [Dr. Morton's testimony] and the admissibility of [Dr. Morton's testimony] at trial." (R. p. 8, line 10–p. 11, line 16).

Judge King allowed defense counsel to proffer Dr. Morton's testimony so that the court could determine its admissibility. (R. p. 11, line 17–p. 13, line 12). Dr. Morton explained that psychopharmacology is "the study and utilization of medicines that affect the brain so that they

would affect a person's thinking, behavior, and mood." (R. p. 9, lines 12–15). Defense counsel then had Dr. Morton discuss his curriculum vitae and various slides that he had prepared explaining the effects of cocaine on humans. (R. p. 14–28; R. pp. 427–468). But after the court encouraged defense counsel to move on to Dr. Morton's testimony pertaining to Appellant's case, defense counsel questioned Dr. Morton more specifically about his research on cocaine and psychiatric symptoms. (R. p. 28, line 18–p. 39, line 22). Dr. Morton explained the effect that cocaine has on the brain—in particular, that cocaine causes a release of dopamine, a chemical in the brain that causes pleasure; norepinephrine or noradrenaline, a chemical that affects "tension energy and anxiety and thinking;" and serotonin, a chemical related to mood stability. (R. p. 33, line 4–p. 34, line 14). Dr. Morton testified that side effects of cocaine use include agitation, restlessness, and paranoia. (R. p. 34, line 15–p. 37, line 5). He also testified that more violent behavior is seen with crack cocaine use than with powder cocaine use. (R. p. 37, line 6–p. 38, line 25).

Dr. Morton told the court that he had testified in seventy-two trials as an expert. (R. p. 39, line 23–p. 41, line 2). In about two thirds of those trials, he testified during the mitigation phase, and in about one-third he testified during the guilt phase. (R. p. 58, line 23–p. 60, line 8).

Dr. Morton testified that to prepare for his testimony in this case he met with Appellant for about two and a half hours, and he also reviewed the videotape of Appellant's confession, but he had not spoken with Appellant's family or any other witnesses. (R. p. 41, lines 3–22). Dr. Morton opined that crack cocaine had an effect on Appellant's behavior and conduct at the time he killed Victim. (R. p. 41, line 23–p. 42, line 3). According to Dr. Morton, in general, "[c]ocaine definitely affects people's ability to reason and use logic." (R. p. 42, lines 7–8). Dr.

Morton also testified that he was "aware that the victim, Ms. Brown, had a laboratory test that showed that she had cocaine metabolite in her blood. . . ." (R. p. 43, lines 9–24).

Dr. Morton explained that cocaine use can result in a loss of impulse control. (R. p. 43, line 25–p. 45, line 25). He also testified that in this case "their behavior is illogical. It does not make sense to me; it does not make sense to people. And to try to make sense of it is futile." (R. p. 46, lines 1–9). Dr. Morton stated, "What's the likelihood that he was acting paranoid and he was aggressive and irritable and uncomfortable on that night? Pretty high. Pretty high likelihood, based on the amount that—of—of cocaine that—that he and Mrs. Brown used over that day, sharing it." (R. p. 47, lines 21–25). Later in his testimony Dr. Morton opined,

> [I]f you were a little paranoid ten years ago and you quit, you're going—soon as you start using now, you're going to be equally paranoid if not more, because it's developed that pathway. It sensitized that pathway in the brain, that thought, that feeling, maybe that behavior, that it's easier to occur and set off.

(R. p. 48, lines 9–14).

The State declined to ask Dr. Morton any questions about his testimony and informed the court that it had no objections to the content of Dr. Morton's testimony except that it was not admissible. (R. p. 49, lines 4–10). The State reserved its arguments on admissibility for the proper time. (R. p. 49, lines 8–10).

The trial court then inquired about Dr. Morton's methods as well as his opinions relating to this case. (R. p. 49, line 11–p. 58, line 16). Dr. Morton admitted that he did not think that Appellant's cocaine use absolved him of criminal responsibility because he had used crack voluntarily. (R. p. 53, line 10–p. 56, line 11). The court and Dr. Morton then had the following exchange:

> COURT: Well, what is, I guess, the purpose of your testimony, then? If you don't think it relieves him of criminal responsibility, then what is

the fact that you think that the jury should consider, based on your testimony?

