

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of General Sessions  
Honorable J. Cordell Maddox, Jr., Circuit Court Judge

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**RECEIVED**  
MAR 14 2019  
SC Court of Appeals

Appellate Case No. 2016-001385

THE STATE, .....RESPONDENT,

v.

HEATHER ELIZABETH SIMS,.....APPELLANT.

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**RESPONDENT’S PETITION FOR REHEARING**

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On February 27, 2019, this Court issued a published opinion in which it reversed Appellant Heather Sims’s conviction for voluntary manslaughter. State v. Sims, Op. No. 5631 (S.C. Ct. App. filed February 27, 2019) (Shearouse Adv. Sh. No. 9 at 109). In reversing Sims’s conviction, this Court held the trial judge erred in instructing the jury on the lesser-included offense of voluntary manslaughter, claiming that when viewing the evidence in the light most favorable to Sims, there was no evidence in the record supporting such charge. Furthermore, this Court held Sims could not be retried on the lesser-included charge of involuntary manslaughter because the jury, on the single verdict form, checked the “guilty” verdict for voluntary manslaughter but the “not guilty” verdict for murder and involuntary manslaughter, finding the jury implicitly acquitted Sims of both charges. Pursuant to Rule 221(a), SCACR, Respondent,

the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked the facts, law, and standard of review in reaching its rulings on both issues.

**This Court Applied the Incorrect Standard of Review**

In its opinion, this Court found the evidence, “taken in the light most favorable to Sims,” did not support the inference that Sims shot Victim in a sudden heat of passion. In reaching this conclusion, this Court viewed evidence in the light most favorable to the party *opposing* the charge when it should have viewed the evidence in the light most favorable to the State.

The State agrees that South Carolina appellate courts have repeatedly held that, when determining whether evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to defendant. E.g., State v. Pittman, 373 S.C. 527, 572–73, 647 S.E.2d 144, 168 (2005). However, in each of those cases, the State opposed the requested voluntary manslaughter charge. Because Sims is the party opposing the charge, all facts and inferences should be viewed in the light most favorable to the State. Cf. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (“On appeal, ‘[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State.’” (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004))). Such a standard is also in accord with our courts’ rulings involving jury charges, which requires juries be instructed on any charge supported by any evidence in the record. See State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) (“If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given.” (emphasis added)); State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) (“If there is any evidence to support a charge, the trial judge should grant the request.” (emphasis added)); State v. Condrey, 349 S.C.

184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (“A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. If any evidence exists to support a charge, it should be given.” (emphasis added)).

Throughout its opinion, this Court relied upon Sims’s trial testimony and evidence, ignoring the evidence of her inconsistent statements to officers and discounting her description of the attack to Brown. Viewing the evidence in the light most favorable to the State, this Court should find the evidence presented by the State supported the voluntary manslaughter charge. Accordingly, this Court should grant the petition for rehearing and apply the correct standard of review to the facts of this case, which, as explained below, would necessarily result in it affirming the trial court’s decision to give the voluntary manslaughter charge.

#### **Evidence of Voluntary Manslaughter**

In Sims’s case, the trial judge properly instructed the jury on the lesser-included offense of voluntary manslaughter because evidence and testimony was presented during trial from which the jury could have concluded Sims was guilty of that offense. Looking to the elements of the offense, voluntary manslaughter is “the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation.” State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951). In order for a killing to constitute voluntary manslaughter, both heat of passion and sufficient legal provocation must exist at the time of the killing, and the heat of passion must result from the legal provocation. State v. Starnes, 388 S.C. 590, 596–97, 698 S.E.2d 604, 608 (2010). Sudden heat of passion resulting from sufficient legal provocation in the context of voluntary manslaughter “need not dethrone reason entirely, or shut out knowledge and volition[.]” State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011). However, it “must be such as would naturally disturb the sway of reason, 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.” Id. “In determining whether the act which caused death was impelled by heat of passion . . . , all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing.” State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969).

In State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993), the defendant was convicted of murder for shooting an unarmed man in a grocery store. Leading up to the shooting: (1) the defendant and the victim got into an argument outside a grocery store; (2) the two men “bumped chests”; (3) the defendant aimed a pistol at victim and pulled the trigger, but the pistol was unloaded; (4) shortly after the fight was broken up, the defendant loaded a clip of ammunition into his pistol, fired a single shot into a nearby sign, and followed the victim into the grocery store; (5) the two men again started arguing and shouting; (6) the victim moved toward defendant in a “menacing fashion” with his arms and hands outstretched “as if to grab him”; and (7) the defendant shot victim in the chest, and after victim fell he cursed him and shot him a second time in the head. The trial judge instructed the jury on murder and self-defense, but declined to charge voluntary manslaughter. Id. at 398, 434 S.E.2d at 273–74.

