ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2013-001783

THE STATE,

Respondent,

vs.

NATHANIEL BERNARD BEEKS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

In a trial where the only issue was whether Appellant committed murder or voluntary manslaughter, the trial judge erred in instructing the jury that words alone would not satisfy the element of voluntary manslaughter requiring sufficient legal provocation to negate malice and by failing to instruct the jury that legally sufficient provocation includes a very emotional argument.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether this Court should affirm under Rule 220(c), SCACR, because the trial judge's submission of the lesser-included offense of voluntary manslaughter was erroneous as a matter of law, where the only evidence in the record was that Beeks "snapped" when the victim told Beeks that "she was seeing someone else. ... [A]fter hearing that, "[he] grabbed her, threw her to the floor and started choking her." Beeks could only be convicted or acquitted of murder because the victim's exercise of her lawful right to terminate her relationship with him did not and could not constitute "sufficient legal provocation" to support a manslaughter charge and there is no evidence that the victim used vulgar or opprprious words or that she did anything other than merely inform Beeks of her intent to leave him?

II. Whether, alternatively, this Court must affirm because the trial judge did not commit reversible error in giving the undeniably correct instruction that words alone are insufficient legal provocation when deadly weapon is used, since (1) the charge given was necessary for jurors to properly assess whether there was "sufficient legal provocation," where the State's evidence was that Beeks used his hands as a deadly weapon, (2) the challenged instruction could not have been prejudicial because it permitted jurors to properly assess Beek's claim that a "heated conversation" could constitute "sufficient legal provocation," and (3) this Court upheld an identical instruction in *State v Horton*, No. 2007–UP–502, 2007 WL 8391903 (Ct. App., Oct. 29, 2007)?"

STATEMENT OF THE CASE

Nathaniel Bernard Beeks (Beeks) is currently in the Perry Correctional Institution, of the South Carolina Department of Corrections, where he is serving a sentence of life imprisonment without parole (LWOP) for murdering Marsha Smith in her apartment. The Greenville County Grand Jury indicted him on August 16, 2011 for murder (2011-GS-23-6315) and grand larceny (2011-GS-23-6316). **R. pp. 254-59**. Randall Lee Chambers, Esquire, represented him on these charges, while Assistant Thirteenth Circuit Solicitor Judy Munson prosecuted the case.

Beeks received a jury trial before the Honorable J. Mark Hayes II, on August 12-14, 2013. Judge Hayes granted Beeks' motion for a directed verdict on the charge of grand larceny, at the conclusion of the state's case, based upon the prosecution's failure to present sufficient evidence as to the value of the car that was stolen. However, Judge Hayes denied a directed verdict on the offenses of murder and petit larceny. **R. p. 170, line 22 – p. 174, line 18**. The State then moved and was allowed to amend indictment 2011-GS-23-6316, so as to allege petit larceny. **R. p. 174, line 19 – p. 175, line 11**.

Judge Hayes charged the jury on murder, voluntary manslaughter and petit larceny. **R. p. 221, line 24 – p. 225, line 22**. The jury convicted Beeks of murder and petit larceny. **R. p. 228, lines 15-21**. Judge Hayes imposed concurrent sentences on him of life imprisonment for murder and thirty days for petit larceny. **R. p. 237, line 23 – p. 238, line 2**; **R. pp. 256, 259** (sentencing sheets).[1]

Beeks timely served and filed a Notice of Appeal. He filed his Initial Brief of Appellant on January 13, 2014. Respondent now submits the Final Brief of Respondent.

[1] Beeks has completed his sentence for petit larceny.

STATMENT OF FACTS

Twenty-five year old Faith Smith testified that in April 2011, she was living in a Greenville, South Carolina, apartment with her minor son and her mother, Marsha Smith. **R. p. 9, line 5 – p. 10, line 25**. Faith did not know of anyone that Marsha was dating during the time that Faith was living with her. Faith knew that Marsha "was seeing Nathaniel Beeks … [b]ut they wasn't like together." **R. p. 11, lines 11-21**. Marsha began dating Beeks eight or nine years before April 2011, and he would stay with Marsha when he came to Greenville. However, he was living in the Atlanta, Georgia area, they were no longer dating, and he did not have a key to the apartment. **R. p. 12, line 21 – p. 13, line 3; p. 17, lines 1-3; p. 27, line 17 – p. 28, line 18**.

Faith testified that Beeks arrived at Marsha's and Faith's apartment on Friday, April 22, 2011. **R. p. 12, line 23 – p. 13, line 3; p. 28, line 19 – p. 29, line 5**. Everything was apparently fine between Marsha and Beeks on Friday. **R. p. 29, line 10 – p. 31, line 8**. The following day was a completely different story.

After Faith got home from work on Saturday, April the 23rd, Beeks came by the apartment and banged and kicked on the door but Faith would not let him into the apartment. Marsha came home shortly afterwards and said, "Faith, … come get your things because Nathaniel Beeks was at her friend['s] house and he was acting the fool, he was drunk, acting crazy." Her mother had a problem with Beeks drinking and they would sometimes argue about his drinking. So, Marsha took Faith and Faith's two year old son to a birthday party that Maryssa Cantrell was having for her child. Faith and her son remained at the birthday party until Maryssa gave them a ride home later that night. **R. p. 13, line 4 – p. 14, line 16; p. 29, lines 1-17; p. 34, line 5 – p. 35, line 16**.

When Maryssa pulled up to the apartment, Faith saw Beeks coming down the stairs.

"[H]e was at the bottom of the stairs. He had a pillow and bags in his arm[s] with something hanging." Faith exited the car and spoke to him, but he did not say anything and he tried to ignore her. He also did not answer her when she asked where her mother was. In response to her repeated efforts to get him to speak, he finally engaged in very brief pleasantries. **R. p. 14, line 15 – p. 15, line 12; p. 32, line 5 – p. 33, line 4.**

Next, Beeks went to Marsha's black Honda, put the items he was carrying in the back seat and got into the car. As Faith was entering the house, he backed up and sped out of the driveway. This was unusual because Marsha did not let anyone drive that car, including Faith. However, Faith was still unaware that anything was wrong and she went into the apartment. **R. p. 15, line 23 – p. 16, line 19; p. 33, lines 5-11.**

Inside of the apartment, Faith found that the kitchen table and a chair in the kitchen had been overturned; one of Marsha's tennis shoes was on the kitchen floor; a two-piece couch that was normally fastened had been pulled apart; there was "stuff all over the floor, [and] it was a big ole mess." Immediately realizing that something was wrong, Faith searched throughout the house and called out for her mother, without getting a response. She finally found Marsha lying on the living room floor. Marsha's back was "against the chair," her head was tilted back and her mouth was open. Faith saw a scratch on Marsha's chest and Faith could not get her to awaken. **R. p. 16, lines 22-25; p. 17, lines 4-24; p. 24, lines 6-23; p. 25, line 16 – p. 26, line 14; p. 27, lines 2-14.**