MORTON: That this—here's a drug that causes incredible changes in a person's perceptions, behavior, and how they—how they feel. And it—it's well known that this should—this would help someone understand how this murder came about.

It doesn't relieve him of the responsibility of doing it, because he took the cocaine and these changes occurred. But—but he didn't plan it, per se.

(R. p. 56, lines 12–23). Dr. Morton later opined,

> [I]f [Appellant] was addressed, "Did you do the wrong thing?" a day after, he would've said, "Yes, I did do the wrong thing. I knew I was doing the wrong thing, but it just got out of hand and—and it occurred."
>
> But I don't think—I don't think he was planning this and wanting to hurt her specifically. He was just using cocaine—and in his own little world, which doesn't necessarily make sense—and his behavior was an overreaction to one of Ms. Brown's behavior[s] [sic].

(R. p. 61, lines 15–23).

The State argued that the trial court did not need to consider whether Dr. Morton's testimony was admissible under the analysis set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), because of well-settled South Carolina law that voluntary intoxication is not a defense to a criminal act. (R. p. 66, lines 19–25). Counsel for the State cited *State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983), and *State v. Vaughn*, 268 S.C. 199, 232 S.E.2d 328 (1977), in support of that argument. (R. p. 67, line 1–p. 68, line 2). The State also noted that it did not believe Dr. Morton was qualified to testify as to whether Appellant used crack voluntarily, whether the use of crack relieved Appellant of criminal responsibility, or whether Appellant knew the difference between right and wrong. (R. p. 68, lines 20–25). Counsel for the State agreed with Judge King's summary of their argument as "the testimony of Mr. Morton is not relevant and will not assist the trier of fact to determine any relevant issue, because the issue of

voluntary intoxication, whether or not it is drugs or alcohol, is not a defense." (R. p. 69, lines 19–23). Though the State expressed that it had no issue if defense counsel wanted to present Dr. Morton's testimony in mitigation, the State also pointed out that the South Carolina trials in which Dr. Morton had testified were all capital trials except one. (R. p. 70, lines 2–16). In addition, the State presented the alternative argument that Dr. Morton's testimony should be excluded under Rule 403. (R. p. 70, lines 21–24).

Defense counsel argued that cocaine use was "inextricably intertwined with what happened" in this case. (R. p. 71, line 20–p. 72, line 23). Defense counsel also made the following arguments:

> DEFENSE: . . . we're talking about voluntary manslaughter, which obviously, an important part here is heat of passion. There are facts in the case, my client being stabbed in the side, which would certainly lead to that heat of passion. And then, or course, there is the aspect—
>
> COURT: Well, that may be. But that—that doesn't have anything to do with Dr. Morton's testimony.
>
> DEFENSE: Well, I was going to say that we're also talking about whether or not the heat of passion remain.
>
> . . .
>
> If it's an issue of whether or not he had actually cooled off, that may—is where the effects of the cocaine come in. Has to do with his cooling off period. Not—not what caused him to do it in the first place there, just whether or not he had actually cooled off.
>
> . . .
>
> COURT: But I—I fail to see what Dr. Morton's testimony has to do with that.
>
> DEFENSE: With the cooling-off period?
>
> COURT: Yeah.

DEFENSE: Well, cooling off has—well either two things: whether or not he had actually cooled off, which Dr. Morton's testify—testimony would deal with; or whether sufficient time had relapsed—had happened so that he should've cooled off. So whether he actually cooled off or whether he should have cooled off.

(R. p. 72, line 24–p. 74, line 14). The trial court expressed some doubts about defense counsel's position, but ultimately the court decided to take the matter under advisement and do some research of its own. (R. p. 75, line 19–p. 78, line 23).

On December 22, 2011, Judge King issued an order outlining his rulings on the matters taken up at the December 9, 2011 hearing. (R. p. 469). Judge King found that Dr. Morton's testimony did not meet the first factor in *Council*, the requirement that the testimony assist the trier of fact to determine a fact in issue. (R. p. 474). Thus, the court excluded the testimony. (R. p. 474). The court also specifically noted in the order that "most of the time [Dr. Morton's] testimony has been in mitigation of the sentence rather than responsibility for the criminal act." (R. p. 471).