The Supreme Court of South Carolina found the trial court erred in failing to charge voluntary manslaughter because, in murder cases, a trial court should provide the charge unless it “very clearly appear[s] there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” Id. at 399, 434 S.E.2d at 274. The court noted the voluntary manslaughter charge was required because evidence was presented showing defendant and victim were in a heated argument and the victim was about to initiate a physical altercation when the shooting

occurred. Id. Moreover, the court noted the failure to charge voluntary manslaughter was not harmless because even though the jury rejected the defendant's self-defense claim and found defendant guilty of murder, "the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find [defendant] guilty of voluntary manslaughter." Id. at 399–400, 434 S.E.2d at 274.

In Starnes, the Supreme Court of South Carolina found the trial judge properly refused to charge the jury on voluntary manslaughter because Starnes's testimony that he felt threatened and was in fear was not sufficient evidence supporting the charge; there was no evidence in the record Starnes shot his victims in a heat of passion; and a person's fear, by itself, is not sufficient to prove a sudden heat of passion. Starnes, 388 S.C. at 596–97, 698 S.E.2d at 608.

Similarly, in State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015), the Supreme Court of South Carolina found the trial court properly charged the jury on murder and refused to charge the jury on voluntary manslaughter because there was no evidence of the latter charge; the only evidence contradicting the State's theory of murder was Niles's own testimony established that he did not wish to hurt the victim, shot with his eyes closed, and was merely attempting to stop the victim from shooting. Id. at 522–23, 772 S.E.2d at 880–81. Thus, there was no evidence of a "sudden heat of passion as would produce an 'uncontrollable impulse to do violence,'" only evidence that Niles's actions constituted either murder or self-defense. Id.

In Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015), the Supreme Court of South Carolina found the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter because there was no evidence Cook acted in a sudden heat of passion when he killed his victim. Id. at 557, 784 S.E.2d at 668. The court, after reviewing its prior decisions in Starnes, Niles, and Lowry, noted the evidence showing: (1) Cook was in fear; (2)

Cook shot victim twice; and (3) “before [he] knew it, [he] fired a shot,” were, without more insufficient to establish a sudden heat of passion. Id. at 557–59, 784 S.E.2d at 668–69. The court specifically distinguished the case from Lowry, noting: (1) Lowry involved both a physical and verbal altercation, as opposed to the brief verbal altercation in Cook; (2) the witnesses in Lowry testified the altercation between Lowry and his victim was obvious, in contrast to the witnesses in Cook who “could hardly tell” there was an argument. Id. at 559, 784 S.E.2d at 669. Further, Lowry “actively pursued” his victim, whereas Cook attempted to walk away and disengage from the situation. Id. Considering these facts, the court found “Lowry’s actions suggest[ed] that he was acting in a sudden heat of passion,” but Cook’s actions “d[id] not do the same.” Id. (emphasis added).

In the instant case, the State presented substantial evidence Sims acted in a sudden heat of passion when she shot Victim. Notably, the State’s evidence was similar to that presented in Lowry, including the portions of Lowry discussed within Cook. Both the State and Sims provided significant evidence Sims acted in a sudden heat of passion when she shot Victim. The undisputed evidence showed Victim and Sims’s marriage was deteriorating; they were constantly fighting and attending marriage counseling. According to Sims’s trial testimony and various pretrial statements, Victim was agitated the day of the attack and started their final, explosive argument. He hurled insults at Sims and threatened to leave her, claiming he did not want “to be married to a damn liar.”

Brown testified Sims and Victim were in a verbal altercation which progressed into a physical struggle for the former’s cell phone. The physical altercation included Victim putting his arms around Sims and biting her finger to force her to drop the phone. Sims told Brown she received a stab wound to her arm during that struggle. Victim ended the struggle after Sims

released her phone and it slid across the bathroom floor. Further, after Victim disengaged from the Sims, then later decided to arm herself with a gun rather than make any attempt to leave the situation. When Sims asked Victim what he was “going to do” with the knife in his hand, he informed her he was not “going to do anything.” When he asked her the same, she declined to State whether or not she planned to shoot him. To paraphrase the Cook court, “Collectively, [Sims’s] actions suggest that [s]he was acting in the sudden heat of passion.”

Additionally, if the events unfolded as described by Brown, Sims was not, nor possibly ever was, in danger of death or serious bodily harm when she shot Victim. Alternatively, Sims was not in such danger, until Victim, fearing for his own life, charged Sims after she armed herself. It was the duty of the jury to weigh this evidence and determine whether Sims’s actions constituted manslaughter. See State v. Mekler, 379 S.C. 12, 16–17, 664 S.E.2d 477, 479 (finding a trial judge erred in failing to charge a jury on both self-defense and involuntary manslaughter because there was evidence supporting both charges and it was the jury’s duty to weigh the evidence and determine how the crime occurred).