Faith then ran outside and ... started screaming." A neighbor came outside and asked what was wrong but she was too upset to speak. So, the neighbor called 911. Moments later, Faith's friend, Olijahwon Roberts, ran into the house to check on her. Once he saw the body, he took her out of the apartment and would not let her re-enter. **R. p. 17, line 24 – p. 18, line 17.**

Maryssa Cantrell testified that she was twenty-four year old. In April 2011, Maryssa was living in Greenville. Faith Smith is her best friend and she knew Marsha though Faith. **R. p. 112, line 16 – p. 114, line 6**. Around 7:00 p.m. on the night of April 23, 2011, Marsha dropped off Faith and Faith's son at the birthday party that Maryssa was having for her son. Maryssa spoke briefly to Marsha and Marsha did not appear to be intoxicated. Faith stayed at the party until Maryssa drove her and her son home sometime after 9:00 p.m. **R. p. 114, line 7 – p. 115, line 25**.

After dropping off another friend who had attended the party, Marrysa drove Faith home. While Marrysa was talking to Faith and Faith was getting her son out of the car, Maryssa saw Beeks walk out of the apartment, go over to Marsha's car and put a duffel bag and a pillow into the car.[2] He then went back into the apartment. He did not speak to her or to Faith. Even after Faith spoke to him, he only stared and did not speak. **R. p. 119, line 12 – p. 120, line 8**.

Beeks went back into the apartment for a brief period. Less than two minutes later, he drove away in Marsha's car. Maryssa did not see anyone else in the car. **R. p. 116, line 1 – p. 119, line 11**.

Cpl. John Blassingame, of the Greenville City Police Department, was the first officer to respond. He arrived around 10:30 p.m. Although Faith was very hysterical, she told him that Beeks had killed her mother and took her mother's car. He escorted her back into the residence briefly, and she got her mother's insurance card. Cpl. Blassingame called the insurance company, obtained the car's VIN and tag numbers, and called dispatch with this information. This resulted in a BOLO. **R. p. 36, line 25 – p. 37, line 21; p. 38, lines 8-19; p. 39, lines 5-23.**

While Cpl. Blassingame was in the apartment, he observed that items seemed to have

[2] She had seen Beeks at the apartment because he was usually there when she went to visit Faith. **R. p. 118, lines 2-8**.

been knocked over, and the apartment was "[k]ind of [in] disarray." It did not look like the apartment was normally kept in that condition. **R. p. 38, line 23 – p. 39, line 2.**

Olijahwon Roberts testified that he and Faith Smith were friends and had gone to high school together. His sister lived in the same apartment complex as Marsha and Faith Smith. Olijahwon was at his sister's residence on April 23, 2011. When he went out to his car to get his cell phone and call Faith that night, he heard someone screaming. He initially did not pay that much attention to it, and he walked back through the house and asked his parents if they had heard anything. **R. p. 41, line 11 – p. 42, line 23.**

As soon as he went back outside, his sister's boyfriend told him that Faith was screaming. So, Olijahwon ran to her apartment and knocked on the door.

> ... [The door] was a little bit opened. So, I opened it up and went in. And [I] saw her holding her momma and her son was standing beside her and she was crying. So, I ran back out the house to get some help. And that's when I ran into my mother and my aunt and next door neighbor. And I asked if anybody [knew] CPR.

R. p. 43, lines 1-8.[3]

Mrs. Billie Witherspoon is Olijahwon Roberts' mother. She testified that he ran into her daughter's apartment on the day of the incident, and he said that "something happened, something bad. And me and my sister followed him out the door" to Marsha's apartment. Faith was crying and Mrs. Witherspoon saw Marsha lying in the position that Faith had described. Another woman present said that she knew how to perform CPR. So, Mrs. Witherspoon helped the woman lay Marsha's body on the floor, for the woman to perform CPR. **R. p. 44, line 10 – p. 46, line 2.**

James Crawford testified that he is forty-eight years old and that he was living in

[3] He recognized Marsha because he had met her once before. **R. p. 43, lines 8-9.**

Greenville at the time Marsha Smith was killed. He knew Marsha through her cousin, Susan, and he knows Faith. Also, he had known Beeks for roughly five years, he was aware that Beeks was seeing Marsha, and he knew that Beeks was living in Georgia at the time but visited Greenville on weekends. On the morning of April 23rd, Marsha came to Mr. Crawford's residence and she took Susan to the Bi-Lo. **R. p. 47, line 17 – p. 49, line 7; p. 53, lines 7-14.**

After the women returned from the store, Marsha stayed at the house and they talked, as Susan prepared to visit her mother at noon. As Mr. Crawford drank a beer and watched television, Beeks got off of a city bus and came into the house. Beeks and Crawford drank beer[4] and "[e]verything was all right at the time." **R. p. 49, line 21 – p. 50, line 9**. Marsha was not drinking because she does not drink. **R. p. 51, lines 12-13.**

About an hour later, however, Marsha and Nate had a conversation. Mr. Crawford did not hear what she said, but Marsha said something to Beeks that "triggered him off." Beeks "jumped off the couch" and he was so mad that he slammed the front door on the way out of the residence. Beeks returned about thirty minutes later. He was sweating and he had beer with him. **R. p. 50, lines10-22; p. 51, lines 14-16; p. 54, lines 11-23.**

Beeks did not answer Mr. Crawford when his friend asked what was wrong with him. He started another conversation with Marsha in the kitchen. Beeks soon got so mad that he gave Marsha a funny look, threw the beer under a coffee table where Marsha was seated, and he left the house again. This was the last time that Mr. Crawford saw him on the 23rd. **R. p. 50, line 22 – p. 52, line 1; p. 54, line 25 – p. 55, line 12.**[5] Marsha stayed at the residence for a short period before announcing her intention to go visit her mother. She then left. **R. p. 51, lines 9-11.**

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[4] Beeks brought two beers with him. **R. p. 54, lines 3-5.**

[5] In all, Beeks only drank two or three beers. **R. p. 55, lines 9-12.**

Darlene Bartee testified that she and Marsha had been co-workers at a residential psychiatric treatment center, and that they became "very close" friends. **R. p. 57, line 12 – p. 58, line 17**. They would discuss many things, including their children, the job and their relationships. **R. p. 59, lines 7-8**. Darlene had notice a recent change in Marsha's demeanor shortly before her death. In the past, Marsha had been "stressed out," but recently she had been a "happier person … because [she] had met someone." **R. p. 59, lines 9-20**.