On January 3, 2012, defense counsel filed a motion for reconsideration with the court. (R. p. 475). Defense counsel asked the court to reconsider its ruling and specifically noted that it was not asserting a voluntary intoxication defense. (R. p. 478). "Rather, the Defendant states that the effects of cocaine on human behavior (both the defendant and the victim's behavior) are appropriate facts for the jury to consider when it determines whether or not the Defendant's heat of passion had cooled or should have cooled." (R. p. 478).

The court held another pre-trial hearing on January 10, 2012. (R. p. 80). At that hearing, the court heard argument from both sides on the motion for reconsideration. (R. pp. 81–93).

Defense counsel argued that under Rule 702 expert testimony may be admitted to assist the trier of fact either to understand the evidence or to determine a fact in issue. (R. p. 82, lines

4–18). Defense counsel told the court that Dr. Morton would testify as to how cocaine use affected Appellant's and Victim's behavior. (R. p. 83, lines 7–14). According to defense counsel, Dr. Morton's testimony would help the jury decide whether the heat of passion was continuing at the time of the actual killing. (R. p. 83, line 25–p. 84, line 19). When asked by the court to sum up Dr. Morton's testimony regarding Appellant's behavior, defense counsel stated, "[H]e did talk about the crack cocaine use increasing impulsivity, and particularly impulse increasing aggressiveness, increasing paranoia." (R. p. 85, lines 15–21). Defense counsel argued that he was not asserting a voluntary intoxication defense—rather, he was asserting that Dr. Morton's testimony would go to the issue of whether Appellant's heat of passion had cooled or should have cooled. (R. p. 86, lines 3–8).

The State reiterated its earlier argument that defense counsel was trying to get around South Carolina law that voluntary intoxication is not a defense. (R. p. 86, line 20–p. 87, line 6). The State further argued, "Everybody knows that once—judgment is affected when you use crack. We don't need a, we don't need some expert to tell us that . . . ." (R. p. 89, lines 9–11).

In response, defense counsel argued that

> while the general public, some people—especially those perhaps that have children who have been involved with crack cocaine—may have some idea of some of the characteristics, Dr. Morton is providing information to the jury that would not be available otherwise in terms of specific characteristics that occur as a result of cocaine use, and I'm talking about immediate characteristics. I'm not talking about long-term use.

(R. p. 90, lines 16–23).

The trial court then denied Appellant's motion for reconsideration. (R. p. 95, line 19–p. 96, line 3). The court explained,

> I don't think that that is a proper subject for expert testimony, and I'm going to deny the motion for reconsideration. I thought the purpose of Dr. Morton's testimony and the proffer, doing it in advance, was to take care of that issue

> before trial. And I'm, based upon what he testified at the time, and based upon the facts that are before the court, while I don't disagree with the logic of the majority rule, I just don't think that it's the law of this state. And so I'm going to deny the motion for reconsideration.

(R. p. 95, line 19–p. 96, line 3).

Analysis

Argument Regarding Provocation Causing Heat of Passion Not Preserved for Appeal

As an initial matter, Respondent submits that Appellant has not preserved the argument that Dr. Morton's testimony was relevant to the jury's consideration of provocation causing heat of passion. Defense counsel did not make that argument to the trial court either during a pre-trial hearing or in his motion for reconsideration. It is a well-settled rule in this state that an issue is not preserved for appellate review unless it is both presented to and passed upon by the trial judge. *See, e.g.*, *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting that an argument must be raised and ruled upon by a trial court to be preserved for appellate review); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court."). Though defense counsel asserted that Dr. Morton's testimony was relevant to the jury's consideration of "whether [Appellant's] heat of passion had cooled or had time to cool prior to the killing of the victim[,]" (R. p. 476), he did not argue that the testimony was relevant to provocation. In fact, at the pre-trial hearing on December 9, 2011, defense counsel argued that the issue of cooling off was "where the effects of the cocaine come in. Has to do with his cooling off period. Not—not what caused him to do it in the first place there, just whether or not he had actually cooled off." (R. p. 73, line 23–p. 74, line 1). Thus, Respondent submits that Appellant renounced any argument that Dr. Morton's testimony was relevant to provocation or

heat of passion—Respondent construes those elements part of "what caused him to do it in the first place."

Dr. Morton's Testimony Regarding Appellant's Intoxicated State

Under S.C. R. Evid. 702,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Supreme Court of South Carolina has provided the following instruction for trial courts dealing with expert testimony:

> When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate.