Further, other evidence at trial, ignored in this Court’s opinion, supported both a jury charge and a verdict of voluntary manslaughter. During her 9-1-1 phone call, Sims claimed Victim had slapped her. Further, during her hospital interview which occurred within hours of the shooting, Sims told officers: (1) she grabbed the gun because Victim was in her face and she felt threatened; (2) when she grabbed the gun, Sims did not know whether she actually needed it because she felt only “a little threatened”; (3) Victim walked toward her with the knife only after seeing her grab the gun; (4) Victim started swinging the knife after seeing her grab the gun; (5) Victim instigated the situation when he held the knife in her face and called her names; (6) Victim threatened to “knock the teeth” out of Sims. The State also presented expert testimony

indicating Victim never stabbed Sims, which included expert testimony noting that based on the shallow depth of the wounds, “hesitation marks,” the position of the knife in Victim’s hand, and the absence of blood on the portion of the knife which should have touched his gunshot wound, all contradict Sims’s trial testimony and support the possibility that she wrongfully killed him. From this evidence, the jurors could have concluded Sims did not act in self-defense: she either created the situation requiring the need for force, did not believe she was in actual danger, or that, after sufficient legal provocation, Sims killed Victim. See Starnes, 388 S.C. at 598–99, 698 S.E.2d at 609; State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (“Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense”).

In its opinion, this Court claims the instant case is distinguishable from Lowry and Knoten in that there was “a period between the initial altercation and the killing in which the defendant was separated from his [or her] victim by four walls in a door,” and in both cases the defendant armed himself, entered the building, and reinitiated conflict before the killing. First, the State notes such a rule would be inapplicable to the instant case if the jury believed, based on Sims’s own testimony, that Sims was at fault in this situation and armed herself before any physical altercation occurred.

As to the merits of such a requirement, this Court’s opinion renders voluntary manslaughter an inappropriate charge any time “four walls and a door” exist between an initial altercation and a fatal shooting. South Carolina law requires a look at the totality of the facts surrounding a violent attack to determine the propriety of a manslaughter charge. See State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969) (stating whether an accused “cooled off” prior to a violent act must be determined by evaluating all of the circumstances surrounding the

event and the people involved). In fact, the separation of time and location between an initial altercation and a killing will often factor against a finding of voluntary manslaughter. See Cook, 415 S.C. at 557, 784 S.E.2d at 668 (stating defendant’s attempt to walk away “does not suggest [he] was incapable of cooling off”); State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585–86 (Ct.App.2010) (affirming the trial court’s decision not to charge the jury on voluntary manslaughter because the evidence demonstrated defendant “cooled off” between his physical ejection from a party and the shooting at issue, which occurred after he returned to the party).

Finally, the State notes the Court’s comparison of the instant case to State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), is inappropriate. In Dickey, Supreme Court overturned a defendant’s conviction for manslaughter after finding the trial court should have granted Dickey a directed verdict because the only evidence in the record indicated he was acting in self-defense at the time he shot and killed his victim. In reaching that conclusion, however, the court analyzed all of the evidence presented pursuant to the elements of self-defense. However, in this Case, self-defense was not the only possible conclusion based on the evidence. Notably, the State presented evidence, including Sims’s own statements to law enforcement, which could have led the jury to reasonably infer Sims was guilty of voluntary manslaughter.

### **Involuntary Manslaughter**

In its opinion, the Court found that because the jury checked “not guilty” on the verdict form for both murder and involuntary manslaughter, it acquitted Sims of both offenses. However, this finding ignores several critical considerations: (1) all three verdicts were on the same form; (2) all three verdicts had only two options from which to choose, guilty and not guilty; (3) the trial judge instructed the jury that it could only consider the offense of voluntary manslaughter if it found Sims not guilty of murder, and that it could only consider involuntary

manslaughter if it found Sims not guilty of voluntary manslaughter. Given these facts, including the instruction by the trial judge, this Court incorrectly found the jury acquitted Sims of involuntary manslaughter and that this case cannot be remanded for a trial on such offense. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow the law as instructed to them).

**Conclusion**

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Sims's conviction and sentence for voluntary manslaughter.

Respectfully submitted,

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March 14, 2019

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**PROOF OF SERVICE**

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I, Shana Montgomery, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Blake A. Hewitt, Esquire  
Bluestein, Thompson, Sullivan LLC  
Post Office Box 7965  
Columbia, SC 29202

I further certify that all parties required by Rule to be served have been served this 14th day of March, 2018.



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ATTORNEY GENERAL

March 14, 2019

**RECEIVED**  
MAR 14 2019  
SC Court of Appeals

The Honorable Jenny Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: State v. Heather E. Sims – Appellate Case No. 2016-001385

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

William F. Schumacher, IV  
Assistant Attorney General  
Bar Number 100231

WFS/ssm  
Enclosures

cc: Blake A. Hewitt, Esquire  
Victim Advocacy Division