Darlene had never met this man but she had spoken to him once on the phone. **R. p. 59, line 23 – p. 60, line 1**. Marsha had met this man at the home of a friend in Greenville. This man "began to talk to her like a woman should be treated and talked to." Marsha liked this because "[s]he knew the difference when somebody [was] appreciating her as a woman as opposed to him being mean and frustrating her and getting drunk all the time." **R. p. 62, lines 10-22**.

According to Darlene, Marsha was looking for another apartment and "she found a nice place." The apartment complex where she was living "was infested with drugs." Marsha also wanted to leave because the complex to which she was moving had restrictions and only people who were on the lease could stay there. This made her "very happy." **R. p. 60, line 2-17**.

Darrlene knew that Marsha had been in a relationship with Beeks for several years, and that he was then living in Georgia. She had assumed that he was in rehab there. **R. p. 61, line 21 – p. 62, line 4**.

Darlene last saw Marsha, at lunch, on the Thursday before she was killed. (This would have been April 21, 2011). Darlene testified that:

> Marsha and I [were] at lunch and -- at our desk and we were talking about her getting away from Nathaniel. And we were discussing how she was going to do that. I gave her [advice] that maybe she should allow [me] or someone else to be around her at that time. It was a conversation of how she was going to tell him. Because she knew that he [sometimes had] a mean streak. Especially when he was

drinking. She did not like that.

* * *

> She told me that she was going to be okay and that she would take somebody with her, [and] that somebody was going to be with her.

R. p. 61, lines 2-15. *See also* **R. p. 62, line 23 – p. 63, line 8.**

Ms. Carrie Wilson testified that she is Marsha Smith's mother. Marsha was killed a few weeks before her fifty-first birthday. **R. p. 64, line 7 – p. 65, line 14.** Marsha and Beeks had been seeing each other for eight or ten years. However, they did not have any children, they had never been married, and Ms. Wilson did not know whether they had ever lived together. **R. p. 67, line 19 – p. 68, line 5.**

Marsha came to Ms. Wilson's house between 6:00 and 6:30 p.m. on April 23rd and stayed for one or two hours. The two women were talking when Marsha's cell phone rang, but no one said anything when Marsha answered. This also happened a second time. **R. p. 65, line 17 – p. 66, line 13.**

The third time the phone rang, Marsha spoke to the caller. After Marsha's conversation with the caller, she told Ms. Wilson,

> Momma, that was Nathaniel. And I'm going home. He wants me to come home and give me him clothing. He says that he's going back to Atlanta.

R. p. 66, lines 13-24.[6]

Because there was not a bus going to Atlanta that night, Ms. Wilson asked Marsha whether she was going to drive him to Atlanta. Marsha said that she was not going to drive him because he had been drinking. Ms. Wilson never saw her daughter alive after Marsha left her

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[6] Ms. Wilson was under the impression that Marsha had taken Beeks to his mother's house and that he was staying there. She did not see Beeks that weekend. **R. p. 68, line 19 – p. 69, line 5.** Also, Ms. Wilson did not know that Marsha had met someone else with whom she was romantically interested. **R. p. 72, lines 12-14.**

house. **R. p. 67, lines 1-16.**

Inv. Adam Davis testified that he is a forensic investigator for the Greenville County Department of Public Safety. He responded to the crime scene around 11:14 p.m. on April 23, 2011, and processed it after speaking to other officers who were present. He found the victim lying on the living room floor, in the manner described by Ms. Witherspoon. He also photographed what he had found and took a video of the scene. **R. p. 74, line 1 – p. 76, line 25.** He saw a baseball bat, which was normally left in a closet, but a swab for blood on the handle was negative. **R. p. 78, line 20 – p. 79, line 14.**

On the floor of the walkway between the living room and dining room, Inv. Davis found a black cell phone that was close proximity to the chair and an artificial tree that had been overturned. He found the victim left shoe under the kitchen table. The table appeared to have been moved and one of its legs was not flush with the floor. Also, there was an ashtray lying in the middle of the floor. **R. p. 80, line 1 – p. 81, line 4.**

In the living room, he found Marsha's cell phone in her right hip pocket. He also found a candle stand on the left side of Marsha's body and he observed what appeared to be a suspected hair on it. He located Marsha's glasses just to the right of her body. He seized all of these items. **R. p. 81, line 5 – p. 83, line 7; State's Exhibit 17 (photograph).**

Det. Collis Flavell works in the Greenville County Department of Public Safety's violent crimes unit. He testified that he became involved in the case on April 23rd, when Det. Garrison called and asked him to assist in investigating Marsha's homicide. Det. Garrison was working the crime scene when he got there. Det. Flavell left shortly and he took Faith Smith back to the office and obtained a written statement from her. **R. p. 104, line 14 – p. 105, line 9.**

On April 24th, law enforcement was attempting to find the victim's car and Beeks. Faith

had shown officers where Beeks lived in Atlanta. Dets. Flavell and Garrison went to the Atlanta apartment complex that Faith had identified for them. The also searched the surrounding roads and apartment complexes trying to find the vehicle and Beeks, but they did not locate either him or the car. However, they received a call from the DeKalb County (Georgia) Sheriff's Office on April 25th, informing them that the vehicle had located and towed to an Atlanta area wrecker company. **R. p. 105, line 24 – p. 106, line 25**

So, Dets. Flavell and Garrison responded to Atlanta and they had a wrecker service from Greenville meet them down there. Marsha's vehicle was then sealed with crime scene tape and towed back to Greenville. **R. p. 106, line 25 – p. 107, line 14**. On February 1st, he received information that Darron Montgomery, who was in the Greenville Detention Center, wanted to speak with him. Det. Flavell took a written statement from Montgomery. Montgomery was not offered anything nor did he request anything from Det. Flavell in exchange for the statement. **R. p. 107, line 15 – p. 110, line 15**.

Sgt. Dar Shaw, of the Greenville County Department of Public Safety, testified that he first became involved in this case the April 27, 2011. Dets. Garrison and Flavell told him that they had a search warrant for a vehicle and that they needed the vehicle processed. He processed it at their crime scene office. Both the left front and the left rear of the vehicle were damaged. Inside the car, he found a pillow. It was on the rear seat, on the passenger's side of the vehicle. **R. p. 84, line 2 – p. 86, line 19; State's Exhibits 12-16 (photographs)**.

Lynita Watts, Marsha's oldest daughter, testified that photographs taken of Marsha's car taken by law enforcement did not reflect how the car looked the last time that Lynita saw it. It was in good condition and drivable. Lynita knew that her mother had traded in another car and was making payments on the Honda, but she did not know what Marsha had paid for the Honda.