State v. Council, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999). The Court has also noted that scientific evidence is subject to attack for relevancy. *Id.* (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)). "Evidence which is not relevant is not admissible." Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Appellant contends that Dr. Morton's testimony was relevant to the jury's consideration of voluntary manslaughter—in particular, the elements of provocation causing a heat of passion and of cooling off. (Final Br. of Appellant at 5). Even if this Court finds that Appellant has

preserved his argument as to provocation causing heat of passion and to cooling off, Respondent disagrees that the testimony was relevant.

During Appellant's trial, the court instructed the jury on the elements of murder and the elements of voluntary manslaughter.[2] (R. p. 410, line 18–p. 415, line 18). Under South Carolina law, "'[m]urder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. On the other hand,

> [v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, 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.

State v. Cole, 338 S.C. 97, 101–02, 525 S.E.2d 511, 513 (2000) (internal quotations and citations omitted).

> [E]ven when a person's passion is "sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter."

State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (2010) (quoting *State v. Knoten*, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001)).

Respondent submits that the relevant inquiry when considering heat of passion is what would inflame the ordinary person,[3] and the relevant inquiry when considering cooling off is

[2] The court did not instruct the jury on either involuntary manslaughter or accident. (R. pp. 401–420).

[3] Appellant contends that "[t]he jury needed guidance on how chemicals here affected perception since a 'rational person standard' is by fact of life not applicable to 'heat of passion.'" (FBOA at

what amount of time would be sufficient for an ordinary person to cool down.[4] The effect of the crack that Appellant had smoked prior to killing Victim is irrelevant to these inquiries—the jury is not charged with determining how an *intoxicated*, reasonable person would act.[5] In fact, in accordance with South Carolina law, voluntary intoxication is not a defense. *See State v. Davis*, 278 S.C. 544, 545, 298 S.E.2d 778, 779 (1983) (citing *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979)) ("Voluntary intoxication does not impair a person's ability to act with malice aforethought so as to reduce murder to voluntary manslaughter."); *State v. Vaughn*, 268 S.C. 119, 125–26, 232 S.E.2d 328, 330–31 (1977) ("We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific. . . . 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.") (internal quotations and citations omitted).

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11). Respondent must disagree with the premise of Appellant's assertion based the South Carolina Supreme Court's explanation of "heat of passion." *See State v. Cole, supra.*

[4] Alternatively, a jury considers whether a defendant's passions had actually cooled. Respondent addresses the relevance of Dr. Morton's testimony with regards to that inquiry later in this brief.

[5] **The Reasonable Man.** Some cases have considered whether the law should take into account, in measuring the adequacy of the provocation, the fact that the defendant possesses some peculiar mental or physical characteristic, not possessed by the ordinary person, which caused him, in the particular case, to lose his self-control. It is quite uniformly held that the defendant's special mental qualities—as where, because of a sunstroke or head injury, he is particularly excitable—are not to be considered. Even more clearly, he does not qualify for the voluntary manslaughter treatment where, because of intoxication, he easily loses his self-control; that is to say, he is to be judged by the standard of the reasonable sober man.

2 Wayne R. LaFave, *Subst. Crim. Law* § 15.2 (2d ed.) (citations omitted).

Indeed, the jury in Appellant's trial was charged with such law. (R. p. 415, line 19–p. 416, line 7).

South Carolina has long recognized that evidence of voluntary intoxication is of no matter in voluntary manslaughter considerations. In 1843, the South Carolina Court of Appeals explained

> [I]t would be jeoparding the peace and safety of society, to say that he who, by half a dozen glasses, is habitually rendered irritable and fierce, shall be looked upon with more indulgence when he has barbarously resented a trivial affront, because he had taken the quantity of liquor requisite to make him a savage: or that he who has never been known to grow cool after a transport of wrath excited when he was in a state of intoxication, until sleep had sobered him, shall, in the application of the circumstances to determine what time for cooling is reasonable, be allowed a longer time because, on the occasion in question, he had voluntarily encountered the hazard which drinking was known to bring upon himself and all around him.

State v. McCants, 28 S.C.L. 384, 395. In other words, one who is voluntarily intoxicated is not treated more favorably by the law than the sober, reasonable man. Consequently, Dr. Morton's testimony regarding the effect of crack cocaine on Appellant's actions was not relevant to the jury's consideration of voluntary manslaughter.

