

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

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Case No. 2013-GS-26-05243  
Appellate Case No. 2016-001385

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**RECEIVED**  
APR 01 2019  
SC Court of Appeals

State of South Carolina ..... Respondent,

v.

Heather Elizabeth Sims ..... Appellant.

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**RETURN**

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This return is filed pursuant to the Court's request. Respectfully, the petition for rehearing should be denied.

- A. Setting aside the lack of any evidence for the State's new theory of voluntary manslaughter, it is hard to understand the theory on its own terms.**

The petition for rehearing posits a hypothetical set of facts as supporting a voluntary manslaughter charge. Setting aside for a moment the lack of any actual evidence for this new theory of the case, it is difficult to understand the theory on its own terms.

The theory goes like this: Heather Sims and her husband David were constantly fighting and had been in counseling. Their marriage was deteriorating. The fatal encounter began with a verbal altercation that progressed to a physical struggle. Heather armed herself at some point. The State

posits Heather *chose* to arm herself “rather than” run away. Then, Heather fired at her husband. The State says Heather might not have actually been in danger when she fired. “Alternatively,” the State proposes Heather was not in any danger until David charged at her because *he* was afraid.

It is difficult to understand the argument that a voluntary manslaughter charge is appropriate because Heather supposedly could have run away or because *David* (the aggressor) might have been afraid when *he lunged at her*. Again, under this theory, David came at Heather while holding a knife. He wrestled her phone away from her through the use of brute force, hurting her with the knife. It is hard to see how someone could seriously fault Heather for arming herself. Her husband had a knife and had just assaulted her. It is frankly hard to derive any support for criminal liability from this version of events.

This State’s newly proposed narrative is nothing like *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001) or *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993). Both of those cases involve a defendant’s active pursuit of the person who eventually died. There is no evidence of active pursuit here. The only way to get this case to *Knoten* or *Lowry* is to make things up. The nominal dispute about whether the gun was located in the bathroom or the bedside table cuts the other way because, as *the State* vehemently argued below, “[e]very step” to get the gun while David was “trapped” in the bathroom would be premeditation. (R.pp.1606, line 23 - p.1607, line 23).

The State’s argument also has a strong flavor of self-interest. It is easy to find cases where the State has successfully argued *against* a voluntary manslaughter charge. *State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015); *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010); *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007). The State’s argument in these cases tends to be some variant of the proposition that the defendant’s own testimony contradicts heat of passion or

sufficient legal provocation. In other words, the defendant is tied to his theory of the case and must own that theory completely when the State *opposes* a manslaughter instruction. Now, however, the State is arguing completely against its theory of the case and speculating about various versions of the facts because the shoe is on the other foot—the State *wants* a manslaughter charge and the defendant objects. This looks like a double standard. The State does not follow such a charitable approach when defendants request charges on lesser offenses.

**B. The Court properly examined all of the evidence, including Heather’s own testimony, and noted there did not appear to be significant inconsistencies.**

The evidence is generally consistent if one sets to the side the opposing opinions given by each side’s experts about Heather’s wounds. The only “witness” testimony came from Heather. The State called Allyson Brown, but Brown’s testimony supported Heather’s testimony in all material respects. Heather’s story has always been consistent: she has always said David entered the bathroom to work on the toilet, that they argued, that David turned on her with a knife, and that he lunged at her before she shot. The Court examined all of this evidence, at length, in its opinion.

The rehearing petition appears to fault the Court for relying on Heather’s testimony. The rehearing petition also criticizes what the State perceives as ignoring supposedly inconsistent statements to law enforcement and to Brown.

Again, Heather’s story has always been consistent. And it was natural for the Court to examine Heather’s testimony at length. Heather is the only witness to this encounter. Most of the evidence related to this event came from her. This is nobody’s fault. It is just a fact.

A disturbing aspect of the State’s argument is that if it is accepted, it would mean voluntary manslaughter should be charged anytime there is a claim of self defense where the defendant is the

only witness. Credibility is always in dispute. The State could simply claim the defendant is lying about the fatal encounter and that the defendant struck the fatal blow in a fit of rage. The State could also claim the threat to the defendant was over and that there was no need to use deadly force. All of this speculation would be fair game.

This is precisely the sort of impermissible blending between voluntary manslaughter and self-defense that the Supreme Court condemned in *State v. Starnes* and that then-Chief Justice Toal criticized in her concurring opinion in *State v. Childers*. See *Starnes*, 388 S.C. at 599–600, 698 S.E.2d at 609 (such a holding would render voluntary manslaughter a lesser-included offense of self-defense); *State v. Childers*, 373 S.C. 367, 376, 645 S.E.2d 233, 237-238 (2007). Voluntary manslaughter is not a lesser-included component of self defense. Inferences are based on evidence. It is not permissible to just make things up.

**C. The Court applied the correct standard of review, explaining the determining factor was whether there was any evidence of manslaughter before examining the whole record.**

The Court cites and applies the right standard of review. The opinion notes that the evidence at trial determines the law to be charged. Slip op. at 10 (citing *State v. Gilland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012)). The opinion also notes that the circuit court must charge a lesser-included offense if there is “any evidence” the defendant committed the lesser offense rather than the greater offense. Slip op. at 11 (citing *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004)). The opinion explains the court examines the “totality of the evidence” in determining whether there is a rational inference the defendant committed the lesser offense. *Id.* (citing *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006)). The opinion then examines Heather’s version of events and the State’s version of events.