Marsha did not allow any of her family to drive the Honda and Lynita was unaware of Marsha ever allowing Beeks to drive it. **R. p. 87, line 18 – p. 89, line 8.**

Lynita had frequent contact with her mother and she knew her mother was dating Beeks. Marsha and Beeks began dating right after Lynita got married in 1999. Although Beeks lived in Greenville in 1999, Beeks was living in Atlanta and he would visit Marsha in Greenville, at the time of Marsha's death. Also, from what Lynita understood of their relationship, they were merely "friends" by then and Marsha "was trying to let him know that she no longer wanted to be involved with him." Lynita was unaware that Marsha may have been dating someone else. **R. p. 89, line 22 – p. 91, line 14.**

Det. David Garrison testified that he went to the scene on the night of April 23rd, and that he was the lead investigator in the case. **R. p. 122, lines 6-25.** Both Faith Smith and Maryssa Cantrell stated that they had seen leaving the apartment when they arrived, and Faith found Marsha dead in the apartment moments later. Based these statements, as well as the condition of the apartment and what police found in it, including Martha's purse, police determined that neither a burglary nor a robbery had occurred. **R. p. 124, line 8 – p. 125, line 11.**

Det. Garrison had been told that Beeks was staying in Atlanta. As noted, Marsha's cell phone was removed from her at the scene. Det. Garrison thereafter searched the contacts list of the phone and found a telephone number he thought might be Beeks' phone number because it had a 404 area code and that is the area code for Atlanta, Georgia. He did not call the phone number but he tried to get the phone company to give him a location for the phone, with GPS coordinates. **R. p. 125, line 12 – p. 126, line 5.**

Det. Garrison corroborated Det. Flavell's testimony about their efforts to locate the car and Beeks in Georgia. He also testified that he took photographs of Beeks at the Doraville

(Georgia) police station on April 28th and that these photographs (State's Exhibits 21-22) depict a fresh scratch on the left side of Beeks' face and a scratch under Beeks' left eye and next to his nose. **R. p. 127, line 7 – p. 130, line 6**.

On cross-examination, Beeks elicited that he had given a statement to Det. Garrison while they were in Georgia. In that statement, "he … [said] that during their argument she had told him that she was seeing someone else." He also said that he snapped after hearing that, "[he] grabbed her, threw her to the floor and started choking her." This was his second story. **R. p. 130, lines 12-21; p. 131, line 18 – p. 132, line 2**.

In Beeks' first story, Det. Garrison and he had discussed that Marsha was dead and he knew that he would be charged with murder. Det. Garrison wanted to know what had happened. When asked, Beeks "said that they were in an argument. And I brought up the fact … he had scratches on his face. And he told me first that Marsha had slapped him or punched him or hit him or some way struck him and that caused the scratches … on his face. And that she then fell to the ground and died." Beeks also denied taking Marsha's car and he claimed that he hitch-hiked to Atlanta from Greenville. **R. p. 133, line 12 – p. 134, line 14**.

Darron Montgomery testified that he is originally from South Carolina and that he has known Beeks all of his life. He considers Beeks to be a good friend. **R. p. 92, line 6 – p. 93, line 24**. Montgomery and Beeks had a conversation about this case when they were both incarcerated in the Greenville County Detention Center.[7] Beeks was "very upset." Montgomery could tell that something was bothering his friend and he asked Beeks what was wrong. **R. p. 93, line 25 – p. 94, line 23; p. 102, lines 10-19**.

Beeks told Montgomery that he and Marsha had been drinking. Then, they got into an

[7] Montgomery was incarcerated for failure to pay child support. **R. p. 94, lines 6-7**.

argument at "their house," but he did not tell Montgomery what the argument was about. Beeks wanted her to "shut the fuck up." So, "he grabbed her by her neck and he thought he had choked her out but she was gone." Montgomery later reported this conversation to law enforcement. **R. p. 94, line 24 – p. 96, line 23; p. 103, lines 1-8**.

Lily Gallman is a forensic DNA analyst employed by SLED. **R. p. 136, lines 4-5**. She received cuttings from the victim's long-sleeved shirt, as well as cuttings from the pillow case taken form Marsha's car and Marsha's fingernail clippings. Also, a blood standard for Marsha and a buccal swab from Beeks were provided. Another member in SLED's lab analyzed the cuttings to determine whether there was blood present and Ms. Gallman did DNA analysis on those with sufficient blood for testing. **R. p. 138, lines 12-23; p. 140, lines 3-16; p. 141, line 18 -p. 145, line 25**.

Blood was present on the four cuttings from Marsha's shirt, and she was able to develop a DNA profile on all but the first of these cuttings (SLED item 3.1). The DNA profile from the second cutting (SLED item 3.2) was consistent with coming from the victim. The DNA from the third cutting (SLED item 3.3) contained a mixture of at least two contributors. The major contributor to this profile "matched" Beeks, DNA profile from the fourth cutting (SLED item 3.4) matched his profile. **R. p. 146, line 20 – p. 149, line 5**.

The first cutting from the pillow case (SLED item 4.1) contained a mixture of DNA and both Marsha and Beeks were excluded from it. However, Beeks could not be excluded from the mixture found on the second cutting (SLED item 4.2). Ms. Gallman "applied a statistical value to that particular mixture. And it was one in 170,000. But Marsha Smith is excluded as a contributor to that mixture." **R. p. 149, line 8 – p. 150, line 4**.

Ms. Gallman determined that the third cutting form the pillow case (SLED item 4.3) "is a

mixture also and Mr. Beeks cannot be excluded as a contributor to that mixture either. And, I applied a statistical value that mixture and it was one in 9.1 thousand. Marsha Smith is excluded as a contributor to that mixture also." **R. p. 150, lines 6-10.**

Marsha's fingernail clippings contained a mixed DNA profile. The major contributor to that profile was consistent with Marsha and Beeks could not be eliminated as the other contributor. "I applied a statistical value to that mixture 2 and it was approximately one in 570,000." **R. p. 150, line 17 – p. 151, line 4.**

Dr. Michael Ward is the forensic pathologist who performed an autopsy on Marsha, on April 25, 2011. **R. p. 156, line 12 – p. 160, line 11.** Most of the injuries that Dr. Ward found were "to the head and neck region. On the left cheek over lining the cheek bone was a superficial abrasion of her skin." Then, "[o]n the ... right neck just to the outside [and] below the jawline were three areas of scratching of the skin or ... abrasion[s]." These abrasions "were in a pattern of about an inch to an inch and a half." **R. p. 160, lines 17-24.**

On Marsha's "right neck was an area of bruising, purple/red bruising of the skin." Dr. Ward found "similar bruising but to a little bit greater degree" on the left side of her neck. He also found an abrasion on her left elbow and her left fingernail was broken. **R. p. 160, line 25 – p. 161, line 9; p. 164, line 5 – p. 165, line 11; State's Exhibits 18-21 (photographs).**