Arguably, Dr. Morton's testimony could have been tangentially relevant to whether Appellant had *actually* cooled down prior to slitting Victim's throat. Of course, Dr. Morton was not present when Appellant killed Victim—thus, he had no lay testimony to contribute as to whether Appellant's passions had cooled. However, based on his interview with Appellant, his viewing of Appellant's confession, and his general knowledge of how crack affects the brain, Dr. Morton surmised that there was a "high likelihood" that on the night Appellant killed Victim, Appellant was acting paranoid, aggressive, irritable and uncomfortable. (R. p. 47, lines 20–25).

Dr. Morton did not testify specifically that Appellant's use of crack would have affected his ability to cool down.[6]

Respondent contends that Dr. Morton's testimony has only slight, if any, evidentiary value on the issue of whether Appellant actually cooled down after the initial altercation. Again, it is clear that in South Carolina "voluntary intoxication is not an excuse for, or a defense to a crime." *State v. Crocker*, 272 S.C. 344, 346, 251 S.E.2d 764, 766. Of course, the jury heard about Appellant's drug use on the day of the crime, but Respondent submits that allowing the jury to consider Dr. Morton's testimony on the effect of crack on Appellant's behavior would have essentially allowed Appellant to benefit, in terms of the jury's considerations of his actions, because he was intoxicated at the time he killed Victim. Respondent submits that such a benefit would be abhorrent to South Carolina law. Furthermore, Dr. Morton's testimony would have been confusing the jury as it would be wholly irrelevant to part of their inquiry (ordinary, reasonable person's cooling down) and perhaps only marginally relevant to another consideration (Appellant's cooling down). Moreover, at trial Appellant testified that on the night of the murder that he felt "paranoid[,]" (R. p. 338, lines 9–11), and "out of control[,]" (R. p. 364, line 22–p. 365, line 9). Thus, Dr. Morton's testimony was not needed to establish how Appellant felt the night he killed Victim. Under S.C. R. Evid. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

[6] In his colloquy with the court, Dr. Morton stressed the spontaneity of Appellant's actions while on crack, and Dr. Morton repeatedly mentioned that Appellant "didn't plan it." (R. p. 49, line 16–p. 63, line 5). However, Respondent notes that no element of "planning" is required to find a defendant guilty of murder. Murder requires "malice aforethought," which is an evil intent existing just before and at the commission of the act. *See State v. Kinard*, 373 S.C. 500, 504–06, 646 S.E.2d 168, 169–70 (2007) (finding a jury charge on malice aforethought to be proper where the trial court instructed the jury that "Malice imports wickedness . . . . There has to be a combination between this evil intent existing aforethought, just before and at the commission of the battery, and the act producing the battery . . .").

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court was correct in excluding the evidence and avoiding confusion.

Dr. Morton's Testimony Regarding Victim's Intoxicated State

Appellant also asserts that Dr. Morton's testimony was relevant to explain Victim's violent reaction, which Appellant characterizes as "not natural given that she was caught in the wrongful act of going through appellant's wallet." (FBOA at 10–11). However, again, the chemical mechanism triggered by crack that may have caused Victim's actions is not relevant to the jury's considerations. There was no need to consider *why* Victim acted the way she did—the jury only needed to consider what Victim did that provoked Appellant. Appellant's own testimony established that when caught rifling through Appellant's wallet, Victim ran into the kitchen, grabbed a knife, and stabbed Appellant.[7] Any testimony that Dr. Morton could have offered regarding Victim's behavior was unnecessary and may have confused the jury.

[7] Appellant's wife's trial testimony corroborated that defendant had been stabbed though he did not go to the hospital for treatment. (R. p. 277, lines 4–18).

CONCLUSION

For all the foregoing reasons, Respondent respectfully asserts that the trial court's exclusion of Dr. Morton's testimony was not an abuse of discretion. Thus, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully Submitted,

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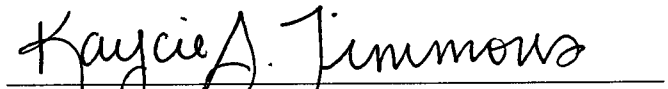

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January 9, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN LEE HOGAN, JR.,

APPELLANT,

Appellate Case No. 2012-208526.

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, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record Robert M. Dudek, Chief Appellate Defender, at:

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

This ninth day of January, 2014.

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