Twice, the opinion says the facts are viewed in the light most favorable to the defendant. Slip. op. at 11 and 17. But that is not what the opinion actually does. The opinion examines Heather's version of events *and* the State's version of events. The opinion notes the absence of any evidence Heather and David were not in relatively close proximity to one another throughout the fatal encounter and the opinion correctly concludes that at bottom, the State's after-the-trial attempt to cobble together a theory of voluntary manslaughter is nothing more than an invitation to speculate. Slip op. at 21, 23.

The statement about viewing facts in the light most favorable to the defendant when determining whether a manslaughter charge is appropriate appears to have originated in *State v. Gadsen*, which says “[i]n determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.” 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994). That sentiment accurately describes the civil summary judgment standard and the directed verdict standard in all cases but it does not seem to fit well with jury charges. In a case with competing claims of murder and self-defense, the facts would presumably support murder when viewed in the State's favor. The facts would presumably support self-defense when viewed in the light most favorable to the defendant. The focal point on lesser-included offenses is more neutral; it is not about viewing the evidence with a lean in either direction. The key question, as the Court noted in the opinion, is whether there is any evidence to support the charge.

Again, the opinion performs the correct analysis. It examines Heather's version of events and the State's version of events. This is the same sort of analysis found in *State v. Wharton*, 381 S.C. 209, 214-215, 672 S.E.2d 786, 788 (2009). Like this case, *Wharton* reversed the circuit court's decision to charge voluntary manslaughter. The Court cited *Wharton* here. Slip op. at 10.

**D. The Court correctly barred a subsequent trial for involuntary manslaughter. Resting the decision on the lack of evidence for that charge would avoid the constitutional question even though the Court's constitutional ruling is correct.**

The Court's constitutional ruling is sound. The jury should not have marked anything next to involuntary manslaughter. Yet, the jury acquitted Heather of that offense. It does not matter that the acquittal was the result of the jury's legal error in being confused or disregarding its instructions. An acquittal is generally binding even though it is the result of an error of law. *Horry Cty. v. Parbel*, 378 S.C. 253, 263, 662 S.E.2d 466, 471 (Ct. App. 2008) (overruled on other grounds by *State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011)); *State v. Tillinghast*, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007); *Ball v. United States*, 163 U.S. 662, 670-671 (1896).

There is an exception to the rule that an acquittal is binding. It requires the acquittal to have been procured by fraud or collusion. *Parbel*, 378 S.C. at 262, 662 S.E.2d at 471 (citing *State v. Holliday*, 255 S.C. 142, 145, 177 S.E.2d 541, 542 (1970)). There is no such claim here. Indeed, the defense consistently maintained involuntary manslaughter should not be on the verdict form at all.

Still, it would be equally sound to ground the Court's analysis on the lack of any evidence supporting an involuntary manslaughter charge. Involuntary manslaughter is an unintentional killing without malice while engaged in either an unlawful activity not naturally tending to cause great bodily harm or a lawful activity with reckless disregard for the safety of others. *Sullivan v. State*, 407 S.C. 241, 244, 754 S.E.2d 885, 887 (Ct. App. 2014).

Keep in mind that the jury would only get to involuntary manslaughter if it had already rejected murder. Thus, the jury would have rejected the State's argument that there was no fight in the bathroom and that Heather's story was fabricated.

It is hard to see what evidence could possibly constitute “an unlawful activity” by Heather. She obviously had the right to arm herself after being assaulted. It is equally hard to see what could possibly qualify as a “lawful activity” Heather did “with reckless disregard for the safety of others.” She obviously had the right to shoot as her husband lunged at her with a knife and she shot one time. It is difficult to understand how any of that can be called reckless.

It also bears mentioning that *the State* specifically argued to the circuit court that there was no evidence of involuntary manslaughter. (R.p.1535, lines 16-25).

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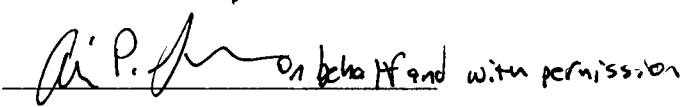
Voluntary manslaughter requires heat of passion—a state of mind in which the killer succumbs to an “irresistible urge to do violence.” Here, both of the parties—the State and Heather Sims—went out of their way to prove Heather had complete control of her faculties. Both parties sought to *disprove* the idea that Heather was *not* in control of her actions. The natural result of these positions is the very thing that commands reversal. There is no evidence of heat of passion. The petition for rehearing should be denied.

Respectfully submitted,

April 1, 2019

L. Morgan Martin # 3667  
LAW OFFICES OF L. MORGAN MARTIN

B. Alex Hyman # 75416  
THE HYMAN LAW GROUP

  
Blake A. Hewitt # 73674  
BLUESTEIN THOMPSON SULLIVAN LLC  
P.O. Box 7965  
Columbia, SC 29202  
(803) 779-7599  
(803) 779-8995 (facsimile)  
blake@bluesteinattorneys.com

Attorneys for Appellant

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the date indicated below she served  
counsel with a copy of the *Return to Petition for Rehearing* by mailing copies of the same  
by hand delivery to the following address:

William F. Schumacher, IV  
Alan M. Wilson  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211



Erin Bridges

April 1, 2019

April 1, 2019

VIA HAND DELIVERY

The Honorable Jenny Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**RECEIVED**  
APR 01 2019  
SC Court of Appeals

RE: State v. Heather Sims  
Case Tracking No.: 2016-001385

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Return to the Petition for Rehearing* in reference to this case. I have also enclosed a proof of service of this document upon counsel for Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,



Erin Bridges  
Paralegal to Blake A. Hewitt  
Bluestein Thompson Sullivan, LLC

/emb

Enclosures

cc: William F. Schumacher, IV, Esquire  
Jimmy A. Richardson, II, Esquire