When Dr. Ward examined the sclera, or the whites of Marsha's eyes, he saw that she had petechial "hemorrhages. These are pinpoint areas of bleeding into the white part of her eye."[8] Petechiae are the "result of increased pressure in the blood vessels that have built up in the

[8] As a review of Dr. Ward's testimony makes clear there are numerous typographical errors in the record. For instance the transcript refers to the hemorrhages as "particular." **R. p. 161, line 18.** On the following page, the record has Dr. Ward "taking the next of lawyers and exposing them." **R. p. 162, lines 10-11.** Also, the victim's carotid artery is referred to as the "corroded artery" (**R. p. 162, line 14**), and as her "corraded artery." **R. p. 166, line 9.** Therefore, Respondent apologizes if it has replaced the wrong word in brackets at any point in this brief.

head," as a result of the flow of blood to the brain being cut off by manual strangulation. **R. p. 161, lines 13-22; p. 165, line 17 – p. 166, line 23.**

Dr. Ward opined that the injuries that he saw on the outer surface of Marsha's neck and the petechiae were "certainly suspicious for some type of strangulation." So, he looked "very carefully" for injuries to the neck on his internal examination. **R. p. 162, lines 2-7.**

Therefore, after removing the brain and other vital organs, he dissected Marsha's neck, cutting the neck in layers and "looking for any bleeding into the tissues." When he did this, he found bleeding into the musculature of Marsha's neck. Specifically, he found "bleeding over the [lining of] the left [carotid] artery ... [and] "a broken hyoid bone." As to the latter injury, "the fracture was to the right horseshoe part of her hyoid bone." This indicated that "a great deal of pressure[] had been applied to the neck, causing that bone to break." **R. p. 162, lines 7-21.**[9]

Based upon these findings, Dr. Ward opined that the cause of Marsha Smith's death was manual strangulation and that the manner of death was homicide. **R. p. 165, lines 17-19; p. 168, lines 14-18.** He explained that:

> Manual strangulation is a process ... where the hands are used as the weapon to apply pressure to the vessels of the neck. It's sort of [a] misnomer. Most people when they hear strangulation think that there's pressure applied to the trachea to obstruct the airway. When, in fact, the pressure's actually over the great vessels of the neck. So, the blood going to the brain and the blood coming back from the brain are [occluded] by basically your thumbs being placed there and pressured being applied. That's how we get the bruising in the skin, the bruising in the musculature underneath and the bruising over lining the corraded artery as well as the fracture of the hyoid bone[,] [f]rom the pressure of your hands squeezing in on the neck. When this is done, blood follow to the brain is stopped. So, ... very suddenly, very quickly, the brain is without oxygen. Now, we can hold our breath for a long period of time. Some people up to a minute and a half to two minutes. That's very different from not having any blood flow to your brain. We can go without breathing for a long time but you can't go without any oxygen going to

[9] Dr. Ward did not find any evidence of disease that could have contributed to Marsha's death. **R. p. 162, line 25 – p. 163, line 7.** Also, there were scratches on Marsha's neck that he opined were caused by her efforts to defend herself from the strangulation. **R. p. 167, line 13 – p. 168, line 7.**

> your brain except for a few seconds before you become unresponsive. And then a shorter period of time, relatively shorter period of time, you die as a result of lack of oxygen to your brain.

R. p. 165, line 22 – p. 166, line 23. Dr. Ward further opined that it took a "great deal of force" to cause the injuries that he found and that Marsha would have been conscious when the strangulation began. **R. p. 166, line 24 – p. 167, line 12; p. 168, lines 8-13.**

ARGUMENT

This Court should affirm under Rule 220(c), SCACR, because the trial judge's submission of the lesser-included offense of voluntary manslaughter was erroneous as a matter of law, where the only evidence in the record was that Beeks "snapped" when the victim told Beeks that "she was seeing someone else. ... [A]fter hearing that, "[he] grabbed her, threw her to the floor and started choking her." Beeks could only be convicted or acquitted of murder because the victim's exercise of her lawful right to terminate her relationship with him did not and could not constitute "sufficient legal provocation" to support a manslaughter charge and there is no evidence that the victim used vulgar or opprprious words or that she did anything other than merely inform Beeks of her intent to leave him.

Although the trial judge properly defined "sufficient legal provocation" in the voluntary manslaughter instructions, Respondent submits that this Court must affirm Beeks' murder conviction based upon the application of three legal rules to the facts in this case:

- "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; *see also State v. Goodstein*, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982) ("An appellate court ... is not, as a general rule, bound by the reasoning adopted below if the record discloses a correct result"); *State v. Davis*, 278 S.C. 544, 545, 298 S.E.2d 778, 779 (1983); *Watkins Motor Lines, Inc. v. Span-America Medical Systems, Inc.*, 296 S.C. 175, 177, 371 S.E.2d 2, 3-4 (Ct.App. 1988) ("This court may affirm a trial judge's decision on any ground appearing in the record and, hence, may affirm a trial judge's correct result even though he may have erred on some other ground");

- "The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence." *State v. Ivey*, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997); *State v. Sandoval-Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010) (same); and

- "South Carolina has [generally] allowed **marital** infidelity to support a charge of marital voluntary manslaughter only when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation." *See State v. Cooley*, 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000) (emphasis added). *See also State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("Spousal adultery, however, is not a license to kill"); *State v. Herring*, 118 S.C. 386, 110 S.E. 668 (1922).

Applying these principles to the facts of the present case, this Court should affirm under

Rule 220(c), SCACR, because the trial judge erred, as a matter of law, by submitting the lesser-included offense of voluntary manslaughter since the only evidence in the record was that Beeks "snapped" when the victim told Beeks that "she was seeing someone else. …[A]fter hearing that, "[he] grabbed her, threw her to the floor and started choking her." **R. p. 131, line 18 – p. 132, line 2**. Beeks could only be convicted or acquitted of murder because the victim's exercise of her lawful right to terminate her relationship with him did not and could never constitute "sufficient legal provocation" to support a manslaughter charge. Also, nothing in the record suggests that the victim used vulgar or opprprious words or that she did anything during this argument, other than merely inform Beeks of her intent to leave him.

A. The charge conference and the voluntary manslaughter charge.

In the charge conference, the trial judge indicated that he was going to charge voluntary manslaughter and he read his proposed manslaughter instructions to the parties. **R. p. 181, line 10 – p. 182, line 23**. In pertinent part, he proposed to give the following definition of "sufficient legal provocation:"

> Sufficient legal provocation must be the type that would make a person of ordinary reason and caution to become enraged and to lose control temporarily. The provocation needed for voluntary manslaughter, must come from some act of or related to the victim. Words alone, however vulgar or insulting are not enough to be legal provocation. Where death is caused by the use of a deadly weapon, the words must be accompanied by some overt, threatening act which would have produced the heat of passion.
>
> The exercise of a legal right, no matter how offense it is to another, is never sufficient legal provocation for voluntary manslaughter.

R. p. 182, lines 2-14.[10]

[10] This definition is identical to the definition found in the South Carolina Judicial Department's *Circuit Court Bench Book: Suggested Jury Instructions in Criminal Cases*, p. 212, which available online at http://www.sccourts.org/juryCharges/GS%20InstructionsJune2013.pdf (last visited June 27, 2014).

Beeks objected to the language in the instruction that "words alone are not enough. It has to be -- there has to be an accompanied act." He contended that "a very emotional argument" would satisfy the requirement of legal provocation, but the charge as given required something more than a verbal argument. **R. p. 183, line 23 – p. 184, line 6**. He further maintained that Professor Hubbard's charge book[11] supported his position that a heated argument could constitute "sufficient legal provocation," but that the proposed instruction informed the jury that an argument alone could not provide legal provocation. **R. p. 184, line 16 – p. 185, line 2; p. 185, lines 15-21**.

Beeks conceded that the trial judge correctly understood that the State's position was the victim had not done anything that "properly should have [caused] his ... emotional reaction that resulted in her being killed." However, he argued that "he gave a statement to the polic[e], which is in evidence, that she did, in fact, tell him that [she had found someone else] during the course of this argument that they were having, and that he snapped." Also, he pointed to Montgomery's testimony that she would not "shut up." He maintained that the trial judge's proposed instruction that "words alone cannot provide sufficient legal provocation" would erroneously preclude jurors from finding that the homicide was manslaughter. **R. p. 187, line 7 – p. 192, line 17**.

The trial judge agreed to listen to further argument after he accepted a guilty plea the following morning. **R. p. 238, line 18 – p. 209, line 11**. When court resumed the next day, Beeks claimed that *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000), *State v. Kahan*, 268 S.C. 240, 233 S.E.2d 293 (1977), and the other cases that he submitted as part of Court's Exhibit 1, supported his position. He also submitted the following request-to-charge from Hubbard, *Jury Instruction for Criminal Cases in South Carolina*, at p. 81, as part of Court's Exhibit 1:

[11] *See* F. Patrick Hubbard, *Jury Instruction for Criminal Cases in South Carolina: Defendants' Requested Instructions*, p. 81 (2nd Ed. 2001).

> A sufficient legal provocation is one that would cause a person of ordinary reason and prudence to become provoked and experience sudden heat and passion. A sufficient legal provocation need not overpower knowledge, rationality, and volition. Instead, it need only be sufficient to disturb or upset reason and render the mind of an ordinary person incapable of cool reflection.
>
> By way of example, and only by way of example, provocation that is legally sufficient to negate malice includes conduct: ... (6) like very emotional arguments.

Court's Exhibit 1, R. p. 239. **R. p. 191, line 5 – p. 192, line 15**. *See also* **R. p. 194, line 24 – p. 195, line 10**.

The State indicated that it was satisfied with the trial judge's proposed instruction. **R. p. 192, lines 18-22**. The judge overruled Beek's objection and denied the request-to-charge because he found that the proposed instruction that he had read correctly covered the facts presented and encompassed what Beeks wished to argue. **R. p. 193, line 3 – p. 194, line 16**.

The trial judge thereafter defined "sufficient legal provocation for the jury in accordance with the proposed instruction. *See* **R. p. 224, lines 13-25**. Beeks renewed his objection at the conclusion of the jury instructions. **R. p. 227, lines 13-16**.

B. Discussion.

The law to be charged to the jury is to be determined by the evidence presented at trial. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001); *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) ("If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge"). In making this determination, the Court views the facts in a light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *State v. Wilds*, 355 S.C. 269, 276-77, 584 S.E.2d 138, 142 (Ct.App. 2003); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (same). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it"); *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992) (malice "is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief").

On the other hand, voluntary manslaughter is "manslaughter, or the unlawful killing of another without malice, express or implied." S.C. Code Ann. § 16-3-50 (2003). It has been defined by the appellate courts of this state as "the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). "A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. *Id.*; *State v. Cole*, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000). Voluntary manslaughter mitigates an otherwise felonious killing to manslaughter, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they 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." *Walker*, 324 S.C. at 260, 478 S.E.2d at 281 (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). If there are no actions by the deceased to constitute legal provocation, a charge on voluntary manslaughter is not required. *State v. Butler*, 277 S.C. 452, 456, 290 S.E.2d 1, 3 (1982), *cert. denied*, 459 U.S. 932 (1982).

"Even when a person's passion has been 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." *Knoten*, 347 S.C. at 303, 555 S.E.2d at 395. Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved. *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969).

Notwithstanding Beeks argument to the contrary, Respondent submits that the trial judge's instructions correctly stated the law on voluntary manslaughter. His instructions are in accordance with the foregoing authorities, as well as the South Carolina Judicial Department's *Circuit Court Bench Book: Suggested Jury Instructions in Criminal Cases*, p. 212, which are available online at http://www.sccourts.org/juryCharges/GS%20InstructionsJune2013.pdf. *See also* Ervin, Tom J., *Ervin's South Carolina Requests to Charge – Criminal* §29-9 p. 224 (S.C. Bar 1994). However, Respondent submits that this Court should affirm pursuant to Rule 220(c), SCACR, because the trial judge erred, as a matter of law, by submitting the lesser-included offense of voluntary manslaughter to the jury in the absence of "sufficient legal provocation" by the victim. *See Goodstein*, 278 S.C. at 128, 292 S.E.2d at 793 ("An appellate court … is not, as a

general rule, bound by the reasoning adopted below if the record discloses a correct result"); *Watkins Motor Lines, Inc.*, 296 S.C. at 177, 371 S.E.2d at 3-4 ("This court may affirm a trial judge's decision on any ground appearing in the record and, hence, may affirm a trial judge's correct result even though he may have erred on some other ground").[12]

Of particular importance to the issue before this Court, Respondent would note that "[t]he exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence." *Ivey*, 325 S.C. at 142, 481 S.E.2d at 127; *Norris*, 253 S.C. at 39, 168 S.E.2d at 567. *See also Sandoval-Hernandez*, 386 S.C. at 661, 690 S.E.2d at 585. Also, "South Carolina has [generally] allowed **marital** infidelity to support a charge of marital voluntary manslaughter **only** when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation." *State v. Cooley*, 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000) (emphasis added); *State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("Spousal adultery, however, is not a license to kill"); *State v. Herring*, 118 S.C. 386, 110 S.E. 668 (1922).

The evidence was conflicting over whether the victim and Beeks were even romantically involved at the time he killed her. Faith Smith, the only person who lived with the victim, testified that he was living in the Atlanta, Georgia area; that the victim and he were no longer dating but, instead, were "friends; and that he did not even have a key to the apartment. **R. p. 12, line 21 – p. 13, line 3; p. 17, lines 1-3; p. 27, line 17 – p. 28, line 18**. Yet, other witnesses thought that they were still in a relationship.

Further, the evidence was that the victim and Beeks had two brief arguments earlier in the day of the homicide, over an unknown topic, at James Crawford's house. Beeks left after the

[12] Respondent has addressed Beek's contentions in **Argument II** but would stress that it is unnecessary for the Court to reach the sufficiency of the voluntary manslaughter charge because there was no evidence to support the charge.

second argument. While Beeks did get mad at the time, there was no physical violence involved in the arguments. Rather, he only slung beer cans down on a coffee table near where the victim was seated, and both Beeks and Marsha were unharmed. **R. p. 50, line 10 – p. 52, line 1; p. 54, lines 11-23; p. 62, lines 10-22.**

Respondent submits that, as a matter of law, there was an adequate cooling off period because these two, very brief arguments apparently occurred roughly nine hours or more before the homicide. *See, e.g., Sandoval-Hernandez*, 386 S.C. at 661-63, 690 S.E.2d at 585-86 (holding that defendant's "intervening actions and demeanor upon returning to the [allegedly drunken violent] party support a finding that he cooled off after being ejected"); *Byrd*, 323 S.C. at 322-23, 474 S.E.2d at 432 (holding that the defendant's actions between the alleged provocation and killing did not support a finding of sudden heat of passion); *Walker*, 324 S.C. at 261, 478 S.E.2d at 281-82 (finding that the defendant demonstrated cool reflection through his actions between the alleged provocation and the killing). That there had been an adequate cooling of Beeks' passions is circumstantially demonstrated by evidence that the victim was apparently unconcerned and voluntarily returned to her apartment, alone, when he summoned her back that night. **R. p. 66, lines 13-24.**[13] Also, nothing in the record suggests that he was still drinking after the second argument and it is reasonable to infer that he did not drink because he threw down all the beer he had with him before leaving Crawford's residence.

As to the reason for arguments between the victim and Beeks, evidence was adduced that they occasionally argued about his drinking because he could be mean when he drank and she did not like that. **R. p. 13, lines 4-12; p. 35, lines 12-16.** On the other hand, there was evidence that the victim had recently met a new man; that she intended to inform Beeks of this and to end

[13] Otherwise, this was evidence that he was lying in wait for her and is evidence of malice.

her relationship with him. **R. p. 60, line 2 – p. 61, line 15; p. 62, line 10 – p. 63, line 8.**

Granted, this is a circumstantial evidence case and Beeks was alone with the victim when he killed her. Further, his life-long friend, Darron Montgomery testified that there was a heated argument and that Beeks wanted her to "shut the f--- up."[14] So, "he grabbed her by her neck and he thought he had choked her out but she was gone." However, Beeks did not tell Montgomery what the argument was about. **R. p. 94, line 24 – p. 96, line 23; p. 103, lines 1-8.**

Whether or not a heated argument may, under some circumstances constitute "sufficient legal provocation," it is clear that it did not in Beeks' case. To the contrary, **the only evidence** in the record about what caused Beeks to kill Marsha Smith was contained in his second statement to Det. Garrison. In that statement, Beeks said that he "snapped" when the victim told him that "she was seeing someone else. …. [A]fter hearing that, "[he] grabbed her, threw her to the floor and started choking her." **R. p. 131, line 18 – p. 132, line 2.**

There is no evidence, whatsoever, that the victim hit him, struggled physically with him, yelled at him, used vulgar or opprprious words, or that she did anything before Beeks strangled her - other than merely inform him of her intent to leave him. In *State v. Smith*, 10 Rich. 341, 346, 1857 WL 3221, 3 (S.C. App.Law 1857), the Court quoted a California case for the following proposition:

> [S]ome causes of passionate excitement are termed 'legal provocations,' while others have been declared not to be 'legal provocations.' This must not be understood to mean that a man has a legal right to be provoked, but only that the law regards certain offensive acts as provocations, while it refuses to consider others as such. The latter, though provocations in common parlance are not provocations in a legal sense, and therefore not comprehended in the legal phrase, *legal provocations*."

(emphasis in online edition)

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[14] This description of her behavior is express evidence of malice.

That is precisely what is presently before this Court and what distinguishes the present case from other cases where courts have found that a "heated argument" supported an instruction on voluntary manslaughter: what caused Beeks to react violently was simply the victim's assertion of her legal right to leave Beeks and nothing more. *Accord State v. Locklair*, 341 S.C. 352, 361, 535 S.E.2d 420, 424 (2000). *Contra State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998) (holding that evidence tended to show defendant acted in sudden heat of passion where defendant was in a heated argument with victim **and feared for his life because victim threatened him**);[15] *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993) (holding that a voluntary manslaughter charge was necessary where the defendant and the victim were in a heated argument **and victim was about to initiate a physical encounter when shooting occurred**); *State v. Gardner*. 219 S.C. 97, 105, 64 S.E.2d 130, 134-135 (1951) (the trial court erred by failing to charge jury on voluntary manslaughter, where defendant's testimony that **his wife " 'jumped on me' and 'me and her got into it'** ...might be subject to the construction that there was some overt, threatening act or a physical encounter. At least there is sufficient doubt thereabout, we think, to warrant submission to the jury of the question of manslaughter"); *Davis*, 278 S.C. at 546, 298 S.E.2d at 779 (holding voluntary manslaughter charge was proper where a

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[15] Beeks cites *Wiggins* for the proposition that "fear can constitute a basis for voluntary manslaughter." **Final Brief of Appellant, p. 13**. This is not a correct understanding of the law. As the Court explained in *Starnes*,

> [A] person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation and cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence."

Starnes, 388 S.C. at 598-99, 698 S.E.2d at 609. Further, given that Beeks told Montgomery he was arguing with the victim and "I just wanted her to shut the f--- up," this scenario is unsupported by evidence. **R. p. 96, lines 2-10.**

witness testified that **defendant and victim had been fighting**); *State v. Kahan*, 268 S.C. 240, 246-48, 233 S.E.2d 293 (1977) (evidence showed that **Kahan and his wife had been arguing and Kahan drinking** "at a Christmas party **several hours before** the shooting" and Kahan claimed that wife committed suicide).[16]

Unless Beeks is taking the offensive and unsupportable position that a woman is viewed as chattel, *conta* U.S. Const. amend. XIII ("[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"),[17] Beeks could only be convicted or acquitted of murder because the victim's exercise of her lawful right to terminate her relationship with him did not and could never constitute "sufficient legal provocation" to support a manslaughter charge. Therefore, it is unnecessary for this Court to address Beeks' challenge to the trial judge's definition of "sufficient legal provocation, since there was no evidence supporting a charge on voluntary manslaughter.

II. Alternatively, this Court must affirm because the trial judge did not commit reversible error in giving the undeniably correct instruction that words alone are insufficient legal provocation when deadly weapon is used, where (1) the charge given was necessary for jurors to properly assess whether there was "sufficient legal provocation," since the State's evidence was that Beeks used his hands as a deadly weapon, (2) the challenged instruction could not have been prejudicial because it permitted jurors to properly assess Beek's claim that a "heated conversation" could constitute "sufficient legal provocation," and (3) this Court upheld an identical instruction in *State v Horton*, No. 2007–UP–502, 2007 WL 8391903 (Ct. App., Oct. 29, 2007).

[16] The emphasized portions of these cases makes clear that, to warrant a manslaughter instruction, the evidence must show more than the victim merely telling a defendant of her intent to exercise a legal right. There was no such evidence here.

[17] As the United States Supreme Court explained in *United States v. Kozminski*, 487 U.S. 931, 942 (1988), "[t]he primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose; the phrase 'involuntary servitude' was intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.' " (citing *Butler v. Perry*, 240 U.S. 328, 332 (1916)).

Alternatively, this Court should reject Beek's argument because the trial judge did not commit reversible error in giving the undeniably correct instruction that words alone are insufficient legal provocation when deadly weapon is used, where (1) the charge given was necessary for jurors to properly assess whether there was "sufficient legal provocation," where the State's evidence was that Beeks used his hands as a deadly weapon, (2) the challenged instruction could not have been prejudicial because it permitted jurors to properly assess Beek's claim that a "heated conversation" could constitute "sufficient legal provocation," and (3) this Court upheld an identical instruction in *State v Horton*, Op. No. 2007–UP–502, 2007 WL 8391903 (Ct. App., Oct. 29, 2007).

This Court recently explained well settled South Carolina law that:

> "In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* at 90–91, 747 S.E.2d at 448." "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citation and quotation marks omitted). "Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* at 94 n. 8, 747 S.E.2d at 449 n. 8. (citation omitted). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct.App.2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95.

State v. Jenkins, ___ S.E.2d ____, 2014 WL 2119009, *3 (S.C. Ct.App., May 21, 2014). *See also State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) ("To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant"); *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991) (jury instructions must also be considered as a whole, and if the instructions are free from any error, isolated portions

which might be misleading will not constitute reversible error).

When these principles are applied to the facts of this case, it is clear that the trial judge's instruction was proper and substantially covered the request to charge. Beek's objection is basically that there should not be a period at the end of the first sentence in the challenged portion of the instruction, arguing that the phrase must be connected to the use of a deadly weapon, which appears to be a correct statement of the law. He then contends that the charge given was erroneous because the trial judge separated the phrase "when a deadly weapon is used" from the rest of the sentence. Thus, the jury was confused and may have applied the proposition that "words are never sufficient legal provocation" to this case even if a deadly weapon was not used, leaving it impossible for Beeks to prove his case of manslaughter. **Final Brief of Appellant, p. 8**. Respondent submits that he has parsed the jury instruction too closely and that the charge given was correct.

Considered in its entirety, the challenged jury instruction accurately informed jurors that words alone are insufficient legal provocation to justify voluntary manslaughter where a deadly weapon is used. Here, the State's theory and its evidence was that Beeks used his hands as a deadly weapon. That Beeks used his hands his is unquestionably supported by the testimony of the pathologist, Dr. Ward.

Dr. Ward opined that the cause of death was "manual strangulation and he testified that "[m]anual strangulation is a process ... where the hands are used as the weapon to apply pressure to the vessels of the neck," thereby cutting off the blood flow to the brain and plunging the victim into unconsciousness and rapid brain death.[18] Dr. Ward further testified that Beeks

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[18] Beeks did not kill the victim with some agency unlikely to produce death. To the contrary, manual strangulation is a form of agency that is likely to cause death. *See, e.g.*, Ortner-Unity: The Center on Family Violence, Fact Sheet: Strangulation in Domestic Violence Cases, http://www.sp2.upenn.edu/ortner/docs/factsheet_strangulation.pdf (last

squeezed the victim's neck so hard that he broke the hyoid bone, a bone in the middle of the neck encasing the esophagus. The bruising found on autopsy went so deep that it reached into the victim's neck muscles, and the victim lost consciousness in 12-20 seconds. Further, this required a great deal of force because, quite literally, Beeks squeezed the life out of the victim's body. *See* **R. p. 165, line 20 – p. 166, line 23.**

Yet, when the charge is read as a whole, it likewise permitted jurors to consider Beeks' assertion that there was "sufficient legal provocation" based upon the "heated argument" between that he had with the victim. The charge permitted them to consider this position, even though the only evidence was that Beeks used his hands as a weapon in order to strangle Marsha Smith. The phrase "words alone, however vulgar" might be confusing on its own; but when taken with the next sentence, it clearly indicates what the purpose of the two sentences is: that words must be accompanied by some overt, threatening act to constitute sufficient legal provocation when a deadly weapon has been used. Merely adding a period to create a sentence does not create any question as to the meaning when the phrase is taken as a whole. Additionally, Respondent would note that this Court has previously upheld an identical jury instruction and found it proper. *See Horton*, Op. No. 2007–UP–502, 2007 WL 8391903 at *2.

Finally, Beeks must understand how weak his argument before this Court is because he has blended the argument presented at trial with a challenge to the implied or inferred malice instruction on direct appeal (**Final Brief of Appellant, pp. 10-11, & 14**), even though this Court is procedurally barred from considering his argument because that portion of the charge was not challenged at trial. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal). *See also State v. Byram*,

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visited June 27, 2014).

326 S.C. 107, 485 S.E.2d 360 (1997) (same); *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"); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

The adequacy of the voluntary manslaughter charge is all that is properly before this Court. To the extent that he contends that the implied malice instruction was improper under *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), the only appropriate remedy is to file a PCR Application alleging that counsel was ineffective for not objecting to that portion of the charge. *State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986) ("Appellant claims his counsel was ineffective in his representation at the trial level. This issue is not appropriate for review on direct appeal, and may be asserted only in proceedings under the Post-Conviction Procedure Act"); *State v. Carpenter*, 277 S.C. 309, 309, 286 S.E.2d 384, 384 (1982).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of conviction must be affirmed.

Respectfully submitted,

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August 13, 2014.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2013-001783

THE STATE,

Respondent,

vs.

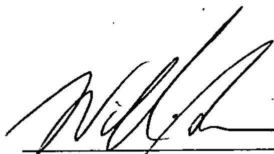
NATHANIEL BERNARD BEEKS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 13th day of August, 2014.



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